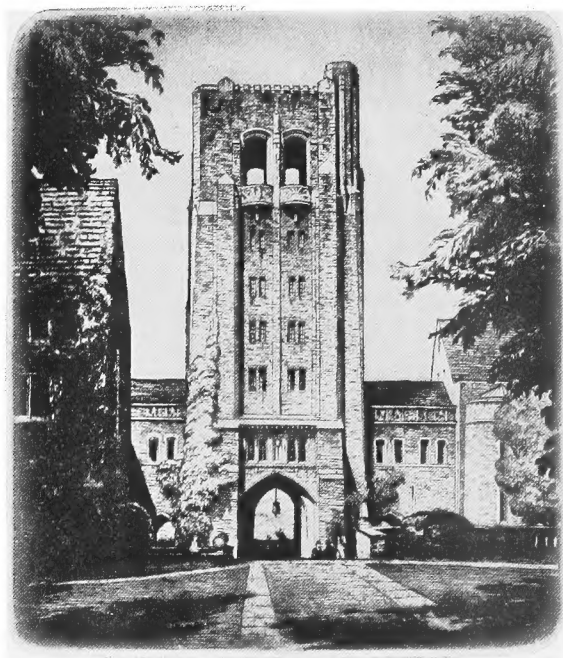


KF

1250

A73

1876



Cornell Law School Library

Cornell University Library

KF 1250.A73 1876

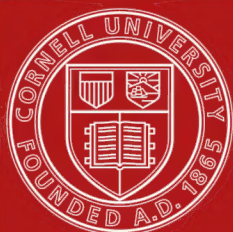
v.1

Wrongs and their remedies. A treatise on



3 1924 019 249 394

law



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.



WRONGS AND THEIR REMEDIES.

A TREATISE

ON

THE LAW OF TORTS.

Charles
GREEN STREET
BY
C. G. ADDISON, Esq.

FOURTH ENGLISH EDITION,

By F. S. P. WOLFERSTAN, Esq.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

AMERICAN NOTES

BY

JAMES M. DUDLEY AND EDWIN BAYLIES,

COUNSELLORS-AT-LAW.

VOL. I.

BANKS & BROTHERS,
473 AND 475 BROADWAY, ALBANY;
144 NASSAU ST., NEW YORK.
1876.

B45108

Entered according to act of Congress, in the year eighteen hundred and seventy-six,

By BANKS & BROTHERS,

In the office of the Librarian of Congress, at Washington.

CHARLES VAN BENTHUYSEN & SONS,

Printers, Stereotypers, Papermakers and Binders,

Albany and Castleton, N. Y.



EXTRACT FROM THE PREFACE TO THE FIRST ENGLISH EDITION.

To those readers who are unacquainted with English law terms it may be desirable to explain, that the word *TORT*, handed down to us from our Norman jurists, is used in our law at the present day to denote a civil wrong, for which compensation in damages is recoverable, in contradistinction to a crime or misdemeanor, which is punished by the criminal law in the interests of society at large. Every invasion of a legal right, such as the right of property, or the rights incident to the possession of property, or the right of personal security, constitutes a *Tort*; and so does every neglect of a legal duty, and every injury to the person, or character, or reputation of another.

The Law of *Torts*, or civil wrongs, therefore, having for its object the protection of our property, and the security of our persons and reputation, is a branch of law of general interest and importance, and there are few persons of any property or station in the country to whom some knowledge of it does not become essential at some time or another, either for the purpose of maintaining themselves in their just rights, or for the purpose of ascertaining the nature and extent of their legal duties and responsibilities.

Torts, it has truly been observed, are infinitely various, and it would be an endless task to enumerate all the wrongs of which the law takes cognizance, and in respect of which redress, in the shape of compensation in damages, is afforded. It is not intended to treat herein of all civil wrongs of every sort and description, but of such wrongs and injuries to property, to the person, and to reputation, as constantly occur in the ordinary intercourse of mankind, and daily occupy the attention of the lawyer: such as wrongful infringements

PREFACE.

of the rights and privileges incident to the ownership and possession, and use and enjoyment, of landed property ; nuisances and injuries arising from the negligent use and management of such property ; injuries to lands and tenements from waste, negligence, and fire ; injuries from trespasses and unlawful entry on land, in disturbance of the possessory and proprietary rights of occupiers and landlords ; wrongful seizure and conversion of chattels ; injuries from the negligent use and management of chattels, and the negligent performance of work ; injuries from negligence and breach of duty on the part of bailees, common carriers, and common innkeepers ; wrongful distress and sale of things distrained ; assault and battery, and wrongful imprisonment ; malicious arrest, malicious prosecution, and malicious abuse of legal process ; trespasses and injuries committed in the execution of void or irregular legal process, or in the execution of warrants and orders of justices ; injuries resulting from the exercise, or intended exercise, of statutory powers and authorities ; injuries from libel and slander ; fraudulent misrepresentation and deceit ; fraudulent concealment, breach of warranty and false pretences ; matrimonial and parental injuries ; adultery and seduction.

In the following Treatise the Author has endeavored to present to the reader an accurate view of the present state of the law on the subjects treated of, without burthening his mind with technical legal learning which is now obsolete, or unnecessarily perplexing his judgment with contradictory and conflicting decisions ; and it is hoped that the task has been faithfully and carefully accomplished.

INNER TEMPLE,
June, 1860.

PREFACE TO THE FOURTH ENGLISH EDITION.

The favorable reception which the last edition of this work, published only three years ago, has met with from the profession and the public, renders it unnecessary to say more as a preface to the present one, than that the same care has been exercised in preparing it for the press, to render the book worthy of being still considered the standard authority on the subjects of which it treats.

The alterations rendered necessary by the Bankruptcy Act, 32 & 33 Vict. c. 71 (which was passed after the last edition had passed through the press), have been made; and, although this edition contains the results of more than 470 new cases decided since the last edition was published, the size of the work has not been materially, if at all, increased.

The cases decided and statutes passed whilst the work was in the press, to the end of November, 1872, will be found, so far as they have not been incorporated in the text, in the Addenda; and by a fresh method of printing and arrangement of the Index it will be found, it is hoped, easier of reference than in the last edition,

TEMPLE, *November*, 1872.

PREFACE TO THE AMERICAN EDITION.

The favorable reception given in this country by the Bench and Bar to the several English editions of "Addison on the Law of Torts," renders an apology for offering to the profession an American edition of the work unnecessary.

In preparing the present edition for the press, it has been the aim of the editors to incorporate in the American notes, within as small a compass as was compatible with the necessary statement of the principles involved, all that was necessary or important to explain, modify or illustrate the text, and to present the rules of law as they at present exist in this country.

It has also been the intention of the editors to give full and copious references to the statutes of the several States, and to the reported decisions of the courts of last resort in this country.

In doing this work, we have used the latest English edition, and, for convenience of reference, have cited the American cases, under the same letters with the English, making no distinction between them.

This plan, we believe, will facilitate the examination of the cases; and while greatly increasing the labor, it has rendered that labor less perceptible to the casual reader.

The amount of labor will, however, be apparent, when the fact is remembered that in the English edition there are not half a dozen American cases cited.

In this edition we have cited more than six thousand American cases, besides the numerous references to statutes. The cases cited cover a period from the time of the earliest reports in our country down to the reports in press, when the manuscript of this edition was put into the hands of the printer.

PREFACE.

We have also added to this edition the chapter on torts by municipal corporations. This seemed necessary to an American edition, as the subject forms an important element in a work on the law of wrongs, and is not treated at any length in the English work.

That other cases and decisions might have been added to the notes we are well aware; but with a text written by one of the ablest English authors, supported by a line of decisions extending from the Year Books down to the present time, and embracing more than twelve thousand reported cases, both English and American, we may be pardoned for assuming that the profession will find the work herewith presented a satisfactory, and, we venture to hope, a very useful and reliable treatise on the law of torts and their remedies.

JAMES M. DUDLEY,
EDWIN BAYLIES.

JOHNSTOWN, *January*, 1876.

CONTENTS.

CHAPTER I.

THE LAW OF TORTS, 1-68.

SECTION I.—*Of actionable wrongs, and injuries that are not actionable, 1-44.*

Of the conjunction of damage and wrong necessary to create a tort, 2

Ex damno sine injuriâ non oritur actio, *ib.*

Damage and wrong—Dangerous things set in motion, *ib.*

Damage without wrong, 3

Wrong without damage, 5

Damage too remote to give rise to a cause of action, 6

Damage, though remote, sufficiently connected with the wrong, 7

It is not necessary to show that actual pecuniary damage has been sustained, 8

Every injury to a right imports a damage, 9

The procurement of the violation of a right creates a cause of action, 11

The general legal rights of mankind are the rights of personal security, personal liberty, or private property, 12

Injuries to property brought about by menace or fraud, *ib.*

Literary and artistic property, 13

Interference by force or fraud with the free exercise of another's trade or occupation, or means of livelihood, *ib.*

Interference with a man's trade by fair competition, 15

Disturbance of a ferry, *ib.*

Disturbance of a market, 16

Market tolls, 17

Torts founded on contract, *ib.*

Breach of duty, 18

Breach of duty on the part of assignees of leases, 19

Breach of duty on the part of public officers, 19

Breach of duty by postmasters—Non-delivery of letters, 21

Negligence and breach of duty on the part of consignors and bailors of chattels, 22

Torts founded on negligence, *ib.*

Contributory negligence on the part of the plaintiff, 24

Liability of the defendant in respect of the remote, ulterior, and unusual consequences of a negligent act, 28

Liability of the master for the negligence of his servant, 30

Indemnification of the master by the servant, 34

Fraud and falsehood are mala in se, 35

A refusal to obey the lawful decree of a court of justice, 36

Malicious injuries, *ib.*

Malicious procurement of loss or damage to another, 37

Abuse of authority by governors of colonies, 38

Abuse of authority on the part of naval and military officers, 39

Torts committed by British subjects in foreign countries, *ib.*

Suspension of the remedy by action when the tort amounts to a felony, 40

Merger of a trespass in a felony, 41

Cheating by forgery, 42

Actions for bigamy, *ib.*

Actions for misdemeanors, *ib.*

Public and private wrongs, 43

Of the legal maxim that there is no wrong without a remedy, *ib.*

Waiver of tort, 44

SECTION II.—*Of rights, duties, and obligations created by by-law and by statute, 45–68.*

By-laws founded on statute, imposing penalties for the suppression of certain torts, 45
 By-laws of municipal corporations, *ib.*
 By-laws for the prevention of indecent bathing, 47
 By-laws by public commissioners, local boards, and public companies, 48
 By-laws in restraint of trade, *ib.*
 Remedies for the enforcement of statutory duties and obligations, *ib.*
 Of the imposition of a penalty as a cumulative, exclusive, or alternative remedy for the protection of a right, or the suppression of a wrong, 50
 Infringement of statutory copyright—
 Penalties and actions for damages, 51
 Infringement of copyright in lectures—
 Penalties and actions for damages, 53
 Infringement of copyright in published

dramatic literary property and musical compositions, 54
 Unlawful representation of dramatic pieces and musical compositions, 55
 Infringement of the Sculpture Copyright Acts, 56
 Piracy of useful and ornamental designs, *ib.*
 Piracy of prints and engravings, 57
 Infringement of copyright in paintings, drawings, and photographs, 58
 Registration of the proprietorship of the copyright, *ib.*
 Proof of the copyright, 59
 Penalties for the use of counterfeit trade marks, *ib.*
 Penalties for the commission of nuisances, 59
 Of patent right, *ib.*
 The subject-matter of a patent, 61
 Remedies for infringement, 64
 Remedies for infringement by assignees and licensees, 65
 Want of novelty or utility, 66
 Statutory benefits and burdens, 68

CHAPTER II.

OF INFRINGEMENTS UPON RIGHTS NATURALLY INCIDENT TO THE POSSESSION AND OWNERSHIP OF LAND, 69–94.

SECTION I.—*Of the right and burthen of natural servitude, 69–84.*

Torts arising from the disturbance of rights of servitude, 69
 Natural and necessary servitudes, 70
 Dominant and servient tenements, *ib.*
 Prædial and urban servitudes, 71
 Natural and necessary servitudes accessory to the drainage of land, *ib.*
 Statutory powers for the improvement of the drainage of land, 73
 Of the natural servitude of support from adjoining land, *ib.*
 Of the natural servitude of support from the subsoil to the surface of land, when the surface and subsoil constitute separate freeholds vested in different proprietors—Mutual rights and duties of separate owners of the surface and subsoil, 74
 Abridgment of the right and servitude of support by express contract, 76
 Transfer of natural servitudes, *ib.*
 Torts arising from the diversion of running water, 77

Diversion of water for purposes of irrigation and drainage, 77
 Effect of acquiescence in the unlawful diversion of water from a running stream, 79
 Of the right to pen back water, 80
 Injuries from the defilement of streams, *ib.*
 Disturbance of the permissive use and enjoyment of water, 81
 Of the right of landowners to well-water, 82
 Of the flooding of lands from artificial collections of underground water, 83
 Statutory property and interest of navigation companies in the water of a navigable river, 84

SECTION II.—*Of the remedy by action and by injunction for infringements of rights incident to the possession and ownership of land, 84–94.*

Direct and consequential injuries, 84
 Parties to be made plaintiffs—Tenant and reversioner, *ib.*

- Parties to be made defendants, 85
 Of the plaintiff's declaration of his cause of action—Venue, *ib.*
 Declarations for infringements of the natural right to support from adjoining land, 87
 Pleas by the defendant, not guilty, 88
 Of the plea of leave and license, 89
 Pleas of a prescriptive right, *ib.*
 Evidence at the trial—Proof on the part of the plaintiff, *ib.*
 Proof of seizin of lands and tenements, *ib.*
 Damages recoverable, 90
 By tenant and reversioner, 91
 Injunction to prevent the disturbance of rights naturally incident to the possession and ownership of land, 91
 Injunction to restrain the diversion of water, 93
 Injunction to restrain a disturbance of the right to support, *ib.*
 Injunction to prevent obstruction to the repair of a watercourse *in alieno solo*, 94

CHAPTER III.

OF CONVENTIONAL AND PRESCRIPTIVE SERVITUDES—EASEMENTS AND PROFITS À PRENDRE, 95–190.

SECTION I.—*Of conventional and prescriptive servitudes—Easements and profits à prendre*, 95–170.

- Easements, 95
 Profits à prendre, 96
 Unlimited claims in the nature of easements, profits, and servitudes, 97
 Grants of rights of servitude—Licenses, *ib.*
 Reservation of privileges amounting to an express grant, 101
 Implied reservation or grant of easements, *ib.*
 Privileges and servitudes which pass as accessory to the use and enjoyment of the principal thing granted—*Omne accessorium sequitur suum principale*, 104
 Ways of necessity, 105
 Necessary incidents to a grant of a right of way or watercourse, 106
 Right of towing on the banks of a navigable river, 107
 When an easement of support from the adjoining land of the grantor passes as accessory to a grant of land or of a tenement, *ib.*
 Of the right to search for minerals under lands weighted by railways and canals, 108
 Servitude of support from one house to another, where several houses have been built together, so as to require mutual support, 111
 Accessorial servitude of support where the separate floors of a building are granted to several different proprietors, 112
 Grants of the privilege of a free passage of light and air, 113
 When the privilege of free passage for light and air across adjoining land passes as accessory to a grant or conveyance, *ib.*
 Of the rule or maxim of law that no man shall derogate from his own grant, 115
 Of the transfer from one person to another of easements and *profits à prendre*, 116
 Easements and *profits à prendre* in gross, *ib.*
 Where the grant is of a liberty, license, power or authority to dig, work, mine, and search for, raise and carry away, metals and minerals, 119
 Exclusive licenses, 121
 The Roman Law, *ib.*
 Rights over another's land claimable by custom, *ib.*
 When a *profit à prendre* is claimable by custom—Manorial customs—Rights of common, 123
 Common appendant, 125
 Common appurtenant, 126
 Common of shack, 127
 Right of common *pur cause de vicinage*, *ib.*
 Common of turbary, *ib.*
 Common of estovers, *ib.*
 Common in gross, 129
 Rights of sole and several pasturage—Cow-grasses and cattle-gates, 130
 Rights of tinbounders to search for tin in Cornwall, *ib.*
 The lord, by his grant of common, gives everything accessory to the enjoyment of the right, 131

Inconsistent rights of common, 131

Of the servitude of maintaining and repairing sea-walls, ditches and sluices, *ib.*

Of customary rights of fishing, and driving stakes for nets in the sea-shore, 132

Customary and prescriptive rights of bathing on the sea-shore, 133

Title by prescription, 134

Prescriptive right to a pew in a church, 135

Prescriptive rights founded on the presumption of a grant—Presumption of a grant from long-continued uninterrupted user and enjoyment as of right, *ib.*

Of the Prescription Act, 138

What profits or benefits may be claimed by user and enjoyment under the Prescription Act, 141

In order to gain a prescriptive title from uninterrupted user and enjoyment under the first and second sections of the Prescription Act, it must be proved that the enjoyment has been "as of right," 142

Enjoyment by consent or agreement, *ib.*

User and enjoyment as of right against all persons having an estate or interest in the land, 143

What sort of enjoyment is essential to the gaining of a prescriptive right of way, *ib.*

Enjoyment of a way over land out on lease, *ib.*

Enjoyment of a right of common by a tenant over land in the possession and occupation of his landlord, 144

What sort of enjoyment is essential to the gaining of a prescriptive right to the use of any watercourse or water—Natural and artificial watercourses, *ib.*

Prescriptive right to pen back water, 145

Prescriptive right to foul the pure water of a stream, and convert a natural watercourse into a sewer, *ib.*

User and enjoyment of water from artificial drainage, 146

What sort of enjoyment is essential to the gaining of a right of support to buildings from the adjoining land of a neighboring proprietor, 147

Houses resting against each other, 148

What sort of enjoyment of the benefit of a boundary fence is requisite to gain a prescriptive right to have the fence kept up at the expense of one landowner for the benefit of another, 149

What sort of enjoyment is essential to the gaining of a prescriptive right to the access of light to windows, *ib.*

Unity of ownership of the dominant and servient tenements preventing the acquisition of a prescriptive right to the free access of light, 151

Enlargement of windows—Enjoyment of enlarged windows, 152

What interruption in the enjoyment prevents the acquisition of title by prescription, 153

Of the necessity of a continuous enjoyment as of right and without interruption, 154

What breaks the continuity of the enjoyment—Asking leave, 156

Of the necessity of a continuous enjoyment down to the period of the commencement of the action, *ib.*

Exclusion from the computation of the thirty and twenty years' enjoyment of those periods during which parties otherwise capable of resisting the claim were infants, idiots, *feme covertes*, or tenants for life, 157

Of the right of reversioners to exclude from the computation of the forty years the period of the enjoyment of a way or watercourse, and use of water over lands demised for life or years, 158

Waiver and extinguishment of easements, 159

Parol abandonment of incorporeal rights, 160

Waiver and extinguishment of an easement of light and air, 162

Extinguishment of an easement of light by alterations in windows and buildings, 163

Disuse of right of way, 164

Extinguishment of ways of necessity, 165

Suspension and forfeiture of rights of way and watercourse by the non-performance of conditions annexed to the grant, *ib.*

Disuse of right to water, 166

Merger and extinguishment of easements and servitudes by a unity of ownership of the dominant and servient tenements, *ib.*

What sort of unity of ownership is essential to the extinguishment of easements, *ib.*

Revival and re-creation of easements and servitudes which have been extinguished or suspended by unity of ownership, *ib.*

Effect of the destruction or alteration of the dominant tenement, 169

Of the maintenance and repairs of ways and watercourses, 170

SECTION II.—*Remedy for the infringement of incorporeal rights*, 172–190.

Abatement of obstructions to the enjoyment of easements and *profits à prendre*, 172

Of the right to distrain beasts wrongfully put upon a common, *ib.*

Of actions for the infringement of incorporeal rights, *ib.*

Actions for taking manure from commons, *ib.*

Actions for surcharging of commons, 173

Actions for obstructions to the enjoyment of a private right of way, *ib.*

Of the parties to be made plaintiffs, 174

Tenant and reversioner, *ib.*

Parties to be made defendants, 175

Of the plaintiff's declaration—Venue—Statement of the cause of action, *ib.*

Declarations for an obstruction to the plaintiff's lights or privileged windows, 179

What may be given in evidence under the plea of not guilty—Not guilty by statute, 180

Traverse of the right, *ib.*

Plea of leave and license, *ib.*

Evidence at the trial, *ib.*

Proof of enjoyment so as to gain a prescriptive title at common law or under the Prescription Act, 181

Proof of right of way, *ib.*

Proof of a right to the free access of light, 182

Proof of obstruction to the right of way—Erection of gates, 183

Proof of obstructions to the access of light, *ib.*

Proof of right to an ancient weir and fishery in a navigable river, *ib.*

Proof of the servitude of maintaining and repairing fences, 184

Inadmissibility in evidence of statements and declarations by a tenant in derogation of the title of his landlord, *ib.*

Of the damages recoverable in actions for the infringement of incorporeal rights, *ib.*

Injunction to prevent the disturbance of easements granted by parol, 186

Injunction to prevent obstructions to the free access of light to windows, 187

Injunction to prevent the working of mines and quarries so as to deprive the adjoining or superjacent land of its necessary support, 189

Bill of peace, *ib.*

CHAPTER IV.

OF NUISANCES AND INJURIES FROM THE NEGLIGENT USE AND MANAGEMENT OF REAL PROPERTY, AND FROM KEEPING FEROCIOUS ANIMALS, 191–276.

SECTION I.—*Of Nuisances and injuries from the negligent use and management of real property, and from keeping ferocious animals*, 191–232.

Of nuisances, 192

Nuisances from the non-repair of, or from neglecting to cleanse, sewers, drains, and watercourses, 193

Offensive smells and noisome trades, *ib.*

Brick-burning, 194

Of prescriptive rights to the exercise of a noisome trade, 196

Nuisances from privies, chimneys, and manufactories—Liability of the landlord and occupier, *ib.*

Defilement of springs and running streams, 198

Noisy nuisances, *ib.*

Collection of crowds, 199

Injuries from spring-guns, man-traps, dog-spears, engines, and machines placed on land, 200

Injuries to animals from dog-traps, *ib.*

Injuries from unguarded wells, mining-shafts, areas, and cellars, *ib.*

Injuries from the dangerous state of private ways, 202

Nuisances adjoining highways—Dangerous pits and excavations—Steam engines and windmills, 203

The use of locomotive steam-engines on highways, 204

Dangerous excavations adjoining highways, *ib.*

Dedication of a highway to the public subject to certain risks and inconveniences, 205

Obstructions in public thoroughfares, 206

Obstructions in navigable rivers, 208

- Obstructions from sunken vessels, anchors, telegraph wires, etc., 209
- Where the public right of free navigation is taken away, and the power of removing obstructions is vested in the hands of conservators of the river, *ib.*
- Injuries to land from the erection of groins, sea-walls, and defences against tides and currents, 210
- Negligent overloading of floors of warehouses and buildings, *ib.*
- Non-repair of ruinous houses—Liability of landlord and occupier, 211
- Negligence in pulling down houses—Negligent excavations, 212
- Ruinous party-walls, 213
- Insecure fences, hedges, and gates, 214
- Railway fences—Statutory servitude imposed upon railway companies of keeping up and maintaining fences, *ib.*
- Negligent use and management of railway stations—Insufficient lights and guards, 217
- Ruinous and insecure railway bridges, viaducts, and embankments, 219
- Neglect of railway companies to erect and maintain bridges over highways, *ib.*
- Negligent management of railway gates placed across public carriage roads, 220
- Negligent management of gates placed across tramways, *ib.*
- Leaving open accommodation gates, 221
- Dangerous canals, *ib.*
- Negligent management of docks and wharves 222
- Dangerous machinery, 223
- Injuries to servants from dangerous premises, *ib.*
- Exemption of the master from liability when the danger is known to the servant, 224
- Where the workman is employed in the use of dangerous machinery, 225
- Injuries to workmen from defective hoisting-tackle in mines, and insecure scaffolding and ladders, 226
- Injuries to guests from the dangerous state of the premises of their host, 227
- Contributory negligence on the part of plaintiff, *ib.*
- Where the plaintiff's right to recover is not defeated by his being a trespasser, 228
- Nuisances and injuries from the keeping of ferocious animals, 229
- Effect of putting up a notice to beware of the dog, 230
- Dogs worrying sheep and destroying game, 231
- Of the keeping dogs reputed to have been bitten by a mad dog, *ib.*
- Injuries from driving ferocious animals along a public thoroughfare, 231
- SECTION II.—*Abatement of nuisances—Statutory remedies and penalties—Actions—Prohibition—Injunction and indictment, 233–257.*
- Abatement of nuisances, 233
- Abatement of nuisances upon commons, 235
- Removal of ruinous buildings, 236
- Abatement of nuisances arising from the exercise in excess of limited rights, *ib.*
- Removal of obstructions in public thoroughfares and watercourses, 238
- Removal of obstructions to the navigation of navigable rivers, *ib.*
- Obstructions to fishing, 239
- Pulling down ruinous houses adjoining a public thoroughfare, *ib.*
- Statutory remedies and penalties in respect of nuisances from gas-works, 240
- Penalties for fouling water, 241
- Penalties for the non-consumption of smoke, *ib.*
- By-laws for the suppression of nuisances, *ib.*
- Actions for nuisances—Private injuries from a public nuisance, *ib.*
- When a notice to abate or discontinue a nuisance should be given before commencing an action, 242
- Continuing nuisances, *ib.*
- Parties to be made plaintiffs, *ib.*
- Parties to be made defendants, 244
- Declarations for nuisances, 247
- Declarations for injuries from the keeping of ferocious animals, 249
- Plea of not guilty, 250
- Pleas justifying the fouling of the water of a stream under a prescriptive right to discharge into it the refuse of dye-houses and manufactories, and the washings of mines, 251
- Pleas justifying the obstruction of a watercourse, *ib.*
- Pleas justifying the poisoning of the atmosphere with noxious smells and exhalations, under a prescriptive right to carry on an offensive trade, *ib.*
- Evidence at the trial—Proof on the part of the plaintiff, 252
- Evidence for the defence, 255
- Damages recoverable, *ib.*
- SECTION III.—*Prevention of nuisances by injunction and indictment, 258–276.*
- Injunction, 258
- Acquiescence precluding equitable relief, 259

- Injunction to prevent the continuance of noisy nuisances, 260
- Prevention of public nuisances, *ib.*
- Prevention of public nuisances by indictment, 262
- Nuisances in public highways, 264
- Indictment against a corporation, *ib.*
- Proof of dedication of way to the public, 265
- User of a way by the public is by no means conclusive of the way being a public way, 266
- Proof of *animus dedicandi*, 267
- Occupation roads, 269
- No particular time of enjoyment is necessary for evidence of dedication, *ib.*
- There may be a highway by dedication to the public, where there is no thoroughfare, *ib.*
- Who may dedicate—A mere tenant or lessee has no power to throw open land to the public, 270
- Commissioners of public works have no power to dedicate, *ib.*
- Limited dedication, *ib.*
- Gates across a highway, 271
- There can be no dedication for a limited time, *ib.*
- Common highway of necessity, *ib.*
- Proof of highway by proof of parish repairs, *ib.*
- Indictable obstructions in public thoroughfares, *ib.*
- Indictable obstructions in navigable rivers, 272
- Repairs of highways, sea-banks and sewers, 273
- Liability to repair *ratione clausuræ*, 274
- Repair by district highway board, 275
- Ditches of turnpike roads, 276

CHAPTER V.

OF INJURIES TO LANDS AND TENEMENTS FROM WASTE, NEGLIGENCE AND FIRE, 277-320.

SECTION I.—Of injuries to lands and tenements from waste, negligence and fire, 277-305.

- Waste, 277
- Commissive and permissive waste, 278
- Permissive waste by lessees for terms of years, *ib.*
- Commissive waste by tenant for terms of years, 279
- Waste by tenant from year to year, 282
- Tenant-at-will, 283
- Tenant for life, *ib.*
- Waste in trees and woods, 284
- Where timber is decaying, 285
- Waste by taming and reclaiming deer, *ib.*
- Equitable waste—Where tenant for life holds without impeachment for waste, *ib.*
- Tenant in fee simple subject to an executory devise over, 286
- Lessee for term of years without impeachment of waste, *ib.*
- The words "without impeachment of waste," as applied to trustees, *ib.*
- Waste by trustees, 287
- Parties having only an equitable interest in land, *ib.*
- The Court of Chancery does not in general interfere to prevent permissive waste, 287
- Ecclesiastical dilapidations, *ib.*
- Waste by copyholders, 290
- Tenants-in-common, *ib.*
- Waste from the removal of fixtures, *ib.*
- The right to remove fixtures, 292
- Landlord's fixtures, *ib.*
- Tenant's fixtures, 294
- Agricultural tenant's fixtures made removable by statute, 296
- Ornamental fixtures, 297
- Domestic and trade fixtures, *ib.*
- Fixtures removable by local custom and usage, 298
- Abandonment of the right to disannex and remove ornamental and trade-fixtures, *ib.*
- Inability of the tenant to remove fixtures after the expiration of the term of hiring, *ib.*
- Right of purchasers, or mortgagees, to enter and remove fixtures, 299
- Waste committed by strangers upon land demised to a tenant or lessee, 300
- License to commit waste, 300
- Right of reversioners to enter upon lands in the possession of their lessees to inspect waste, 301

Injuries to lands and tenements from fire, 301	Pleas, 312
Accidental fires, 303	Evidence at the trial—Proof on the part of the plaintiff, <i>ib.</i>
Fire spreading from blast furnaces and steam-engines, 305	Damages recoverable in respect of the severance and sale of fixtures, 313
Fire spreading from railways to the adjoining property, <i>ib.</i>	Effect of the recovery of nominal damages, 314
Fires occasioned by the negligence of servants, 307	Assessment of damages, <i>ib.</i>
Injuries from gunpowder and explosive substances—Explosions of gas, 308	Damages recoverable from a tenant who obstructs the reversioner in the exercise of his right to enter upon the demised premises to inspect waste, 315
SECTION II.— <i>Remedies at common law for injuries to lands from waste, negligence, and fire, 309–316</i>	SECTION III.— <i>Of injunction to prevent waste, 316–320.</i>
The writ of prohibition for waste, 309	Prevention of commissive or wilful waste by injunction, 316
Actions for waste, <i>ib.</i>	Effect of acquiescence in the commission of waste, 319
Actions by owners of insured premises, 310	Effect of <i>laches</i> or delay in seeking a remedy, 320
Parties to actions for waste, <i>ib.</i>	Parties entitled to sue in equity, <i>ib.</i>
Declarations for waste, 311	
Declarations upon the custom of the realm for the negligent keeping of a fire, 312	

CHAPTER VI.

OF TRESPASS UPON REAL PROPERTY—TITLE TO LANDS AND TENEMENTS, 321–389.

SECTION I.— <i>Of trespasses upon lands and tenements, 321–332.</i>	SECTION II.— <i>Of the title to land, fences, and boundary-walls, 333–354.</i>
What constitutes a trespass, 322	Proof of possession of land and pendency of the rents is <i>prima facie</i> evidence of a seisin in fee of a person possessed, 333
Abuse of a license or authority rendering a party a trespasser <i>ab initio</i> , <i>ib.</i>	Trial of title in an action of trespass, <i>ib.</i>
Trespasses by cattle and domestic animals, 324	Title to realty from twenty years' possession—Limitation of actions for the recovery of realty, <i>ib.</i>
Trespasses from want of fences, and from defective fences, 327	Accrual of the right on dispossession or discontinuance of possession, 334
Who is bound to fence and repair fences, 328	What is a dispossession or discontinuance of possession causing the time of limitation to begin to run, 335
Destruction of crops by rabbits and pigeons, 329	Occupation by poor relations and servants—The possession of the servant the possession of the master, <i>ib.</i>
Damage done by intruding dogs, <i>ib.</i>	Accrual of the right on death, alienation, forfeiture, etc., 336
Trespasses where the surface and subsoil of land constitute separate freeholds, 330	Conversion of defeasible tenancies-at-will into an indefeasible title—Possession of land by a <i>cestui que trust</i> , <i>ib.</i>
Forcible entry and detainer, <i>ib.</i>	
Of trespasses upon the soil of highways set out and dedicated to the public by private proprietors, 331	
Of continuing trespasses, 332	

- Title of *bonâ-fide* purchasers of trust estates, 337
- Acquisition of title by parties who obtained possession originally as tenants from year to year, 338
- Effect of continued wrongful receipt of rent, *ib.*
- Entry upon land, and continued claim, 339
- Possession of coparceners, joint-tenants, and tenants-in-common, *ib.*
- Possession of younger brothers or relations, *ib.*
- Acknowledgments of title, *ib.*
- Ecclesiastical and eleemosynary corporations, *ib.*
- Disabilities, *ib.*
- Preservation of the rights of the landowner by re-entry and resumption of possession of lands before the expiration of the period of limitation, 341
- Rights of mortgagees, 343
- Title to the church, chancel, and churchyard, *ib.*
- Title to the sea-shore and bed of navigable rivers, 345
- Title to the soil of rivers or fresh-water lakes, 348
- Of the title to waste uninclosed land adjoining the sea-shore, 349
- Right to the soil of turnpike-roads and highways, *ib.*
- Of the right to the soil of accommodation-ways and private roads, 350
- Title to waste lands adjoining public highways, *ib.*
- Of the right to the soil of towing-paths and the banks of rivers and canals, 351
- Right of property in trees and bushes, 352
- Of the ownership of trees standing in boundary-hedges, 353
- Right of property in boundary-walls and fences, *ib.*
- Of the ownership of ditches and hedges, 354
- Title to a pew in a church, 355
- SECTION III.—Of actions for trespasses upon lands and tenements, 355–388.**
- Of actions against the hundred for damage done to tenements by rioters, 355
- Parties to be made plaintiffs in actions for trespasses—Heirs-at-law, 356
- Tenants-in-common, *ib.*
- Tenant and reversioner, 357
- Parties to be made defendants, 358
- Declaration for trespasses upon land—Venue, 359
- What may be given in evidence under the plea of not guilty, 360
- Of pleas denying the plaintiff's title or right of possession, 360
- Of the plea of *liberum tenementum*, or plea of freehold, 361
- Replication—Estoppel, *ib.*
- Of the plea of leave and license—Equitable defence, *ib.*
- Special pleas of matters in confession and avoidance—Matters of excuse, 362
- Of pleas of justification of trespass, 363
- Justification of trespass under the powers and provisions of an act of parliament, *ib.*
- Pleas justifying the breaking and entering a dwelling-house without warrant, 364
- Of pleas of justification under a prescriptive title, *ib.*
- Pleas of justification in the exercise of a right of way, 365
- Replications traversing the prescriptive right set up by the defendant's pleas, 366
- Traverse of the enjoyment as of right and without interruption, 367
- Replications traversing the enjoyment of a right of way, 368
- Facts and circumstances which must be specially replied, and cannot be given in evidence under a general traverse of the enjoyment as of right and without interruption for the periods named in the Prescription Act, *ib.*
- Replication of the existence of a tenancy-for-life during part of the period of enjoyment relied upon by the plea, 370
- Rejoinder traversing the fact of the existence of the tenancy-for-life during part of the period of enjoyment, *ib.*
- Evidence at the trial—Proof on the part of the plaintiff, *ib.*
- Proof under a traverse of the plaintiff's possession, or right of possession, of the *locus in quo*, 371
- Proof by the reversioner, 374
- Heir-at-law, *ib.*
- Proof of disseisin and re-entry, *ib.*
- Evidence for the defence, 375
- Proof of leave and license, 376
- Proof of pleas of justification, 378
- Proof of right of way—Pleas of justification, *ib.*
- Proof of deviations *extra viam* in the case of private ways, 379
- Proof of a public right of way, 380
- Proof of a right of way over vacant or waste strips of land extending alongside a public thoroughfare, *ib.*
- Proof of entry on the plaintiff's land for the purpose of depositing thereon the plaintiff's own goods, or removing therefrom the goods of the defendant, *ib.*

- | | |
|--|---|
| <p>Of the damages recoverable in actions for trespasses upon real property, 381</p> <p>Trespasses on land after notice or warning not to trespass, <i>ib.</i></p> <p>Damages in respect of trespasses in dwelling-houses, <i>ib.</i></p> <p>Assessment of damages in cases of injury to buildings, 383</p> <p>Assessment of damages for digging and carrying away coal and earth, <i>ib.</i></p> <p>Assessment of damages in respect of trespasses by diseased cattle, 384</p> | <p>Assessment of damages where the plaintiff has no certain or determinate interest in the property, 384</p> <p>Apportionment of damages as between tenant and reversionor, <i>ib.</i></p> <p>Damages recoverable from one of several co-trespassers, 385</p> <p>Damages recoverable from tenants who hold over wrongfully after the expiration of a notice to quit, <i>ib.</i></p> <p>Trespass for mesne profits, 386</p> <p>Prevention of trespasses by injunction, 387</p> |
|--|---|

CHAPTER VII.

OF TRESPASS AND CONVERSION OF CHATTELS—TITLE TO CHATTELS, 391-464.

SECTION I.—*Of trespass and conversion of chattels, 391-483.*

- | | |
|---|--|
| <p>Trespass upon personalty, 392</p> <p>Conversion of chattels, 396</p> <p>Wrongful destruction of chattels, <i>ib.</i></p> <p>Fixtures severed from the inheritance, 397</p> <p>Conversion of chattels by purchasers without title, <i>ib.</i></p> <p>When a demand and refusal must be proved in order to establish a conversion, <i>ib.</i></p> <p>What is a sufficient demand and refusal, <i>ib.</i></p> <p>Goods not in the possession of the defendant at the time of the demand, 400</p> <p>Goods found, <i>ib.</i></p> <p>Goods deposited in the hands of public officers, servants and bailees, <i>ib.</i></p> <p>Fraudulent deposits, 403</p> <p>Conversion of goods by railway companies, <i>ib.</i></p> <p>Conversion of bills and notes, <i>ib.</i></p> <p>Conversion of lost or stolen bank notes or negotiable securities, 404</p> <p>Conversion of chattels by one of several partners, joint-tenants or tenants-in-common, 405</p> <p>Conversion of trust property, 407</p> <p>Right of lien, 408</p> | <p>Title to chattels by finding, 411</p> <p>Title to wild birds and animals <i>feræ naturæ</i>—Right of the hunter to the game he kills, 412</p> <p>Title of the fishermen to the fish he harpoons or nets, 413</p> <p>Title to chattels by gift, 414</p> <p>Title to clothes by hiring and service, 415</p> <p>Of the right to the possession of grants of arms, title-deeds, leases, bonds and securities, <i>ib.</i></p> <p>Right to the possession of documents and securities for money as between trustee and <i>cestui que trust</i>, 416</p> <p>The right of property in letters, <i>ib.</i></p> <p>Title to chattels by purchase in market overt, <i>ib.</i></p> <p>Title to chattels by private sale and transfer, 418</p> <p>Colorable transfers, 419</p> <p>Title of innocent purchasers from fraudulent vendors, 420</p> <p>Transfers of chattels in the hands of bailees, 421</p> <p>Title by delivery order, <i>ib.</i></p> <p>Title by purchase from the sheriff, 422</p> <p>Title to bills, notes and cheques, <i>ib.</i></p> <p>Title to the property of bankrupts, 423</p> <p>Leaseholds—Onerous property, <i>ib.</i></p> <p>Contracts or dealings with the bankrupt without notice, 425</p> <p>Title to chattels purchased from a bankrupt after an act of bankruptcy, 426</p> <p>Transfer of property by bankrupts constituting an act of bankruptcy—Fraudulent preference, <i>ib.</i></p> <p>Executions levied on the property of bankrupts, 428</p> |
|---|--|

SECTION II.—*Of the title to chattels personal, 410-443.*

- Title to things altered by a wrongdoer, 410
- Title to timber severed from the inheritance, 411

- Title of trustee in bankruptcy to property settled or transferred by bankrupt, 429
- Title to chattels of which a bankrupt was reputed owner, at the time of his bankruptcy, *ib.*
- Recovery of possession of the goods by the true owner before notice of the act of bankruptcy, 430
- What things are comprehended under the words "goods and chattels," *ib.*
- What possession is within the statutes, 431
- Reputation of ownership, 432.
- Things sold by the bankrupt, and left in his possession—Raw materials of manufacture, 433
- Goods and chattels which have never been the property of the bankrupt, 435
- Possession by manufacturers, workmen and depositaries, 436
- Possession, sale and disposition of chattels by factors and commission agents for sale, 437
- Non-consent of the true owner, 439
- Possession by a bankrupt *cestui que trust*, *ib.*
- Possession by bankrupt trustees, *ib.*
- Goods in the apparent possession of the bankrupt within the Bills of Sale Act, Title to trust property, 441
- Right of property in things taken and converted after recovery of judgment in an action for the conversion of them, *ib.*
- SECTION III.—Remedies for the wrongful conversion of chattels, 442–464.**
- Recaption of goods wrongfully seized or stolen, 442.
- Of the plaintiffs in actions of trespass and conversion, 443
- Joinder of joint-owners as plaintiffs—Joint-tenants and tenants-in-common of chattels, 446
- Parties to be made defendants, *ib.*
- Of the staying of proceedings on the delivery of the chattels to the plaintiff, 448
- Declarations for a trespass, or for the conversion of chattels, *ib.*
- What may be given in evidence under the plea of not guilty, 449
- Pleas denying the plaintiff's right of property in, or his right to the possession of, the chattel, 450
- Pleas of justification, 451
- Evidence at the trial—Proof, by the plaintiff, 452
- Proof of constructive possession of chattels, *ib.*
- Proof of title of trustees of bankrupts, executors, and nominal parties, 454
- Proof of conversion, *ib.*
- Evidence for the defence, 455
- When the defendant is estopped from disputing the title of the plaintiff, 456
- Evidence under pleas of justification, *ib.*
- Of the assessment of damages, 457
- Assessment of damages where the plaintiff has only a limited or doubtful interest in the goods, 461
- In cases between pawnor and pawnee, *ib.*
- Damages for the conversion of bills and notes, *ib.*
- Of the damages recoverable where the plaintiff has offered to return the goods, or the defendant has received them back after the commencement of the action, 462
- Damages in the nature of interest, over and above the value of the goods, 463
- Special damages, *ib.*
- Damages in actions for seizures under the Customs' Act, 464

CHAPTER VIII.

OF TRESPASSES AND INJURIES FROM NEGLIGENCE—NEGLIGENT MANAGEMENT OF CHATTELS, 465–520.

- SECTION I.—Of trespasses and injuries from negligence—Negligent management of chattels, 465–502.**
- Negligence and inevitable accident, 465
- Negligence of carriers of passengers for hire, 467
- When the very occurrence of a railway accident is *prima facie* proof of negligence, 472
- Accidents at level crossings, 473
- Injuries from secret defects in carriages or race-stands, 474
- Collisions in public thoroughfares—Negligent driving, 475

Liability of the master for the negligence of his servant, 475	Negligence of bank managers, 501
Liabilities of owners of carriages let to hire who select and send their own coachmen, 478	Negligence of directors of public companies, <i>ib.</i>
Liabilities of borrowers of carriages for the negligence of their drivers, 479	SECTION II.— <i>Of actions for negligence—Direct and consequential injuries</i> , 502–520.
Identification of the passenger with his driver, <i>ib.</i>	
Negligence of servants in breaking-in and training horses, 480	Actions for compensating the families of persons killed by negligence, 502
Collisions in public thoroughfares, <i>ib.</i>	Actions at law, and proceedings in the High Court of Admiralty for negligence, 504
Collisions between vessels—Compulsory pilotage, <i>ib.</i>	Parties to be made plaintiffs, 505
Collisions with foreign ships, 483	Joint and separate rights of action, <i>ib.</i>
Non-observance of statutory or Admiralty regulations, <i>ib.</i>	Parties to be made defendants, 506
Collisions between vessels—Limitation of liability, 486	Contractor and sub-contractor, 508
Negligent navigation causing damage to owners of cargoes, <i>ib.</i>	Negligence of servants working under builders, contractors, and sub-contractors, 509
Duty of master or shipowner as to goods damaged on voyage, 487	Voluntary and involuntary trespasses—Direct and consequential injuries, 510
Negligent stowage causing injury to goods, <i>ib.</i>	Joint and separate liabilities, 511
Negligent navigation causing personal injury—Damage to sea-walls, etc., 488	Declarations for injuries from negligence, <i>ib.</i>
Negligence of masters causing injury to their servants, 488	Plea of not guilty, 513
Injuries to one fellow-servant from the negligence of another fellow-servant, 490	Evidence at the trial—Proof of negligence, <i>ib.</i>
Injuries to volunteers who assist gratuitously in work of a dangerous nature, 493	Proof of retainer and employment, 516
Contributory negligence on the part of the plaintiff, <i>ib.</i>	Proof of the ownership of chattels damaged by negligence, <i>ib.</i>
Negligence on the part of the plaintiff forming no impediment to an action for damages, 495	Evidence for the defence—Questions for the jury, <i>ib.</i>
Injuries from the negligence of skilled workmen and professional men, <i>ib.</i>	Damages recoverable, 517
Negligence of attorneys and solicitors, 496	Damages not too remote, 518
Negligence of barristers, 500	Negligent management or navigation of vessels, <i>ib.</i>
Negligence of surveyors or valuers, <i>ib.</i>	Damages when the plaintiff is insured against loss, or has received full indemnity under a contract of insurance, 519
	Damages recoverable by personal representatives in cases of death from negligence, <i>ib.</i>

CHAPTER IX.

OF NEGLIGENCE ON THE PART OF BAILORS AND BAILEES—DETENTION AND LOSS OF CHATTELS BY BAILEES, 521–566.

SECTION I.— <i>Of negligence on the part of bailors and bailees—Detention and loss of chattels by bailees</i> , 521–553.	Of the negligent keeping of chattels by bailees, 522
Of bailments of chattels, 522	Loss of chattels by workmen, 527
Negligence of bailors, <i>ib.</i>	Theft by servants, <i>ib.</i>
	Negligent keeping of goods by warehousemen, wharfingers, and depositaries for hire, 529

- Distinction between robbery and theft, 530
- Losses occasioned by the negligence of the bailor, *ib.*
- Loss of chattels by wharfingers, 531
- Loss of cattle—Liabilities of agisters of cattle, *ib.*
- Deposit of luggage and parcels at railway stations, 532
- Deposit of goods under a special contract, *ib.*
- Loss of goods by parties receiving them to be carried, but who are common carriers, 533
- Limitation of Liability of shipowners, 536
- Detention of chattels by bailees under a claim of lien, *ib.*
- Particular liens and general liens, 537
- Ordinary lien of workmen and artificers, 538
- A person cannot set up a right of lien which is at variance with the terms or conditions, or implied understanding, upon which he received the property, 539
- Parties against whom a lien may be claimed, 541
- General lien, 542
- Lien of factors and brokers, 543
- Insurance brokers, *ib.*
- Lien of bankers, 545
- Lien of attorneys and solicitors, *ib.*
- Certificated conveyancers have no lien, 547
- Lien of shipmasters, *ib.*
- Lien for freight, 548
- Lien of consignees, *ib.*
- Notices that goods will be held subject to a general lien, *ib.*
- General lien by custom of trade—Warehouse keepers—Wharfingers, *ib.*
- Lien of policy-brokers, 549
- Extinguishment of lien by abandonment of possession, 550
- Statutory power of sale in discharge of a right of lien, 551
- Tender of the debt in extinguishment of the right of lien, 551
- Detention of goods and chattels, deeds and securities, by one of several joint-owners or tenants-in-common, 552
- Re-delivery of chattels to one of several joint-bailors, *ib.*
- SECTION II.—*Of actions for the negligent management, negligent keeping, and unlawful detaining of goods and chattels, 553-566.*
- Parties to be made plaintiffs, 553
- Joint and separate rights of action, 555
- Power to compel rival claimants to establish their title by garnishment and by interpleader, 556
- Declarations against bailees for loss of chattels, 557
- Declarations against bailees for damage to chattels, 558
- Plea of not guilty, *ib.*
- Plea of non-detinet, *ib.*
- Pleas of delivery to one of several joint-plaintiffs, 559
- Pleas denying the plaintiff's property, *ib.*
- Pleas justifying detention under claim of lien, 560
- Pleas of payment of money into court, *ib.*
- Evidence—Proof on the part of the plaintiff, 561
- Evidence for the defence, 562
- Proof of abandonment of possession before commencement of action, 563
- Damages recoverable—Orders for delivery of the specific thing detained, 564
- Assessment of value, 565
- Assessment of damages where the whole, or part, of the goods have been delivered up after action, *ib.*
- Evidence in mitigation of damages, 566

CHAPTER X.

OF NEGLIGENCE OF BAILORS AND BAILEES—LIABILITIES OF COMMON CARRIERS, COMMON FERRYMEN, COMMON INNKEEPERS, AND LODGING-HOUSE KEEPERS, 567-632.

- SECTION I.—*Of negligence and breach of duty on the part of common carriers, 568-606.*
- Duties and responsibilities of common carriers, 568
- Who may be said to be a common carrier, 571
- Public profession of railway companies through their time-tables and toll-tables, *ib.*
- Duty of railway and canal companies to

- afford reasonable facilities for the carrying of passengers, merchandise, and chattels, 572
- Loss of goods by common carriers, 574
- Concealment of risk by consignors, 578
- Contributory negligence, *ib.*
- Inability of the common carrier to rid himself of the public duties imposed upon him, 579
- Statutory protection of common carriers in respect of the carriage of gold and silver, title-deeds, valuables, etc., 580
- Of the fixing up of notices required by the statute, 581
- When a declaration of value is a condition precedent to any liability on the part of the common carrier, 582
- By whom the declaration of value is to be made, and the increased rate of carriage paid, 583
- Articles to which the statute extends, *ib.*
- Losses covered by the statute, 585
- Loss of goods from theft by the common carrier's servants, *ib.*
- Inability of railway and canal companies to exonerate themselves from liability for their own neglect, default, or breach of duty by notice, condition, or declaration, 586
- Signature of notices, conditions, declarations, and special contracts, 589
- What are just and reasonable conditions respecting the receiving, forwarding, and delivering goods, 590
- Commencement and duration of the liability—Damage or loss of goods in warehouses, 593
- Delivery of goods at the place of destination, *ib.*
- Delivery of luggage at railway stations, 595
- Acceptance of goods and passengers to be carried beyond the limits of the ordinary destination, *ib.*
- Loss of passengers' luggage by railway companies, 598
- Loss of merchandise carried as luggage, 599
- Limitation of the liability of shipowners, 600
- Refusal of the consignee to receive the goods—Liability of the carrier as bailee, *ib.*
- Landing of goods by shipowners where the consignee fails to take them away, *ib.*
- Lien of common carriers, 601
- Railway charges, 603
- Charges for packed parcels, 604
- Passenger fares—Right of a passenger to alight at intermediate stations, 604
- Duties and responsibilities of common ferrymen, 605
- Loss of goods by common ferrymen and common hoymen, *ib.*
- SECTION II.—*Negligence of common innkeepers and lodging-house keepers* 606-619.
- Of the duty of common innkeepers to provide food and shelter for travellers and wayfarers, 606
- Who may be said to be a common innkeeper, 607
- Duty of the innkeeper to protect his guest from robbery and theft, 608
- Limitation by statute of the liability of innkeepers, 613
- Losses occasioned by the misconduct of the guest, 614
- Who are guests and travellers, 615
- Lien of innkeepers, 616
- Detention of the person of the guest, 617
- Liability of lodging-house keepers, *ib.*
- SECTION III.—*Remedies against common carriers and common innkeepers for negligence and breach of duty*, 618-632
- Summary proceedings against railway and canal companies, 618
- Parties to be made plaintiffs in actions against carriers, *ib.*
- Parties to be made defendants, 620
- Declarations against a common carrier for refusing to carry, 622
- Declarations against an innkeeper for the loss of chattels deposited within the precincts of the inn, *ib.*
- Plea of not guilty, *ib.*
- Special pleas, 623
- Evidence at the trial—Proof of the bailment, *ib.*
- Proof of a special contract, 625
- Proof of felony by a carrier's servants, *ib.*
- Proof of *jus tertii* by a common carrier, *ib.*
- Damages recoverable, 626
- Loss of, or injury to, chattels from negligence, *ib.*
- Damages in respect of delay in delivery, 628
- Injunction against railway companies to enforce compliance with the Railway and Canal Traffic Act, 629

CHAPTER XI.

OF WRONGFUL DISTRESS—DISTRESS FOR RENT—DISTRESS DAMAGE

FEASANT, 633-688.

SECTION I.—*Of unlawful and excessive distresses, 633-666.*

Distress for rent in arrear, 633
 When there is no certain ascertained rent there is no right to distrain, 636
 Of conditions precedent to the right to distrain, 638
 Distress for rent payable in advance—Rent when due—Several demises, *ib.*
 Distress after the termination of the term of hiring, 639
 Distress by agents—Joint tenants—Tenants-in-common, etc., 641
 Distress by executors and administrators, 642
 Agreements not to distrain, *ib.*
 Acceptance of a bill or note by way of payment, *ib.*
 Tender of rent before distress, 643
 Time, mode and place of distraining, *ib.*
 Things not distrainable, 644
 Perishable articles, growing crops, fruit, money, etc., 645
 Property of strangers on the demised premises in their own possession, 646
 Property of strangers placed on the demised premises, with the leave and license of the landlord, 647
 Materials placed on the demised premises to be manufactured or worked upon, 648
 Property of guests at a common inn cannot be distrained, *ib.*
 Chattels in the custody of the law are not distrainable, *ib.*
 Statutory exemption from distress in favor of foreign ambassadors and public companies in liquidation, 649
 Things distrainable—Chattels of traders left on the demised premises in the possession of the tenant, 650
 Distress of chattels mortgaged by the tenant, 651
 Things distrainable under a license to distrain, 652
 Distress and seizure of things fraudulently removed, 653
 What amounts to a distress for rent, 654
 Abuse of the right to distrain rendering parties trespassers *ab initio*, 655
 Of unlawful distress when no rent was in arrear, 656
 Excessive distresses, *ib.*

Distress for more rent than is due, 657
 Repeated distress for the same rent, 658
 Impounding the goods—Pound-breach, 659
 Abandonment of distress, 660
 Statutory power of sale, *ib.*
 Tender of rent rendering a sale unlawful, *ib.*
 Parties to whom tender may be made, 661
 Power of sale of growing crops and things fraudulently removed—Tender before sale, *ib.*
 Notice of distress, 662
 Appraisal and sale, 663
 Costs and expenses, *ib.*
 Effect of non-compliance with the statutes authorizing the sale, 664
 Keeping the distress without selling, 665
 Indemnification of bailiffs, *ib.*

SECTION II.—*Of distress damage feasant, 666-671.*

Seizure and impounding of animals and chattels damage feasant, 666
 Right to distrain animals trespassing and doing damage on unfenced lands adjoining public highways, 667
 What things may be distrained damage feasant, 668
 Distress by railway companies of locomotive engines damage feasant, 669
 Tender of amends, *ib.*
 Sale of impounded animals, 670
 Duties and responsibilities of pound-keepers, 671

SECTION III.—*Remedies for unlawful and excessive distresses, 671-688.*

Replevin of things distrained, 671
 Replevin in the county court, 673
 Replevin in the superior courts, 674
 Actions of replevin of things distrained damage feasant, *ib.*
 Actions for unlawfully selling impounded animals and cattle, *ib.*
 Actions for unlawful and excessive distresses, 675
 Parties to be made plaintiffs, *ib.*
 Parties to be made defendants, 676

- Declarations in replevin, 677
 Declarations for a wrongful and excessive distress, *ib.*
 Declarations for distraining and selling goods without notice of distress, or without appraisement, or for not selling for the best price, *ib.*
 Pleas in replevin—Non cepit, 678
 Avowries in replevin, *ib.*
 Avowries for double rent, 679
 Avowries by joint tenants, coparceners, and tenants-in-common, *ib.*
 Pleas in bar to an avowry—Non-tenuit—Riens in arriere, 680
 Payment of money into court, 681
 Of the plea of not guilty “by statute” in actions of trespass, or upon the case for an unlawful distress, *ib.*
 Pleas justifying an entry upon land for the purpose of distraining goods fraudulently removed, *ib.*
 Pleas justifying the seizure of animals damage feasant, 682
- Pleas of a recovery of the goods in an action of replevin, 682
 Evidence at the trial—Proof of distress, *ib.*
 Proof of no rent being due, and of unlawful and excessive distresses, 683
 Proof of material averments in the declaration, 684
 Proof that the defendant ordered or authorized the distress, *ib.*
 When proof of special damage is necessary, *ib.*
 Proof of waiver of right of action, *ib.*
 Proof of tenancy, as between plaintiff and defendant, *ib.*
 Proof of the nature and terms of a tenancy, 685
 Damages recoverable—Double value, 686
 Damages recoverable where the entry upon the premises was effected in an unlawful manner, 687
 Recovery of special damage, *ib.*

CHAPTER XII.

OF ASSAULT AND BATTERY, AND WRONGFUL IMPRISONMENT, 689–737.

SECTION I.—Of assault and battery, and mayhem, 689–697.

- What constitutes an assault, 689
 Assaults resulting from acts of negligence, 691
 Assaults by constables—Handcuffing unconvicted prisoners, *ib.*
 Assault and battery, 692
 Mayhem and wounding, *ib.*
 Assault and battery in self-defence, 693
 Assault in defence of the possession of a house, or close, or of property, *ib.*
 Assault in resistance of a forcible entry, or to prevent a seizure of chattels, 694
 Resistance to a forcible entry by a landlord, *ib.*
 Assaults in preservation of the public peace, 695
 Battery and wounding in self-defence, or in defence of the possession of tenements or chattels, *ib.*

SECTION II.—Of false imprisonment, 697–710.

- False imprisonment, 697
 Constructive imprisonment, *ib.*
 Imprisonment by order of a judge or judicial officer, 698

- Arrest in execution of warrants of justices, 698
 Arrest by constables without warrant, *ib.*
 Arrest by private persons without warrant, 700
 Arrest for a misdemeanor, *ib.*
 Arrest of the wrong party, 701
 Arrest for malicious injuries to property, *ib.*
 Wilful and malicious trespass, 702
 Arrest of persons committing indictable offences in the night, *ib.*
 Arrest for an assault and breach of the peace, *ib.*
 Arrest during the continuance of an affray, 703
 What amounts to a breach of the peace, 704
 Arrest of persons disturbing divine service, *ib.*
 Arrest of vagrants and persons found committing acts of public indecency, 705
 Arrest under the Merchant Shipping Act, *ib.*
 Arrest of a principal by his bail, *ib.*
 Arrest for offences committed within the limits of the Metropolitan Police district, 706
 Arrest by servants of railway companies, 707

- Detention of recruits and deserters, 708
 Imprisonment of dangerous lunatics, *ib.*
- SECTION III.—*Of actions for assault and battery, and for false imprisonment*, 709–737.
- Statutory protection to constables and their assistants from vexatious actions, 709
 Protective clauses in favor of parties acting in the execution of acts of parliament, 711
 Limitation of actions, and notice of action, 712
 Notice of action to persons acting in execution of the Larceny Act, 714
 Notice of action to persons acting in execution of the Metropolitan Police Act, 715
 Persons entitled to the benefit of the protection, *ib.*
 Length of notice of action, *ib.*
 Statement of the cause of action, 716
 Tender of amends, 717
 Payment of money into court, *ib.*
 Parties to be made plaintiffs—Master and servant, *ib.*
 Of the parties to be made defendants, *ib.*
- Liability of a corporation to an action for an assault, 720
 Subsequent ratification of wrongful imprisonment rendering the ratifying party responsible for the wrong, 721
 Declarations for an assault and false imprisonment, 722
 What may be given in evidence under the plea of not guilty, 723
 Not guilty by statute, 724
 Pleas setting forth a previous hearing and dismissal by magistrates, *ib.*
 Pleas of justification, 726
 Defence of neighbors and friends, 727
 Moderate correction by parents, schoolmasters, masters of ships, etc., *ib.*
 Pleas of justification of imprisonment, 728
 Evidence of trial—Proof of an assault, 730
 Proof of an arrest and imprisonment, 731
 Evidence for the defence, *ib.*
 Damages recoverable, 733
 Damages where there are several co-trespassers, 734
 Prospective damages, *ib.*
 Special damages in action for false imprisonment, 735
 Evidence in mitigation of damages, 736

CHAPTER XIII.

OF MALICIOUS CONSPIRACY, MALICIOUS PROSECUTION AND ARREST—
MALICIOUS ABUSE OF LEGAL PROCESS, 739–768.

- SECTION I.—*Of malicious conspiracy, malicious prosecution and arrest—Malicious abuse of legal process*, 739–758.
- Malicious conspiracy, 739
 Malicious exhibition of articles of the peace against another, 741
 Malicious prosecution, 742
 What is evidence of a want of reasonable and probable cause, and of malice, *ib.*
 Prosecution by persons who manifest a consciousness of the innocence of the accused, 744
 Prosecutions under the advice of counsel, 746
 Malicious complaints before magistrates—Maliciously causing a justice's warrant to be issued against the plaintiff, 748
- Continuance by defendant of proceedings commenced without his knowledge, 750
 Effect of the complaint or information before the magistrate being followed up by a conviction of the plaintiff, *ib.*
 Maliciously causing a search-warrant to issue, 751
 Malicious indictment, *ib.*
 Malicious prosecution by court-martial, *ib.*
 Malicious assertion of a legal right, *ib.*
 Malicious and unfounded actions, 752
 Maliciously putting the process of the law in motion in the name of a pauper or insolvent, *ib.*
 Maliciously issuing execution for a larger sum than is due upon a judgment, 753
 Maliciously causing an extent to issue, 754

- Malicious proceedings in bankruptcy, 754
 Malicious abuse of legal process, 755
 Malicious detention of judgment-debtors after tender of the debt and costs, *ib.*
 Malicious arrest, 756
 What amounts to a malicious arrest—Proof of actual custody, 757
- SECTION II.—*Of actions for malicious arrest and malicious prosecution*, 758–768.
- Parties to be made defendants, 758
 Pendency of a rule for a criminal information against the defendant, 759
- Declarations for a malicious prosecution, 759
 Of the plea of not guilty in actions for a malicious arrest and malicious prosecution, 760
 Pleas of justification, *ib.*
 Evidence at the trial—Proof on the part of the plaintiff—Malicious arrest, or prosecution, 761
 Proof of malicious informations and complaints before magistrates, 762
 Proof by certified copy of the record of the prosecution and acquittal, 763
 Proof of malice and of want of reasonable and probable cause, 764
 Proof on the part of the defendant, 766
 Of the damages recoverable in actions for a malicious prosecution, 767

CHAPTER XIV.

OF TRESPASS IN EXECUTION OF VOID OR IRREGULAR PROCESS—RESPONSIBILITY OF JUDGES AND MINISTERIAL OFFICERS OF JUSTICE, AND PERSONS SETTING THEM IN MOTION, 769–821.

- SECTION I.—*Of trespasses in execution of void or irregular process—Responsibility of judges and ministerial officers of courts of justice, and persons setting them in motion*, 769–779.
- Exemption of judges from actions in respect of things done in the exercise of their judicial functions, 770
 Arbitrators, 771
 Conditions precedent to the existence of jurisdiction on the part of a judge, 772
 Disqualification of judges on account of interest, 773
 Exemption of judges from actions where they had a *prima facie* jurisdiction, and no objection is taken to their jurisdiction, *ib.*
 Orders of commitment by county court judges, 775
 Commitments for contempt, *ib.*
 Statutory forms of commitment by county court judges, 776
 Who are judges and judicial officers, *ib.*
 Delegation of judicial functions, 777
 Removal of the proceedings of inferior courts for a revision by a superior tribunal, *ib.*
 Proceedings against county court judges to compel them to act in particular cases, 778
 Proceedings of courts martial, 779
- SECTION II.—*Of the duties and responsibilities of ministerial officers of courts of justice*, 779–805.
- Illegal assumption of the judicial office by ministerial officers, 779
 Neglect of duty by ministerial officers of courts of justice, 780
 Duties and responsibilities of the sheriff and his officers—Execution of writs, *ib.*
 Priority of writs of execution, 781
 Trespasses by the sheriff and his officers, 782
 Execution of writs by special bailiffs, 783
 Trespasses in dwelling-houses by sheriffs and their officers under color of the execution of legal process, *ib.*
 Of the breaking open the outer door of a dwelling-house in the execution of legal process, 784
 What amounts to a breaking of the outer door, 785
 Of the breaking open of inner doors in the execution of a writ, *ib.*
 Illegality of arrest or seizure of goods effected through the medium of an act of trespass, 786
 When the sheriff becomes a trespasser by remaining on premises an unreasonable time, 787

- Seizure of the goods of the wrong person, 787
- Seizure by sheriffs and their officers of privileged or protected goods, 789
- Power of the sheriff to compel rival claimants to interplead and establish their title, 790
- Claims of landlords on sheriffs for rent in arrear, 793
- Sale by sheriffs of goods taken in execution, 794
- Capture of the wrong person, *ib.*
- Arrest of the right person under a wrong name, *ib.*
- Illegal arrest on Sundays, 795
- Incurability of a wrongful imprisonment—Arrest under one of several writs, *ib.*
- Arrest of privileged persons, 796
- Countermand of writs and warrants, *ib.*
- Liability of the sheriff for an escape, 797
- Recapture upon fresh pursuit, 798
- Discharge of debtors taken in execution, *ib.*
- Arrest of the person and seizure of goods under void or irregular process, 799
- Exemption of sheriffs and others from responsibility when the injury has been brought about by the misrepresentation of the plaintiff, 800
- False returns to writs of execution, 801
- Extortion by sheriffs and their officers, *ib.*
- Duties and responsibilities of the high-bailiff, bailiffs and registrars of the county court, 802
- Liability of ministerial officers where the court has no jurisdiction, and no authority to issue the process, *ib.*
- Duty of bailiffs of the county court to satisfy the landlord's claim for rent, 803
- Liabilities of gaolers, 804
- Liability of the messenger of the Court of Bankruptcy, 805
- SECTION III.—*Of actions against judges, sheriffs and ministerial officers and their assistants, and parties setting them in motion, 805-821.*
- Actions against county court judges—Notice of action, 805
- Remedies against sheriffs and officers for an escape, 806
- Actions to recover money in the hands of the sheriff, 806
- Actions against high-bailiffs of county-courts and their assistants, *ib.*
- Statutory protection to high-bailiffs, and persons acting by their order, or in their aid, in the execution of county-court warrants, *ib.*
- Of the staying of proceedings in actions against high bailiffs and officers of the county-court, 807
- Plaintiffs in actions against sheriffs, 809
- Of the defendants in actions for wrongs done under color of legal process, *ib.*
- Declaration against a sheriff for not executing the Queen's writ, or for an escape, 810
- Declarations against sheriffs for removing goods taken in execution without paying rent due to the landlord, *ib.*
- Declarations against sheriffs for treble damages for extortion, *ib.*
- The plea of not guilty, 812
- Pleas of justification, *ib.*
- Justification in the execution of legal process, *ib.*
- Replications, 813
- Evidence at the trial—Proof on the part of the plaintiff, 814
- Proof of judgments, writs, and process from the superior courts, *ib.*
- Delivery of the writ to the sheriff to be executed, *ib.*
- Proof the sheriff's having directed or authorized the commission of the wrongful act, *ib.*
- Proof of false return to a writ, 816
- When admission by an under-sheriff and bailiffs are evidence against the sheriff, *ib.*
- Proof of the removal of goods taken in execution without paying the landlord's rent, *ib.*
- Evidence of the process under which the sheriff acted, 817
- Evidence for the defence—Proof of rent being in arrear at the time of the levy, *ib.*
- Proof of proceedings in the county-court, *ib.*
- Damages recoverable in actions against sheriffs and officers—Negligence and breach of duty, *ib.*
- Assessment of damages in actions for an escape, 818
- Special damages, 820
- Exemplary damages, 821
- Recovery of treble damages for extortion, *ib.*

CHAPTER XV.

OF TRESPASSES AND INJURIES COMMITTED IN EXECUTION OF WARRANTS
AND ORDERS OF JUSTICES—RESPONSIBILITY OF MAGISTRATES,
CONSTABLES, THEIR ASSISTANTS, AND PERSONS
SETTING THEM IN MOTION, 823-879.

SECTION I.—*Of trespasses and injuries committed in the execution of warrants and orders of justices, 824-886.*

Of the jurisdiction of justices of the peace, 824

Jurisdiction of justices residing or being out of the county for which they are justices, 826

Jurisdiction of borough justices under the Municipal Corporation Act, *ib.*

The power of summary conviction, 827

Liability of justices for misconduct in the exercise of their judicial functions, 828

Of the granting of search-warrants by magistrates, *ib.*

Liability of justices for acts done by them without jurisdiction, or in excess of their jurisdiction, 829

Exemption of justices from actions in cases where they had a *prima facie* jurisdiction, and no objection was taken to their jurisdiction until after they had adjudicated, *ib.*

Wrongful proceedings by justices interested in the matter before them, 688

Wrongful commitment and imprisonment by justices, 831

Acts of a justice of the peace who has not duly qualified, 834

Of the form of commitment, *ib.*

Commitment by justices of accused persons for trial—Examination of the witnesses, 835

Effect of the depositions being taken in the absence of the magistrate who acts upon them, *ib.*

Convictions by magistrates on their own view, 836

Summary convictions founded upon informations, *ib.*

Statutory provisions respecting summary convictions and orders of justices, 837

Requisites of the information or complaint, *ib.*

Of the time within which the information or complaint must be laid, 838

Proceedings upon information or complaint, 839

Unlawful proceedings of justices when there is no information or complaint before them, 840

When a complaint once made cannot be settled and withdrawn, *ib.*

Convictions by justices in excess of their jurisdiction, 841

Ouster of the jurisdiction of justices by setting up a claim of title, *ib.*

To what extent a justice of the peace is protected in the exercise of a discretionary power, 843

Wrongful ministerial acts, 844

Convictions upon by-laws, 845

Of the drawing up of convictions and orders, 846

Disclosure of the authority and jurisdiction of justices on the face of their proceedings, 847

Description of the offence or subject-matter of complaint, *ib.*

Of singling out the offender, 848

Description of the locality of the offence, 849

Orders and adjudications by justices, *ib.*

Statutory forms of convictions and orders, 851

Immateriality of mere surplusage, *ib.*

Effect of the conviction, 852

Warrants of distress and commitment, *ib.*

Exemption of justices from actions in respect of warrants of distress for poor-rate, 854

Warrants of distress and commitment in case of non-payment of costs by an informer or complainant, *ib.*

Service of a copy of the minute of the order before the issue of a warrant of commitment or distress, *ib.*

The power of appeal to the court of quarter sessions against summary convictions and orders of justices, *ib.*

Excess of jurisdiction may be made a ground of appeal, 855

Of the execution of convictions and orders after notice of appeal, 856

Exemption of justices from liability where a defective conviction or order has been confirmed upon appeal, *ib.*

- Statement of a case to the superior courts by way of appeal from decisions of justices, 857
- Of the quashing of convictions and orders—Removal of orders and convictions by certiorari, 858
- Decisions which are final, and cannot be reviewed by certiorari or mandamus, *ib.*
- Commitment for contempt, 859
- When the writ of certiorari is not taken away by express statutory prohibition, *ib.*
- Proof by affidavit of the facts and circumstances calling for the interference of the superior court, 860
- Amendment of orders or judgments of justices on return to a certiorari, 862
- Of testing the legality of a commitment by writ of *habeas corpus*, 863
- Proceedings against justices to compel them to act in particular cases, 864
- Right of county justices to order the expense of county litigation to be defrayed out of the county funds, *ib.*
- Of the power of justices to give costs, 865
- SECTION II.—Exemption of constables and their assistants from liability when acting in the execution of warrants and orders of magistrates, 865–868.**
- Exemption of constables, officers, and their assistants from liability for acts done by them in obedience to a warrant of justices, 865
- Excess of authority on the part of constables and officers—Handcuffing unconvicted prisoners, 867
- Abuse of a search-warrant, *ib.*
- SECTION III.—Remedies for wrongs done under color of convictions and warrants of justices, 868–879.**
- Replevin of chattels distrained under warrant of justices, 868
- Of actions against justices, 869
- When the action is brought in respect of things done without jurisdiction, or in excess of jurisdiction, 869
- When the action is brought for a malicious conviction, commitment, or distress, or a malicious abuse by a magistrate of the functions of his office, 870.
- Effect of the existence of a power of appeal on the right to bring an action, 870
- Objections by justices to actions against them in the county court, 871
- Of setting aside certain actions brought against justices of the peace, *ib.*
- Limitation of actions against justices of the peace, *ib.*
- Of notice of action against justices, 872
- Statement of the cause of action on the face of the notice, 874
- Tender of amends before action, *ib.*
- Of the computation of the month's notice, and of the time for tendering amends, *ib.*
- Of the statutory protection to constables, officers, and their assistants from vexatious actions, 875
- Parties to be made defendants—Wrongful convictions and orders by one justice acted upon by another justice, *ib.*
- Liability of persons who set justices and constables in motion, *ib.*
- Evidence at the trial of actions against justices, 876
- Proof of malice and of the want of reasonable and probable cause, *ib.*
- Evidence at the trial of actions against constables and officers—Proof of the injury having been done in execution of a warrant of justices, 877
- Proof of warrant of justices—Secondary evidence of the contents of a warrant, 878
- Proof by the plaintiff of his demand of the perusal and copy of the warrant, *ib.*
- Proof by the defendant of the production of the warrant—Production and perusal of a copy of the warrant, *ib.*
- Damages recoverable in actions against justices of the peace, 879

CHAPTER XVI.

OF INJURIES FROM THE EXERCISE OF STATUTORY POWERS—STATUTORY
COMPENSATION FOR INJURIES AUTHORIZED BY STATUTE, 881-923.SECTION I.—*Of injuries from the exercise of statutory powers, 881-896.*

Exemption of persons from personal liability in respect of things done under statutory authority, 882 *

Injuries from the negligent execution of statutory powers, 883

Nuisances from the negligent working of railways, 885

Duties and responsibilities of boards of public works, trustees, and commissioners—Contractors and workmen acting in the exercise of statutory powers, *ib.*

Surveyors of highways and county bridges, 888

Effect of clauses in particular statutes exonerating persons from all personal liability in respect of things done in the *bonâ fide* execution of the statute, 889

Right of commissioners, trustees, and public officers to indemnify themselves in respect of the costs and expenses they incur out of the public funds they are authorized to administer, 890

When expenses incurred through blunders or negligence may be charged upon a public or trust-fund, 891

Creation of nuisances in the *bonâ fide* exercise of statutory powers, *ib.*

Pollution of streams and injuries to docks, wharfs, towing-paths, etc., in the exercise of statutory powers, 892

Creation of nuisances in the exercise of the statutory powers contained in the Towns Improvement Clauses Act, 893

The Metropolis Local Management Act, 894

Of the power to take lands and streams for public purposes, *ib.*

Licenses to enter upon land authorized to be taken for public works, 895

Seizure and detention of goods by custom-house officers acting in the execution of statutory powers, *ib.*

SECTION II.—*Of statutory remedies for the recovery of compensation for injuries authorized by statute, 896-911.*

Injuries establishing a right to statutory compensation, 896

Of ascertaining the amount of statutory damage by arbitration, 897

Jurisdiction of the arbitrator, 898

Damages recoverable before justices of the peace, and not by action, *ib.*

Of the statutory remedy for the recovery of compensation under the provisions of the Lands Clauses and Railway Clauses Consolidation Acts, 899

Of statutory compensation to tenants and occupiers of lands taken for public works, 903

Notices by claimants of the nature and extent of the injury sustained, and of the amount of compensation required, *ib.*

Assessment of damages, 904

Future damages, 905

Assessment of damages to which the claimant is not legally entitled—Removal of the inquisition by *certiorari*, 906

Recovery of the amount of compensation assessed by a jury, 907

Declaration in actions for railway compensations, *ib.*

Pleadings—Defences—Traverse of the injury to the land, 908

Remedy for subsequent unforeseen damages, *ib.*

Remedy in cases of severance, 910

Compulsory purchase of house by railway company, 911

SECTION III.—*Remedies by action and by injunction in respect of injuries from the negligent doing of things authorized to be done by statute, 912-923*

Limitation of actions in respect of things done under local and personal statutes, 912

Accrual of the cause of action and commencement of the period of limitation, *ib.*

Of notice of action, 913

Notice of action to gas companies and trading corporations and their officers, *ib.*

Notice of action to toll and tax-collectors and revenue officers, 914

Notice of action against contractors, etc., under local boards of health, 915

- | | |
|---|---|
| <p>Notice of action against surveyors and persons acting in execution of the highway acts, 915</p> <p>Tender of amends before action, 917</p> <p>Parties to be made defendants, <i>ib.</i></p> <p>Pleadings—Plea of not guilty, 918</p> <p>Plea of tender of amends before action, 919</p> <p>Pleas of justification under the authority of an Act of Parliament, <i>ib.</i></p> <p>Evidence at the trial—Proof of notice of action, <i>ib.</i></p> | <p>Power of the Court of Chancery to grant an injunction to prevent unnecessary injury from the execution of statutory powers, 919</p> <p>Injunction to restrain nuisances created by public bodies acting in the exercise of statutory powers, 920</p> <p>Injunction to prevent misuse by companies and public bodies of land acquired by them under statutory authority, <i>ib.</i></p> |
|---|---|

CHAPTER XVII.

OF LIBEL AND SLANDER, 925–1001.

SECTION I.—*Of libel and written slander*, 925–952.

- Of the distinction between slander by word of mouth and slander in a published writing, 926
- Oral slander rendered actionable by being printed and published—Exemption of the author and liability of the publisher, 927
- What writings are libellous and actionable, 928
- Of malice, 930
- Privileged writings and communications, 931
- Defamatory writings in courts of justice, 933
- Defamatory petitions to the Queen, to Parliament, or to ministers or officers of state, respecting the conduct of magistrates and officers, 935
- Criminatory communications by public officers acting in discharge of a public duty, 936
- Criminatory pastoral letters, and printed communications from clergymen to their parishioners, *ib.*
- Defamatory letters respecting clergymen, 938
- Privileged confidential communications between relations respecting the character of a person proposing marriage, *ib.*
- Privileged confidential communications between friends to prevent an injury 939
- Privileged communications by persons having a pecuniary interest involved in the matter of the communication, 940
- Reckless and inconsiderate communications, 941

- Disclosures made *bonâ fide* in the course of an investigation set on foot by the plaintiff himself, 941
- Communications between subscribers to charities, 942
- Privileged communications respecting the character of servants, *ib.*
- Comments in excess of the privilege, 945
- Of the effect of addressing privileged communications to a wrong party by mistake, 946
- Reports of trials containing defamatory matter, *ib.*
- Publications of *ex parte* statements, and of proceedings preliminary to a trial, 947
- Publication of speeches and proceedings in parliament, 948
- Defamatory reports of proceedings at vestries and public meetings, 949
- Reviews and criticisms in public papers, *ib.*
- Criticisms by one public journalist upon another, 950
- Criticisms upon handbills and advertisements, 951
- Criticisms upon sermons and clergymen, *ib.*
- Comments upon the public character of public men, 951
- Disparaging criticisms by one tradesman upon the goods of a rival tradesman, 952

SECTION II.—*Of verbal slander*, 953–971.

- When defamatory words are actionable, 953
- Defamatory words not actionable without special damage, 954

- Defamatory words actionable *per se* without proof of any special damage, 955
- In what cases actionable words are rendered not actionable by precedent or subsequent words, 956
- Defamatory words imputing to the plaintiff that he is afflicted with a contagious disorder, 957
- Defamatory words concerning tradesmen and professional men, *ib.*
- Words imputing misconduct or gross ignorance or incapacity to professional men, 958
- Words imputing official misconduct to a person in an office of profit or trust, 960
- Words rendered actionable by reason of special damage, *ib.*
- Slandorous denunciations from the pulpit causing loss of custom, situation, or employment, 961
- Effect of the dismissal of a slandered servant, being a wrongful dismissal on the part of the master, 962
- Effect of the slander being disbelieved by the master, *ib.*
- Special damage, not being the immediate and natural consequence of the words spoken—Spontaneous and unauthorized repetition of verbal slander, 963
- Special damage directly resulting from the repetition of oral slander, 964
- Circumstances rebutting the presumption of malice, *ib.*
- Privileged communications—Proof of malice, 965
- Privileged charges of felony made *bonâ fide*, with reasonable grounds for suspicion, *ib.*
- Privileged statements and comments by advocates in the course of judicial proceedings, or in the conduct of a cause, 966
- Defamatory statements by a party in open court conducting his own cause, 967
- Privileged comments and charges by judges and magistrates in the exercise of the duties of their office, 968
- Of the interpretation and application of the words used, *ib.*
- Slander of title, 969
- SECTION III.—*Of actions for libel and slander, 971–1003.*
- Consolidation of actions for the same libel, 971
- Parties to be made plaintiffs, *ib.*
- Parties to be made defendants, 972
- Declarations for libel and slander, *ib.*
- Of the innuendo or defamatory sense attributed to the writing or words or the face of the declaration, 973
- Statement of special damage in actions for verbal slander, 975
- What may be given in evidence under the plea of not guilty, 976
- Plea that the libel was inserted without malice or gross negligence, and that an apology was published—Payment of money into court, 977
- Pleas of justification, 978
- Evidence for the plaintiff—Printed placards—Proof of publication, 979
- Publication in newspapers, 981
- Proprietorship of newspapers containing libels, 982
- Proof of the utterance of the words charged in actions for verbal slander, 983
- Proof of the singing of libellous songs, *ib.*
- Application of the libel to the plaintiff, 984
- Proof of the defamatory sense of the words used, *ib.*
- Admissibility of evidence of surrounding circumstances to explain and point the libel—Interpretation of the words used, 986
- Proof of subsequent libels to explain and point the libel charged in the declaration, 987
- Proof of successive libels to show malice, *ib.*
- Evidence of malice, 988
- Proof of injury to the plaintiff, 989
- Evidence of special damage, *ib.*
- Proof of the trade, or profession, or official character of the plaintiff, 990
- Proof that the words were spoken concerning a tradesman or professional man in the way of his trade or profession, *ib.*
- Evidence on the part of the defendant—
- Traverse of material allegations, 990
- Proof of the truth of the charge or accusation, *ib.*
- The damages recoverable in actions for defamation, 992
- Evidence in aggravation of damages, 993
- Mitigation of damages, *ib.*
- Proof of libels by the plaintiff on the defendant, 996
- Evidence of offers of apology in mitigation of damages, *ib.*
- Of the judge's direction to the jury, 997
- Setting aside verdict—Arrest of judgment, 998
- Indictments for libel and slander, 999
- When the truth of the matter may be given in evidence, 1000
- Evidence for the defence, *ib.*

CHAPTER XVIII.

OF FRAUDULENT MISREPRESENTATION AND DECEIT, FRAUDULENT CONCEALMENT, BREACH OF WARRANTY, AND FALSE PRETENCES, 1003-1078.

SECTION I.—*Of fraudulent misrepresentation and deceit, fraudulent concealment, and breach of warranty, 1004-1033.*

Of wilful deceit, 1004

Unintentional deception, 1005

False representations under pretence of a claim of right—False claim of lien, 1006

Representations by a person of his knowledge of a particular fact, when he knows that he has no knowledge at all about it, 1007

Statements and representations which must be authenticated by a signed writing—False representations concerning the conduct, credit, ability, trade or dealings of third persons, 1008

Representations concerning the character, credit, trade, or dealings of co-partnerships and joint-stock companies—Authentication thereof by a signed writing, 1009

Misrepresentation by directors and officers of public companies—Publication of deceitful prospectuses and reports, *ib.*

Fraudulent breach of warranty, 1012

Warranties made pending a negotiation for the sale of property, 1014

Private representations made prior to a sale by auction forming no part of the public contract of sale, *ib.*

False representations amounting to a warranty by a person of his knowledge of a particular fact, where the means of knowledge lie peculiarly or exclusively within his reach, 1015

Representations concerning matters which are obvious to ordinary intelligence, and which lie as much within the knowledge of one party as the other, 1016

Representations amounting merely to expressions of opinion and belief, *ib.*

Statements in answer to inquiries—Information to sheriffs and public officers, 1017

Warranties by vendors on sales of real property, 1018

False representations of title by vendors of corporeal and incorporeal hereditaments—Representations not amounting to a warranty, 1019

Representation of title on sales of chattels amounting to a warranty, *ib.*

False representation by manufacturers of the character and quality of the articles they manufacture and sell, 1020

Representations by a vendor who is told that the purchaser wants the article he proposes to buy for a particular purpose, 1021

False representation by vendors made to absent purchasers amounting to a warranty, 1022

False representations by vendors where the purchaser has means of examination and judgment—Sale of goods by sample, *ib.*

False representations by railway companies amounting to a warranty, 1024

False representation of authority—Pretended agency—Deceit by agents, 1025

When a principal is responsible for the fraud of his agent, 1027

False assumption of authority, as between master and servant, employer and employed, 1028

Counterfeiting trade-marks—Fraudulent use by one person of the trade-mark of another with intent to deceive, *ib.*

Warranty of the genuineness of articles with trade-marks, 1029

Warranty of description as to quantity or country, *ib.*

Fraudulent assumption of the name of a bank, 1030

Deceit by provision-dealers in selling unwholesome food, *ib.*

False and fraudulent representations by married women and infants, 1031

Fraudulent concealment, *ib.*

Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried, 1033

Fraudulent sales with all faults, *ib.*

SECTION II.—*Of actions for fraud and deceit, and the remedy by injunction, 1034-1055.*

Actions for deceit—Parties to be made plaintiffs, 1034
 Parties to be made defendants—Principal and agent, 1036
 Joint-stock companies, 1037
 Of declarations for deceit, 1038
 Declarations for breach of warranty on the sale of a horse, 1039
 Declaration by an agent against a principal for a false representation, *ib.*
 Declaration for fraudulently inducing an architect to withhold his certificate, 1040
 Of the plea of not guilty, *ib.*
 Proof of fraudulent misrepresentation and deceit, 1041
 Proof of the representation having been made to the plaintiff, *ib.*
 Proof that the plaintiff relied upon the representation, and not upon his own examination and judgment, 1042
 Proof of warranties, 1043
 Proof of the terms and conditions of

warranty by proof of public notices stuck up in an auction-room or repository where the thing warranted was sold, 1043
 Evidence of breach of warranty of a horse—What constitutes unsoundness, *ib.*
 Proof of manifest defects not covered by the warranty, 1044
 Proof of vice, 1045
 Proof of the use of counterfeit trade-marks, *ib.*
 Remedies in equity for a false representation, *ib.*
 Of the damages recoverable in actions for fraudulent misrepresentation and deceit, 1046
 Special damages—Breach of warranty, *ib.*
 Special damages—False assumption of agency, 1047
 Prevention of fraud by indictment, 1048
 Indictments for obtaining, or endeavoring to obtain, money or goods by false pretences, *ib.*
 Injunction to prevent fraud, 1049
 Injunction to prevent the fraudulent use of trade-marks, 1050

CHAPTER XIX.

OF MATRIMONIAL AND PARENTAL INJURIES, ADULTERY, AND SEDUCTION, 1057-1100.

SECTION I.—*Of the infringement of matrimonial and parental rights, 1057-1087.*

Rights of wives deserted by their husbands, 1057
 Right of action of married women after they have obtained an order for protection, 1059
 What amounts to desertion, *ib.*
 Of the restitution of conjugal rights, *ib.*
 Of judicial separation on the ground of adultery, cruelty, or desertion, 1060
 What amounts to cruelty, 1061
 Revival of condoned cruelty, 1063
 What amounts to desertion without cause, 1064
 Rights of married women after a decree for a judicial separation, 1066
 Alimony in case of judicial separation, *ib.*
 Of adultery and the dissolution of the marriage contract, *ib.*
 Adultery and desertion on the part of the husband, 1068
 Wilful neglect or misconduct on the part of the husband conducing to adultery on the part of the wife, *ib.*
 Connivance or toleration of adultery, 1069
 Condonation of adultery, 1070
 Alimony in cases of dissolution of marriage contract, 1071
 Orders for the settlement of property for the benefit of the innocent party and children, *ib.*
 Power of the Divorce Court over marriage settlements, *ib.*
 Orders respecting the custody of children, 1072
 Of the common-law right of fathers to the custody of their infant children, 1074
 Right of guardians for nurture to the custody of infant children, 1075
 Inability of courts of common law to interfere with the right of the father to the custody of his children, *ib.*
 Of the controlling power of the Court of Chancery over the father's right

- to the custody of his infant children, 1076
- Jurisdiction of the Court of Chancery over the custody of the children of British subjects born abroad, 1077
- Jurisdiction of the Court of Chancery over the children of foreigners in this country, 1078
- Right of access of mothers to their infant children, and to the custody of children under seven years of age, *ib.*
- Of the right of the mother to the custody of her children on the death or transportation of the father, 1079
- Of the obligation of parents to provide for their children, *ib.*
- Evidence on the hearing of petitions—Competency of the husband and wife to give evidence, 1080
- Trial of questions of fact before a jury, *ib.*
- Petitions for damages from adulterers, 1081
- Evidence at the trial of a claim for damages for adultery—Proof of the marriage, *ib.*
- Proof of marriage by certified extracts from parochial registers of marriages, 1082
- Proof of marriage through the medium of examined copies and certified extracts from non-parochial registers, 1083
- Of the damages recoverable in cases of adultery, 1084
- Evidence of the defendant's circumstances or property, 1086
- Application of the damages recovered—Payment of costs, *ib.*
- SECTION II.—Of seduction, 1086–1099.
- Of the harboring of married women and inducing them to live apart from their husbands, 1087
- Of the seduction and loss of service of servants, 1088
- Of injuries to parents in being deprived of the services of their children through the tortious act of another, 1089
- Of injuries to parents from the seduction of their daughters, *ib.*
- Effect of the absence of the daughter from the parent's roof at the time of the seduction, 1090
- Pretended hiring of girls for the purposes of seduction, 1092
- Seduction of married daughters, 1093
- Effect of proof that the defendant, though he seduced the girl, was not the father of the child of which she was delivered, *ib.*
- Effect of the seduction and loss of service having been occasioned by the plaintiff's own misconduct and neglect of his parental duties, *ib.*
- Of the parties entitled to maintain an action for seduction, 1094
- Of the pleadings in actions for seduction, *ib.*
- Evidence at the trial in actions for seduction—Proof of the relationship of master and servant, 1095
- Of the damages recoverable in actions for seduction, 1096
- Evidence in aggravation of damages—Proof that the defendant made his advances to the daughter under the guise of matrimony, *ib.*
- Evidence in mitigation of damages, 1097
- Damages recoverable in actions for inducing or persuading wives, servants, or workmen to abandon their duties, or neglect the fulfilment of a contract, 1098
- Indictment for the abduction of unmarried girls, 1099

CHAPTER XX.

OF ACTIONS EX DELICTO—PARTIES THERETO—NON-JOINDER AND MIS-JOINDER OF PARTIES, 1101–1136.

- SECTION I.—Of actions *ex delicto* and the parties to be made plaintiffs in such actions, 1101–1113.
- Parties to be made plaintiffs in actions of tort founded on contract, 1101
- Of the remedies which tenants-in-com-
- mon and joint-tenants have against each other, 1104
- Rights of the survivor of two joint-tenants or tenants-in-common, *ib.*
- Trustee and cestui que trust, 1105
- Bailees of goods, *ib.*
- Master and servant, *ib.*

Husband and wife, 1106
 Actions by married women after a judicial separation, or an order for protection, 1108
 Infants, 1109
 Heir-at-law, devisee, and personal representatives, *ib.*
 Administrators, 1112
 Trustees of bankrupts, *ib.*
 Transfer of rights and liabilities *ex delicto* to trustees of bankrupts, 1113
 Right of the trustee to the bankrupt's wife's choses in action, 1114
 Of the number of the plaintiffs in actions *ex delicto*—Joint and separate rights of action, *ib.*

SECTION II.—*Of actions ex delicto and the parties to be made defendants in such actions*, 1116–1132.

Tenants-in-common, 1116
 Corporations, 1117
 When a joint-stock company is responsible for the tortious acts of the directors and managers, 1119
 Trustees and commissioners of public works, 1120
 Military and naval officers, 1121
 Master and servant, *ib.*
 Principal and agent, *ib.*
 Subsequent ratification and adoption of a wrongful act by parties for whose use and benefit the act was done, 1122

What amounts to evidence of ratification of a wrongful act, 1122
 Servants and agents, 1123
 Husband and wife, *ib.*
 Infants, 1126
 Executors and administrators, 1127
 Wrongs committed by a deceased person within six months before his death, 1128
 Actions against the executor of a prebendary, vicar, and incumbent of a benefice, 1129
 Liabilities of executors and administrators for their own wrongful acts, *ib.*
 Trustees in bankruptcy, 1130
 Of the continued liability of a bankrupt to actions *ex delicto*, and to arrest, *ib.*
 Of the number of the defendants in actions *ex delicto*—Parties jointly and severally liable, 1131

SECTION III.—*Of non-joinder and misjoinder of parties—Amendment before and at the trial*, 1132–1136.

Amendment of non-joinder and misjoinder before trial, 1133
 Amendment at the trial, *ib.*
 Amendment after notice or plea in abatement of non-joinder of parties, 1134
 Mis-joinder of defendants, 1135
 Effect of marriage, death, and bankruptcy upon the proceedings in an action, *ib.*

CHAPTER XXI.

OF ACTIONS EX DELICTO, PLEADINGS, DEFENCES, AND EVIDENCE, 1137–1182

SECTION I.—*Of pleadings, defences, and evidence in actions ex delicto*, 1137–1168.

Of actions in the county court, 1137
 General jurisdiction of the county court, 1138
 Copyright of design, 1139
 Friendly societies, *ib.*
 Ouster of jurisdiction of county court in cases where the title to land, etc., is in question, 1140
 Recovery of possession of small tenements in the county court, 1142
 Equitable jurisdiction, 1143
 Admiralty jurisdiction, *ib.*
 Jurisdiction by consent, 1145
 Waiver of objection to jurisdiction, *ib.*

Of actions in the superior courts—Different forms of action—Joinder of different causes of action in the same suit, 1146
 Requisites of the declaration, *ib.*
 Statement of special damage, 1147
 Several counts in declarations in respect of the same cause of action, 1148
 Pleas, *ib.*
 Pleas to the jurisdiction—Privileges of ambassadors, *ib.*
 Plea of not guilty, 1149
 Not guilty by statute, *ib.*
 Of pleading several matters of defence, *ib.*
 Traverses by the defendant, 1150
 Traverses by the plaintiff, *ib.*
 Requisites of special pleas, 1151

Fictitious and needless averments in pleading, 1151	SECTION II.— <i>Proceedings and Evidence at the trial</i> , 1168-1195.
Defences arising after the commencement of the action, 1152	Right to begin, 1168
Payment of money into court by way of compensation or amends, <i>ib.</i>	Proof on the part of the plaintiff, 1169
Pleas of infancy in actions <i>ex delicto</i> , 1153	Effect of payment of money into court, <i>ib.</i>
Plea of accord and satisfaction, <i>ib.</i>	Primary and secondary evidence, 1170
Plea of the pendency of another action for the same wrong, 1154	Notice to produce a written document to let in secondary evidence of its contents, 1172
Plea of judgment recovered, 1156.	Proof of facts resting on hearsay and reputation, 1173
Continuing injuries—Judgment recovered, 1160	Entries of deceased persons against their interest, 1175
Effect of the recovery of judgment in actions for the conversion of property 1161	Entries made by deceased persons in the exercise of their duties, <i>ib.</i>
Recovery of judgment <i>in rem</i> , <i>ib.</i>	Statements and declarations accompanying an act, <i>ib.</i>
Plea of the bankruptcy of the plaintiff, 1162	When the adverse party in a suit is estopped from giving evidence to contradict his own statements and representations to the plaintiff, 1177
Pleas of the Statute of Limitations, <i>ib.</i>	Evidence of manorial customs, 1179.
Commencement of the period of limitation, 1163	Evidence of title and seizin, <i>ib.</i>
Extension of the period of limitation in certain cases, 1165	Amendment of variances between the declaration of the cause of action, and the proof adduced in support of it, 1180
Equitable pleas and defences, <i>ib.</i>	Admissions of liability, 1182
Joinder of issue, 1166	Illness of witness, <i>ib.</i>
Pleadings construed distributively, <i>ib.</i>	
New assignments, 1167	

CHAPTER XXII.

OF THE DAMAGES AND COSTS RECOVERABLE IN ACTIONS EX DELICTO,
1183-1226.

SECTION I.— <i>Of damages recoverable in actions ex delicto</i> , 1184-1204	Prospective damages, 1191
Of the assessment of damages in actions <i>ex delicto</i> , 1184	Exemplary and vindictive damages, 1192
Damages recoverable in particular actions, 1185	Evidence in mitigation of damages, 1194
Special and extraordinary damages, 1186	Joint-trespases—Recovery of damages from one of several co-trespasers, 1196
Damages too remote, and not naturally resulting from the wrong done, 1187	Damages when the plaintiff has insured against loss, or has received full indemnity under a contract of insurance, 1197
Damages in actions of tort founded on contract, <i>ib.</i>	Double and treble damages, 1198
Expense of obtaining legal advice, 1188	New trial on the ground of excessive and outrageous damages, 1199
Costs of previous legal proceedings, <i>ib.</i>	New trial on account of the smallness of the damages, 1201
Recovery of damages which the plaintiff has become liable to pay through the default of the defendant, 1190	Arrest of judgment where the plaintiff has a verdict for greater damages than he is legally entitled to, 1202
Medical expenses—Physician's fees, 1191	Inquisition of damages before the sheriff, 1203

SECTION II.—Of the recovery of costs in actions *ex delicto*, 1203–1226.

Award of costs to a successful plaintiff in the superior courts, 1203
 Costs to a successful defendant, 1204
 Costs on pleas setting up matters of defence which have arisen since the last pleading, 1205
 Costs on a stay of proceedings, *ib.*
 Costs on arrest of judgment, or judgment *non obstante veredicto*, 1206
 Where the court has no jurisdiction it has no power to give costs, *ib.*
 Effect on costs of withdrawing a juror, *ib.*
 Costs in actions of slander and libel, 1207
 When the certificate of a judge or presiding officer is necessary to enable the plaintiff to recover costs, 1209
 Certificate that the action was brought to try a right, *ib.*
 Within what time the certificate must be granted, 1210
 County Court Acts depriving the plaintiff of costs in the superior courts, *ib.*
 When the foundation of the action is a contract, 1211
 When money has been paid into court, 1212
 The certificate that it appeared to the judge that there was sufficient reason for bringing the action in the superior court, 1213
 Costs on references, 1215
 Costs of reference, 1216
 Certificate for full costs in actions for wilful and malicious grievances, *ib.*
 Full costs in actions for wilful and malicious trespass, or after notice not to trespass, *ib.*
 Costs in the superior courts in actions against justices, 1217

In actions against constables and officers, and parties acting or intending to act in the execution of statutory powers, 1218
 Certificate for costs in actions for things done in supposed pursuance of the Act for the Protection of Property from Malicious Injuries, *ib.*
 Costs in actions against executors, *ib.*
 Costs in actions for duties and penalties at the suit of the Crown, 1219
 In actions upon judgments, *ib.*
 Costs on new trials, *ib.*
 In cases of appeals from the decision of a county-court judge, or judge of an inferior tribunal, *ib.*
 In the case of an appeal from a superior court to the Court of Exchequer Chamber, 1219
 Costs on removal of actions by writ of certiorari, 1220
 In cases of prohibition, *ib.*
 On indictments for libel and slander, *ib.*
 Costs of writs of mandamus and injunction, 1221
 On an application for an injunction under the Railway and Canal Traffic Act, *ib.*
 Repeal of divers statutes enabling plaintiffs in certain actions to recover double costs, *ib.*
 Costs in compensation cases, *ib.*
 Taxation of costs, 1222
 Costs of particular issues, 1223
 Where costs are to be taxed by the court in which the action is brought, 1224
 Security for costs, *ib.*
 Award of costs in the county court, 1225
 Costs of prosecutions, 1226
 As to costs of injunction under Common Law Procedure Act, *ib.*

CHAPTER XXIII.

OF DAMAGES IN CHANCERY, AND THE REMEDY BY INJUNCTION, PROHIBITION, AND CERTIORARI, 1227–1253.

SECTION I.—Of damages in Chancery, and the remedy by injunction, 1227–1239.

Award of damages in the Court of Chancery, 1227
 The writ of injunction issuing out of Chancery, 1228
 Injunction to restrain a public company from exceeding its statutory powers, 1229

Injunction to restrain disturbance of grave-yards, and obstructions to rights of burial, 1230
 Injunction to restrain the infringement of patent rights and copyright, *ib.*
 Injunction to restrain the sale or detention of chattels, 1232
 Effect of *laches* and delay in applying for an injunction, *ib.*
 Acquiescence precluding a plaintiff from relief, *ib.*

Of the statutory obligation upon the Court of Chancery to decide all questions of law and fact, on the determination of which the title to relief in equity depends, 1233

Of the remedy by injunction at common law, 1235

Injunction at common law to restrain infringements of patent right and copyright, 1236

Injunctions and orders to stay proceedings, 1237

SECTION II.—*Of the remedy by prohibition for the prevention of judicial wrongs, 1237–1248.*

The writ of prohibition, 1237

Prohibition before judgment, 1238

Prohibition after judgment and execution, 1239

Prohibition where appeal lies, 1240

Prohibition to the ecclesiastical courts, 1240

Notwithstanding an appeal entered, 1241

The writ of prohibition to restrain a county court judge, 1242

Prohibition to the Lord Mayor's Court, 1246

Proceedings in prohibition, *ib.*

The application for a prohibition, 1247

The rule or summons to show cause why a writ of prohibition should not issue to a county court, 1247

Notice of the issue of the writ, *ib.*

Refusal of writ when final, 1247

Of the setting aside writs of prohibition issuing out of Chancery, 1248

SECTION III.—*Of the remedy by certiorari, 1248–1253.*

The writ of certiorari, 1248

Where the inferior court has jurisdiction, *ib.*

Where the inferior court has no jurisdiction, 1249

Limitation of time for issuing the writ, *ib.*

Grounds for the issue of the writ, 1250

Certiorari to remove causes from the county court, *ib.*

Of the concurrent remedy by appeal and by certiorari—County court appeals, 1251

The application for the writ, 1252

Affidavits when necessary, *ib.*

Notice of the issue of the writ, 1253

The effect of the issue of the writ, *ib.*

The effect of the refusal of a writ of certiorari, *ib.*

Proceedings after removal, *ib.*

Quashing of the writ—*Procedendo, ib.*

CHAPTER XXIV.

OF THE REMEDY BY MANDAMUS, 1255–1295.

SECTION I.—*Of the remedy by mandamus for the vindication of rights, and the enforcement of the performance of public duties, 1255–1288.*

The prerogative writ of mandamus, 1256

Mandamus to enforce statutory, corporate, and public duties and obligations, *ib.*

Mandamus to judges, magistrates, and judicial officers, commanding them to hear and adjudicate, 1258

Mandamus to ministerial officers, 1260

Mandamus to overseers or clergymen to bury the dead body of a pauper, 1262

Of the granting of the writ where there is another remedy, 1263

Mandamus to compel the surrender of public documents, 1264

A mandamus to restore a public officer to a freehold office from which he has been wrongfully dismissed, 1267

How a freehold office may be forfeited and vacated, 1269

Offices held at will, 1270

Visitatorial power excluding the proceeding by mandamus, *ib.*

Mandamus to restore the name of a medical practitioner to the medical register, 1271

Mandamus to test the validity of an election, *ib.*

Mandamus to elect corporate and public officers, *ib.*

Mandamus to enforce an appointment to a public or corporate office, 1272

Mandamus to chartered companies and corporations, 1273

Mandamus to make calls, 1275

- Mandamus to local boards, commissioners, trustees, and public officers to levy rates and satisfy and discharge a judgment debt or a pecuniary obligation, 1276**
- Mandamus to railway companies, corporate bodies, and local boards, to make compensation for lands taken or injuries inflicted upon private persons, 1278**
- Mandamus to boards of health to make compensation, *ib.***
- Effect of *laches* or delay in applying for the writ, 1279**
- The proceedings upon a mandamus, *ib.***
- Proceedings by mandamus in respect of corporate officers in boroughs, 1280**
- Conditions precedent to the issue of the writ, *ib.***
- Requisites of the writ, 1281**
- Parties to whom the writ is to be directed, *ib.***
- Service of the writ, 1282**
- Return to the writ, *ib.***
- The return to a mandamus to restore a dismissed public officer to his office, 1283**
- Return setting up inability or impossibility of performance—Expiration of statutory power, *ib.***
- Pleas to the return—Traverse of material allegations, *ib.***
- Statutory protection to certain public officers, 1284**
- Time for taking objections to the writ, 1286**
- Review of the proceedings in mandamus by writ of error, *ib.***
- Damages and costs, 1287**
- Judgment *non obstante veredicto*, *ib.***
- Action or information for a false return, *ib.***
- Attachment for disobedience of the peremptory writ of mandamus, 1288**
- SECTION II.—Of the claim to a writ of mandamus in an action at common law, 1288–1295.**
- Of the union of an action in respect of a private injury with an application for a mandamus, 1288**
- Actions in which a claim for a mandamus may be sustained, 1290**
- Actions in which a claim for a mandamus cannot be sustained, 1292**
- Declaration in an action for a mandamus, 1293**
- The pleadings in the action, 1294**
- Orders for the rectification of the register of shareholders in joint-stock companies, *ib.***

CHAPTER XXV.

TORTS BY MUNICIPAL CORPORATIONS AND REMEDIES THEREFOR.

- SECTION I.—*Liability of municipal corporations.***
- General rule as to liability for torts, 1297**
- Liability of quasi corporations, 1298**
- Implied liability of municipal corporations proper, 1300**
- Liability for torts of officers and agents, *ib.***
- No liability in respect to exercise of discretionary powers, 1304**
- Property destroyed by mobs, 1305**
- Buildings destroyed to prevent fire, 1306**
- Not liable for consequential damages, *ib.***
- Liability for defective streets and sidewalks, 1308**
- Liability for defective drains and sewers, 1313**
- Liability as to watercourses and surface water, 1315**
- Liability for nuisances maintained on corporate property of, *ib.***
- Liability for obstructions to navigation, 1316**
- Miscellaneous liabilities, *ib.***
- SECTION II.—*Remedies for torts by municipal corporations, 1318.***
- Remedy by action or indictment, 1318**
- Parties to actions for torts of, 1319**
- Pleadings in actions for torts of, 1320**
- Evidence in actions for torts of, *ib.***
- Damages recoverable in actions against, 1321**
- Remedy by indictment, 1322**

TABLE OF AMERICAN CASES CITED.

A

- | | |
|---|---|
| <p>Abbott v. Abbott, 374
 Abbott v. Stewartstown, 165
 Abrams v. Foshee, 955
 Abrahams v. Kidney, 1093-1095
 Acheson v. Miller, 1195
 Achtenhagen v. Watertown, 26
 Ackerman v. Desha County, 1257
 Ackle v. Southeastern R. R. Co., 470
 Ackley v. Tarbox, 1108
 Adams v. Brereton, 281
 Adams v. Carlisle, 1309
 Adams v. Clem, 615
 Adams v. Frothingham, 210
 Adams v. Goddard, 397
 Adams v. Lawson, 928
 Adams v. Lisher, 765
 Adams v. O'Conner, 443
 Adams v. Rankin, 926
 Adams v. Rivers, 323
 Adams v. Saratoga & Washington R. R., 332
 Adams v. Van Alstyne, 96, 149
 Adams v. Waggoner, 691, 693, 736
 Adams v. Walker, 72
 Adkins v. Brewer, 770, 771, 829
 Adkins v. Williams, 988
 Admr's of Chambers v. Ohio, etc., Ins. Co., 1315
 Administrator v. Ins. Co., 1323
 Aersten v. Brady, 727
 Ahern v. Collins, 12
 Aiken v. Benedict, 192
 Aiken v. Buck, 371
 Aikin v. Western R. R. Co., 16
 Albin v. Lord, 371
 Albin v. Presley, 613
 Albright v. Penn, 606
 Albro v. Agawam Canal Co., 490, 492
 Alcorn v. Philadelphila, 1303
 Alderman v. French, 993</p> | <p>Alden v. New York Central R. R. Co., 468
 Aldrich v. Boston and Worcester R. R., 529
 Aldrich v. Palmer, 1199
 Aldrich v. Press Printing Co., 952, 972
 Aldrich v. Tripp, 1318
 Aldridge v. Churchill, 743
 Alexander v. Fisher, 316
 Alexander v. McDowell, 1280
 Alexander v. Milwaukee, 1307
 Alford v. Dewin, 1115
 Alger v. Lowell, 28
 Alger v. Mississippi, etc., R. R. Co., 216
 Allen v. Board of Freeholders, 261
 Allen v. Crary, 395
 Allen v. Crofoot, 322
 Allen v. Mackay, 495
 Allen v. Sackrider, 571, 733
 Allen v. State, 195, 162, 1172
 Allen v. Willard, 508
 Allentown v. Kramer, 1307
 Allison v. Chandler, 322, 1184, 1193
 Allison v. Farmers' Bank of Virginia, 417
 Allison v. King, 403
 Alley v. Carleton, 105, 165
 Allgor v. Stilwell, 760
 Allred v. Bray, 1123
 Almonds v. Nugent, 496
 Alsbroom v. Hathaway, 44
 Alston v. Huggins, 1186
 Althause v. Rice, 360
 Althorf v. Wolfe, 302, 519, 1198
 Alvord v. Ashley, 265
 Ambler v. Church, 770
 American Co. v. Bradford, 106, 136, 138
 American Contract Co. v. Cross, 570
 American Express Co. v. Perkins, 579
 American Express Co. v. Sands, 587
 American Express Co. v. Second National Bank, 596
 American Express Co v. Stack, 594</p> |
|---|---|

American Print Works, 1306
 American River Water Co. v. Ams-
 dem, 346
 Ames v. Hazard, 978, 979
 Ames v. Rathbun, 747
 Amick v. Frazier, 372
 Ammerman v. Crosby, 743, 766
 Ammerman v. Wyoming, etc., Co., 222
 Amoskeag Manufacturing Co. v. Spear,
 1050
 Amory v. Flynn, 413
 Anderson v. Brown, 1259
 Anderson v. Foresman, 533
 Anderson v. Milliken, 37
 Anderson v. Nicholas, 397
 Anderson v. Ryan, 1096
 Anderson v. Saylor, 1195
 Andover v. Gould, 49
 Andrew v. Dietervich, 420
 Andrews v. Kneeland, 1023, 1024
 Andrews v. Shattuck, 399
 Andrews v. Stone, 722
 Angle v. Mississippi, etc., R. R. Co., 596
 Angus v. Dickerson, 524
 Anthony v. Lapham, 78
 Anthony v. Stephens, 995, 996
 Antisdel v. Chicago & Northwestern R.
 R. Co., 216, 221
 Aortsen v. Ridgway, 1031
 Appleby v. Obert, 361
 Appling v. Bailey, 1256, 1259
 Arbery v. Bearers, 1265
 Archer v. McMechan, 543
 Armstrong v. Armstrong, 1070
 Armstrong v. Cooley, 32
 Armentrout v. Moranda, 928
 Arnold v. Foot, 78, 79, 93
 Arnold v. Jones, 575
 Arnold v. Munday, 345
 Arnold v. Shields, 1237
 Arnold v. Stevens, 160
 Arrington v. Van Houton, 1264
 Artieta v. Artieta, 5, 6, 954
 Artic, etc., Ins. Co. v. Austin, 571
 Arctic Fire Ins. Co. v. Austin, 28
 Ash v. Putnam, 395
 Ashbrook v. Commonwealth, 195, 196,
 252
 Ashley v. Ashley, 96, 174, 244
 Ashmore v. Penn. Central R. R. Co., 587
 Ashley v. Wolcott, 78
 Atchison v. Twiner, 1306
 Atkins v. Boardman, 106, 151, 171, 182
 Atkinson v. Hartley, 954
 Atkinson v. Reading, 955
 Atlantic & Great Western R. R. Co. v.
 Dunn, 12, 733
 Atterby v. Powell, 979
 Attorney-General v. Forbes, 261
 Atty.-Gen. v. Hudson R. R. Co., 261
 Attorney-General v. Heishon, 161
 Atwater v. Baltimore, 1303
 Auchmuty v. Ham, 30, 230, 231
 Aurora v. Pulfer, 1321

Aurora v. Reed, 1315
 Austin v. Hudson River R. R. Co., 12,
 300
 Austin v. New Jersey Steamboat Co.,
 485, 495, 574
 Averett v. Thompson, 799
 Avery v. Ray, 736
 Avery v. Slack, 1319
 Aylesworth v. Harrington, 326, 328, 329

B

Babcock v. Utter, 99
 Bachelder v. Heagan, 306
 Bachelder v. Wakefield, 136
 Bacon, *Ex parte*, 1259
 Bacon v. Boston, 1309
 Bacon v. Towne, 728, 759, 765
 Backus v. Richardson, 957
 Badgley v. Decker, 1094
 Bailey v. Bailey, 1064
 Bailey v. Bussing, 1195
 Bailey v. Dean, 970
 Bailey v. Mayor, etc., of New York,
 305, 1300
 Bailey v. Miltenberger, 345
 Bailey v. Wright, 639, 643
 Bailey v. Quint, 550
 Bailey v. Wiggins, 770, 828
 Bainbridge v. Sherlock, 345, 346
 Bakeman v. Talbot, 182, 379
 Baker v. Boston, 1304
 Baker v. Cook, 546
 Baker v. Crosby, 165, 168
 Baker v. Davis, 294
 Baker v. Drake, 458, 1184
 Baker v. Fuller, 543
 Baker v. Hopkins, 767
 Baker v. Johnson, 1265
 Baker v. Wheeler, 410, 460
 Baker v. Young, 988, 289
 Baulch v. Patten, 44
 Baldwin v. American Express Co., 571
 Baldwin v. Cooley, 1237
 Baldwin v. Munro, 458
 Baldwin v. United States Telegraph Co.,
 536
 Ball v. Armstrong, 193
 Ball v. Bruce, 1094, 1095
 Ball v. Lappins, 1257
 Ball v. Liney, 402
 Ballard v. Butler, 167
 Ballen v. Alexander, 417
 Ballentine v. North Missouri R. R. Co.,
 574
 Ballou v. Hale, 1116
 Ballou v. Hopkinton, 93
 Baltimore v. Branman, 1309
 Baltimore, etc., R. R. Co. v. Blocher, 12,
 461, 1193
 Baltimore, etc., R. R. Co. v. Brady,
 587, 625
 Baltimore, etc., R. R. Co. v. Dorsey, 885

- Baltimore, etc., R. R. Co. v. Shumacker, 529
 Baltimore, etc., R. R. Co. v. Skeels, 587
 Baltimore, etc., R. R. Co. v. State, 23, 494
 Blatimore, etc., R. R. Co. v. Wheeler, 545
 Balton v. Beers, 733
 Banderburgh v. Bassett, 452
 Bangor v. Lansil, 72, 1315
 Bank v. Mayor, etc., 1302, 1304
 Bank of the Metropolis v. New England Bank, 545
 Bankhead v. Alloway, 1005
 Banks v. Bussey, 261
 Bannon v. Angier, 160, 164
 Banton v. Wilson, 1266
 Barb v. Fish, 442
 Barber v. Essex, 1317
 Barber v. Morgan, 1038
 Barber v. Roxborough, 1311
 Barclay v. Commonwealth, 234
 Bard v. Yohn, 33, 477, 1132
 Barger v. Barger, 955
 Barker v. Braham, 810
 Barker v. Commonwealth, 199, 263
 Barker v. Savage, 476
 Barnes v. Allen, 11, 1088
 Barnes v. Brian, 797
 Barnes v. Chapin, 29
 Barnes v. City of Racine, 208
 Barnes v. Trundy, 975
 Barnes v. Martin, 690, 733
 Barnes v. Webb, 978
 Barnard v. Kellogg, 1023
 Barnard v. Poor, 304, 306
 Barnett v. Reed, 755, 1193
 Barnett v. Stanton, 1022
 Barney v. Burstenbinder, 578
 Barney v. Lowell, 1384
 Barnstable v. Thatcher, 371
 Barnum v. Van Dusen, 384
 Barret v. Jarvis, 954
 Barring v. Commonwealth, 243
 Barron v. Cobleigh, 411
 Barron v. Eldredge, 593
 Barron v. Mason, 766
 Barrows v. Bell, 933
 Barrows v. Carpenter, 978, 991
 Barrows v. Massachusetts Medical Society, 1271
 Barry v. Inglis, 736
 Barstow v. Sprague, 371
 Bartholomew v. Hamilton, 300
 Bartis v. Buffalo and State Line R. R. Co., 596
 Bartlett v. Churchill, 732
 Bartlett v. Crittendon, 13
 Bartlett v. Hippock, 1023
 Bartlett v. Prescott, 99, 103, 366
 Bartlett v. Wood, 293
 Bartley v. Richtmyer, 1090, 1091, 1094, 1095, 1098
 Barton v. Barton, 1116
 Barton v. Holmes, 987
 Barton v. Kavanaugh, 767
 Barton v. Springfield, 1316
 Barton v. Syracuse, 1305, 1313, 1314, 1318
 Barwick v. Wood, 456
 Bass v. Chicago, Burlington and Quincy R. R. Co., 306
 Bassell v. Elmore, 964, 975, 988, 989, 990
 Bassett v. City of St. Joseph, 1312
 Bassett v. Green, 418
 Bassett v. Salisbury Manufacturing Co., 79, 82, 92, 259, 262
 Bassett v. Spafford, 972
 Bates v. Plymouth, 1267
 Batty v. Duxbury, 1317
 Bauer v. Clay, 745
 Bann v. Mullen, 1036, 1124
 Baxter v. Second Avenue, 476
 Baxter v. Winoski Turnpike Co., 222, 241
 Bayine v. Steamship Co., 627
 Beach v. Hancock, 690, 733
 Beach v. Livergood, 375
 Beach v. Parmenter, 475
 Beach v. Ranney, 969
 Beach v. Schmulty, 411
 Beal v. Finch, 1195
 Beard v. Durald, 294
 Beardsley v. Bridgman, 5, 826, 960, 961, 988
 Beardsley v. Smith, 1322
 Beardsley v. Tappin, 941, 974
 Beasley v. Meigs, 993
 Beatty v. Gillmore, 1316, 1321
 Beatty v. Gregory, 99
 Beatty v. Perkins, 799
 Beavors v. Trimmer, 178, 198, 242, 244, 249
 Bechtell v. Carslake, 261
 Bechtell v. Shatler, 973
 Beckwith v. Boyce, 297
 Beckwith v. Griswold, 194, 243, 256, 1160, 1163
 Beckwith v. Shordike, 329
 Beckley v. Howard, 402
 Bedford v. Hunt, 68
 Bedell v. Long Island R. R. Co., 307
 Beebe v. Robert, 1023, 1024
 Beekman v. Creamer, 132
 Beekman v. Shouse, 580
 Beers v. St. John, 299
 Beers v. Williams, 1021
 Beggarly v. Croft, 1199
 Beguhl v. Swan, 1259
 Beirne v. Dord, 1024
 Beisiegel v. New York Central R. R. Co., 473
 Belden v. Henriques, 35, 1031
 Belger v. Dinsmore, 571
 Belknap v. Boston, etc., R. R. Co., 733
 Bell v. Byerson, 1016
 Bell v. Drew, 570
 Bell v. Hansley, 691
 Bell v. Hogan, 561

- Bell v. Percy, 743, 744
 Bell v. Potter, 635
 Bell v. Troy, 417
 Bellinger v. N. Y. Central R. R., 882, 885
 Bemis v. Connecticut & Passumpsic
 Rivers R. R. Co., 214
 Bemis v. Upham, 93
 Benaway v. Conyne, 974
 Bendetson v. French, 614
 Benedict v. Goit, 1307
 Benkert v. Benkert, 1065
 Bennett v. Appleton, 732
 Bennett v. Bennett, 1062
 Bennett v. Buffalo, 1382
 Bennett v. Bullock, 356
 Bennett v. Clemence, 357
 Bennett v. Chicago, etc., R. R. Co., 217
 Bennett v. Dutton, 568
 Bennett v. Flyan, 596
 Bennett v. Judson, 1027, 1036
 Bennett v. Matthews, 994
 Bennett v. O'Brien, 523
 Bennett v. Smith, 11
 Bennett v. Williamson, 926
 Benoist v. Sollee, 634
 Bensell v. Lynch, 814
 Benson v. Suarez, 211
 Benton v. Baxter, 476
 Berard v. Hoffman, 772
 Berks County, etc. v. Myers, 1319
 Berkshire Woollen Co. v. Proctor, 609,
 616
 Berry v. Borden, 726
 Berry v. Carle, 346
 Berry v. Carter, 926
 Bertram v. Curtiss, 353
 Berry v. Dryden, 983
 Berry v. Fletcher, 1123, 1195
 Besson v. Southard, 728, 742, 743, 764
 Best v. Allen, 1193
 Beswick v. Chappel, 955
 Betts v. Farmers' Loan, etc., Co., 591,
 592
 Betts v. Lee, 410, 460
 Betts v. Mouser, 443
 Bevan v. Crooks, 648
 Beveridge v. Lacey, 261
 Bickel v. Polk, 132
 Biddle v. Ash, 183
 Big Mountain Improvement Co.'s Ap-
 peal, 96, 259
 Biggs, *Ex parte*, 775
 Biggs v. D'Aquin, 1193
 Bigelow v. Hartford Bridge Co., 261
 Bigelow v. Randolph, 1299
 Bigelow v. Young, 461
 Bill v. Norrick, 1312, 1315
 Billings v. Russell, 799
 Binney's Case, 259, 320
 Binney v. Hull, 96
 Birge v. Gardiner, 26
 Bircher v. Parke, 299
 Birney v. New York & Washington
 Telegraph Co., 535
 Birchard v. Booth, 1193, 1199
 Birdsey v. Frost, 1013
 Bisbey v. Shaw, 994
 Bissell v. Michigan Southern and Nor-
 thern Indiana R. R. Companies, 597
 Bissell v. New York Central R. R. Co.,
 268, 349, 350, 470, 533, 591
 Bissell v. Price, 601
 Bishop v. Banks, 258
 Bishop v. Blair, 1117
 Bishop v. Mayor of Macon, 1202
 Bixby v. Brundidge, 765
 Bizzell v. Booker, 2
 Black v. Auditor, 1256
 Black~~er~~ v. Grant, 371
 Black v. Philadelphia, etc., R. R. Co.,
 261
 Blackley v. Sheldon, 444
 Blackstock v. New York and Erie R. R.
 Co., 575
 Blaisdell v. Roberts, 372
 Blair v. Milwaukee R. R. Co. 217
 Blake v. Everett, 181
 Blake v. Ferris, 245, 510
 Blake v. Jerome, 100
 Blake v. St. Louis, 1312
 Blake v. Sturtevant, 1172
 Blanchard v. Baker, 78
 Blanchard v. Isaacs, 624
 Blanchard v. Page, 619
 Blanchard v. Porter, 346
 Blanchard v. Stearns, 37
 Blanche v. Bradford, 651
 Bland v. Adams Express Co., 575
 Bland v. Womack, 533
 Blane v. Klumpke, 43, 208, 241
 Blankenship v. Perry, 402
 Blass v. Gregor, 743
 Bleker v. St. Louis Law Commissioner,
 1259
 Blickenstaff v. Perrin, 994, 996
 Blin v. Mayo, 531
 Bliss v. Greeley, 116
 Bliss v. Kennedy, 93
 Bliven & Mead v. Hudson River R. R.
 Co., 625
 Block v. McGuire, 12
 Bloch v. Pfaff, 96
 Blodgett v. Boston, 1299, 1309
 Blodgett v. Brattleboro, 1193
 Blood v. Sayre, 771, 829
 Bloodgood v. Jamaica, 1320
 Bloomhuff v. State, 263
 Bloss v. Toby, 974
 Blossom v. Barrett, 42
 Blossom v. Dodd, 587, 625
 Blossom v. Griffith, 593
 Blumenthall v. Brainard, 587, 589
 Blunt v. Little, 742
 Board of Commissioners v. Hicks, 1264
 Boardman v. Meriden Britannia Co.,
 1052
 Bodfish v. Bodfish, 155
 Bodwell v. Bragg, 607

- Bodwell v. Osgood, 749
 Boggis v. Martin, 603
 Bogert v. Phelps, 799
 Bohm v. Dunphy, 633
 Boland v. Missouri R. R. Co., 26, 494
 Boldt v. New York Central R. R. Co., 491, 492
 Bolivar Manufacturing Co. v. Neponset Manufacturing Co., 90, 173
 Bolton v. Colder, 476
 Bolton v. Miller, 1091
 Bond v. Clark, 1038
 Bonesteel v. Bonesteel, 697
 Bonner v. McPhail, 955
 Bonner v. State, 1272
 Bonsall v. McKay, 382
 Boody v. Keating, 40, 417
 Boom v. City of Utica, 1301, 1302
 Boon v. Orr, 293, 294
 Boorman v. Jenkins, 1023, 1024
 Booth v. Northrop, 1038
 Booth v. Powers, 462
 Booth v. Sherwood, 356
 Boston & Albany R. R. Co. v. Shanly, 578
 Boston, etc. v. Dana, 417
 Boston v. Springfield, 1309
 Bostwick, *Ex parte*, 1258, 1259
 Bostick v. Rutterforth, 667, 765
 Bottoms, *Ex parte*, 1259
 Boucher v. New Haven, 1317
 Bowen v. Coker, 444
 Bowen v. N. Y. Central R. R. Co., 467
 Bowie v. Bowie, 1061
 Bowland v. Nixon, 1156
 Bowling Green Savings Bank v. Todd, 546
 Bowlsby v. Speer, 72
 Bowman v. Cornell, 818
 Bowman's Devises v. Walthen, 346, 348
 Bowmau v. Eaton, 400
 Bowman v. Parker, 1185
 Bowman v. Wickliffe, 267
 Boyce v. Brockway, 394
 Boyce v. Brown, 173
 Boyce v. California Stage Co., 468, 1185
 Boyce v. Russell, 1264
 Boyd v. Byrd, 1091
 Boyd v. Brent, 961
 Boyleston v. Kerr, 702
 Boynton v. Newton, 1276
 Boynton v. Remington, 952
 Brackett v. Hayden, 550
 Bracy v. Kibbe, 1094
 Bradbury v. Gilford, 324, 328
 Bradford v. Manly, 1024
 Bradley, *Ex parte*, 1259
 Bradley v. Ballard, 1229
 Bradley v. Buffalo, New York & Erie R. R. Co., 217
 Bradley v. Fisher, 770, 771
 Bradley's Fish Co. v. Dudley, 154, 159, 167
 Bradley v. Norton, 1052
 Bradley v. Rice, 349
 Bradsher v. Lea, 261
 Brady v. Ball, 326
 Brady v. Waldron, 817
 Brady v. Weeks, 192
 Brainard v. Head, 799, 803
 Brasher v. Kennedy, 513
 Brasher v. Mason, 1265, 1266
 Branch v. Doane, 80
 Bravers v. Trimmer, 176
 Bray v. Wallingford, 1298
 Breese v. United States Telegraph Co., 535
 Brennan v. Whitaker, 293, 300
 Brewer v. Crosby, 30
 Brewster v. De Fremery, 211
 Brewster v. Silliman, 566
 Brice v. Randall, 97, 103
 Birch v. Benton, 983
 Brickner v. N. Y. Central R. R. Co., 490
 Bridges v. Purcell, 98
 Bridgman v. Hopkins, 995
 Briggs v. Boston, etc., R. R. Co., 601
 Briggs v. Briggs, 1062
 Briggs v. Evans, 1095
 Briggs v. Large, 648
 Briggs v. New York Central R. R. Co., 403
 Brigham v. Smith, 105
 Brill v. Flagler, 199
 Brinkley v. Brinkley, 1060
 Brintnall v. Saratoga and Whitehall R. Co., 596
 Brittain v. Newland, 1319
 Britton v. Cummington, 1309
 Britts v. Lee, 810
 Briyendine v. Frankfort Bridge Co., 555
 Broadwell v. Wilcox, 326
 Brock v. Smith, 118
 Brockway v. Crawford, 699, 700
 Brodie v. Rutledge, 770
 Brokaw New Jersey, etc., R. R. Co., 721
 Brooker v. Coffin, 926, 955
 Brooks v. Schwerin, 476
 Brooks v. Clifton, 211
 Brooks v. Curtis, 112, 153, 182
 Brooks v. Jones, 743
 Brother v. Cannon, 813
 Broughton v. Broughton, 359
 Brow v. Hathaway, 932
 Brower v. Mayor, etc., of New York, 1298, 1315
 Brown v. Brown, 974, 1066
 Brown v. Brooks, 994
 Brown v. Bowen, 77, 80, 174
 Brown v. Carpenter, 231
 Brown v. Cayuga and Susquehanna R. Co., 242, 885
 Brown v. Chadburne, 346
 Brown v. Chadsey, 719, 749, 1193
 Brown v. Connelly, 760
 Brown v. Crego, 1265

- Brown v. Gray, 1031, 1032
 Brown v. Haynes, 458
 Brown v. Hoburger, 393
 Brown v. Howard, 727
 Brown v. Illius, 192, 445
 Brown v. Jefferson County, 1311
 Brown v. Maxwell, 490
 Brown v. McCune, 1031
 Brown v. McCloud, 371
 Brown v. Milwaukie, etc., R. R. Co., 215
 Brown v. Montgomery, 1031
 Brown v. Murphee, 1021
 Brown v. Nickerson, 954
 Brown v. New York Central R. R. Co., 467, 474, 479
 Brown v. Perkins, 208
 Brown v. Pine, 974
 Browne v. Providence, etc., R. R. Co., 215
 Brown v. Randall, 742, 763
 Brown v. Remington, 928
 Brown v. Sax, 460
 Brown v. Simms, 648
 Brown v. Stewart, 317
 Brown v. Thomas, 373
 Brown v. United States, 1266
 Brown v. Watson, 241, 242
 Brown v. Wood, 799
 Brownell v. Manchester, 444
 Brownell v. McEwen, 1096
 Browning v. Springfield, 1308
 Brozzart v. Corlett, 117
 Bryan v. Cattell, 1262
 Bryant v. Rich, 32, 33
 Bruce v. Andrews, 544
 Bruce v. N. Y., etc., R. R. Co., 217
 Bruning v. New Orleans Canal and Banking Co., 241
 Brush v. Carter,
 Brushaben v. Hegeman, 697
 Buck v. Ashley, 399, 402, 450, 455
 Buck v. Lockport, 1260, 1264
 Buckley v. Knapp, 733, 982, 992
 Buckley v. Leonard, 230, 250
 Buckman v. Buckman, 349
 Buchannan v. Curtis, 265
 Budd v. Hiler, 44
 Buddington v. Bradley, 144, 145
 Buel v. New York Central R. R. Co., 495, 518
 Buffington v. Alen, 1164
 Bulkley v. Dolbeare, 371
 Bulkley v. New York, etc., R. R. Co., 216
 Bullitt v. Clement, 772
 Bullock v. Babcock, 2, 1126
 Bullock v. Hayward, 1115
 Bullock v. Wilson, 346
 Bunkmeyer v. Evansville, 1302
 Bundy v. Hart, 983
 Burbank v. Horn, 975
 Burbank v. Crooker, 397
 Burden v. Stein, 93, 320
 Burdick v. Heivly, 138
 Burdick v. Murray, 538
 Burditt v. Swenson, 194
 Burhans v. Sanford, 765
 Burk v. Baxter, 297
 Burk v. Hollis, 299
 Burk v. Savage, 443, 452
 Burke v. Miller, 995, 996
 Burke v. Munroe County, 1259, 1256
 Burkart v. Jennings, 759
 Burkett v. Lanata, 728, 764
 Burlingame v. Burlingame, 966
 Burney v. The Proprietors, etc., in Hull, 149
 Burney v. Pledger, 458
 Burnett v. Burkhead, 11
 Burnett v. Phalon, 1050
 Burnap v. Albert, 742, 758
 Burnham v. Butler, 475
 Burnham v. Kempton, 257
 Burnham v. Stevens, 771
 Burnell v. New York Central R. R. Co., 599
 Burns v. Erben, 699, 700, 719
 Burnside v. Twitchell, 300
 Burr v. Van Buskirk, 639
 Burroughs v. Housatonic R. R. Co., 307
 Burroughs v. Norwich and Worcester R. R. Co., 596
 Burrow v. Landry, 79
 Burson v. Edwards, 988
 Burt v. Dutcher, 452, 458, 460
 Burthe v. Fortier, 268
 Burtch v. Nickerson, 956
 Burton v. Young, 1014
 Burwell v. Hobson, 93
 Buys v. Gillespie, 926
 Buyard v. Holmes, 1038
 Bush v. Brainerd, 305
 Bush v. Geneva, 1317
 Bush v. Peru Bridge Co., 16
 Bush v. Prosser, 993
 Bushnell v. Scott, 270
 Bussey v. Mississippi Valley Transportation Co., 571
 Butman v. Hussey, 90, 172
 Button v. Hudson R. R. Co., 23, 27, 28, 495
 Buttrick v. Lowell, 1302
 Butterfield v. Buffum, 969
 Butterfield v. Western R. R. Co., 473
 Butterworth v. Crawford, 102, 104
 Butler v. Butler, 1064
 Butler v. Page, 293, 300
 Butler v. Peck, 73
 Butler v. Newkirk, 413
 Buzzell v. Laconia Co., 225, 226, 491
 Byrket v. Monohon, 988

C

- Cabot v. Christie, 1007, 1015, 1017
 Cadwalder v. Tindall, 649

- Cairns v. Bleeker, 399, 455
 Calavaras County v. Brockway, 1259
 Caldwell v. Abby, 6, 957, 974
 Caldwell v. Copeland, 135, 141
 Caldwell v. Eaton, 444
 Caldwell v. Fulton, 120
 Caldwell v. New Jersey Steamboat Co., 467
 Calkins v. Long, 1063
 Calkins v. Sumner, 967
 Call v. Butrick 243
 Callahan v. Bean, 26
 Callahan v. Burlington, etc., R. R. Co., 510
 Callahan v. Caffarata, 742, 743, 757, 1193
 Callahan v. Warner, 494
 Callan v. Gaylord, 980
 Callahan v. Brown, 462
 Cullender v. Marsh, 1307
 Camden, etc., R. R. Co. v. Burk, 580
 Camden Transportation Co. v. Belknap, 580
 Camp v. The Marcellus, 481
 Camp v. Martin, 958
 Camp v. Matheson, 261
 Camp v. Moseley, 799
 Camp v. Western Union Telegraph Co., 535
 Campbell v. Brown, 30
 Campbell v. Campbell, 406
 Campbell v. Mesier, 171
 Campbell v. Race, 379
 Campbell v. Smith, 138
 Campbell v. Stakes, 1126
 Campbell v. Stokes, 395
 Campbell v. Threlkeld, 742
 Campbell v. Woodworth, 460
 Canal Co. v. Graham, 1321
 Canal Commissioners v. People, 349
 Candee v. Pennsylvania R. R. Co., 597
 Candee, Swan & Co. v. Deere & Co., 1050
 Canefox v. Crenshaw, 329
 Canning v. Williamstown, 1322
 Cannon v. Janvier, 1275
 Cape v. Ramsey, 771
 Capen v. Peckham, 293, 294
 Capner v. Flemington Mining Co., 317
 Capers v. McKee, 379
 Caperton v. Ballard, 1121
 Caperton v. Bowyer, 1121
 Caperton v. Martin, 1121
 Caperton v. Nickel, 1121
 Capuro v. Builders' Insurance Co., 1038
 Carbrey v. Willis, 96
 Carey v. Bright, 397, 401
 Carew v. Rutherford, 12, 14
 Carhart v. Auburn Gas Light Co., 81
 Carl v. Ayers, 728, 757
 Carle v. Delesdernier, 799
 Carlisle v. Cooper, 154, 155
 Carlisle v. Quattlebaum, 616
 Carleton v. Lovejoy, 398, 414
 Carlton v. Redington, 98
 Carlock v. Spencer, 955
 Carlyon v. Lannan, 458
 Carnahan v. Brown, 120
 Carney v. Reed, 1195
 Carpenter v. Gwynn, 268
 Carpenter v. Stilwell, 418
 Carpenter v. Taylor, 608
 Carpenter v. Willett, 814
 Carr v. Dodge, 1116
 Carr v. Northern Liberties, 1313
 Carroll v. Board of Police, 1277, 1300
 Carroll v. Weiler, 329
 Carckadon v. Johnson, 1121
 Carson v. Blazer, 345, 346
 Cartner v. Sliker, 1176
 Carter v. Abbott, 1013
 Carter v. Andrews, 957
 Carter v. Beals, 374
 Carter v. Bennett, 444
 Carter v. Davis, 545
 Carter v. Dow, 828
 Carter v. Dowell, 987
 Carter v. Harrison, 37
 Carter v. Simpson, 418
 Casturn v. Reid, 761.
 Case Bank v. Keen, 1178
 Case of a private road, 117
 Case v. Fogg, 537
 Case v. Marks, 992, 995
 Case v. New York and New Haven R. Co., 403
 Casperson v. Sproule, 742, 743
 Cassin v. Marshall, 819
 Cason v. Stone, 16
 Cartle v. Durgee, 2, 466
 Castleman v. Griffin, 1042
 Castleman v. Griffin, 1004
 Carswell v. Ware, 414
 Caruthers v. Caruthers, 1061
 Cates v. Kellogg, 964
 Cates v. Wadlington, 346
 Catlin v. Valentine, 1229
 Catting v. Cox, 374
 Catterlin v. Douglas, 371
 Cator v. Merrill, 543
 Canfield v. Bullock, 37
 Cazeaux v. Mali, 1006
 Cecil v. Pacific R. R. Co., 214, 215
 Ceghorn v. New York Central and Hudson River R. R. Co., 489, 518
 Centlivre v. Ryder, 612
 Central R. R. Co. v. Hines, 572
 Center v. Spring, 728, 764
 Central R. R. Co. v. Moore, 493
 Chadburn v. New Castle, 1306
 Chadsey v. Greene, 1013
 Chadwick v. Lamb, 461
 Chapin v. State, 267
 Chapman v. Dodd, 165, 746
 Chapman v. Dyett, 720, 799, 800
 Chapman v. Erie R. R. Co., 490, 491
 Chapman v. Kimball, 345
 Chapman v. Morgan, 359

- Chapman v. New Haven R. R. Co., 472, 499
 Chapman v. O'Brien, 1178
 Chambers v. Lewis, 395, 447
 Chamberlain v. Cobb, 523
 Chamberlain v. Sibley, 1262
 Chamberlin v. Ward, 495
 Chamberlain v. Western Transportation Co., 600
 Chamblos v. Philadelphia, etc., R. R. Co., 604, 631
 Champion v. Vincent, 1193
 Champlain and St. Lawrence R. R. Co. v. Valentine, 349
 Chandler v. Edson, 410
 Chandler v. Holloway, 983
 Chandler v. McPherson, 744
 Chandler v. Walker, 371
 Chapin v. Sullivan, 215
 Charless v. Rankin, 12
 Chase v. Blaisdell, 397
 Chase v. Fish, 799
 Chase v. Hazleton, 281
 Chase v. Jefferson, 362
 Chase v. New York Central R. R. Co., 603
 Chase v. Whitlock, 6, 926, 954, 955
 Chase v. Sutton Manufacturing Co., 161
 Chatfield v. Wilson, 6, 10, 79, 82, 90, 172
 Chatham v. Bgainard, 349
 Chattanooga v. State, 1322
 Cheadle v. Buell, 983
 Cheatham v. Shearon, 262
 Chelf v. Penn, 759
 Cheery v. McCall, 733
 Cheery v. Stein, 150
 Cheesebrough v. Green, 112
 Check v. Little Miami R. R. Co., 597
 Chester v. Comstock, 1004, 1016, 1041
 Chester v. Dickerson, 1006
 Cheswell v. Chapman, 368
 Chicago v. Fowler, 1317
 Chicago v. Gallagher, 1309
 Chicago v. Johnson, 1313
 Chicago v. Langlas, 1321, 1322
 Chicago v. Railway Co., 225
 Chicago v. Robins, 508
 Chicago v. Starr, 26
 Chicago & Alton R. R. Co. v. Murphy, 490
 Chicago, etc., R. R. Co. v. People, 1274
 Chicago & Northwestern R. R. Co. v. Simonson, 306
 Chicago & Northwestern R. R. Co. v. Jackson, 226, 491
 Chicago & Alt. R. R. Co. v. Utley, 215, 216
 Chicago, etc., R. R. Co. v. Scott, 529
 Chicago, etc., R. R. Co. v. Ried, 217
 Chicago, etc., R. R. Co. v. Harris, 216
 Chicago & Burlington & Quincy R. R. Co. v. Parks, 603
 Chicago, etc., R. R. Co. v. Barrie, 215, 216, 221
 Chicago & Northwestern R. R. Co. v. Swett, 226, 491
 Chicago, etc., R. R. Co. v. Cauffman, 215
 Chicago, etc., R. R. Co. v. Collins, 570
 Chicago R. R. Co. v. Triplett, 27
 Chicago, etc., R. R. Co. v. Herring, 603
 Chidsey v. Canton, 1322
 Chisey v. Canton, 1299, 1309
 Child v. Boston, 1314
 Childress v. Wright, 295
 Chiles v. Drake, 1184
 Chipman v. Cook, 959
 Chontean v. Steamboat St. Anthony, 571
 Chontean v. Goddin, 1178
 Chrisman v. Bruce, 37
 Christian v. Dripps, 293
 Christie v. Griggs, 468
 Christenson v. American Express Co., 571, 587
 Church v. Bridgeman, 964
 Church v. Mansfield, 31
 Church v. Meeker, 373
 Churchill v. Churchill, 799
 Cincinnati v. Stone, 508
 Cincinnati Chronicle Co. v. White Line Transit Co., 627
 Cincinnati, etc., R. R. Co. v. Marcus, 579, 600
 Cincinnati, Hamilton & Dayton, etc. v. Pontius, 587
 City of Atchison v. Chalis, 1315
 City of Atchison v. King, 1322
 City of Brooklyn v. Brooklyn City R. R. Co., 1317
 City of Buffalo v. Holloway, 249
 City of Chicago v. Mayor, 26
 City Council v. Gilmer, 1313
 City of Galena v. Amy, 1257
 City of Henderson v. Sandeford, 1312
 City of St. Paul v. Kirby, 26
 City of Ripon v. Bittel, 1322
 Chaney v. Byrne, 211, 1102
 Clap v. Draper, 118
 Clark v. Bales, 1195
 Clark v. Barrington, 469
 Clark v. City of Lockport, 1310, 1381
 Clark v. Clark, 1070
 Clark v. Faxton, 580, 587
 Clark v. Fitch, 1091
 Clarke v. Foot, 305
 Clark v. Fraley, 634
 Clark v. Fry, 508, 510
 Clark v. Glidden, 443
 Clark v. Harlan, 1088
 Clark v. Holden, 281
 Clark v. Lowell, etc., R. R. Co., 601
 Clark v. Malory, 412
 Clark v. May, 829
 Clark v. Miller, 1264
 Clark v. Reyburn, 300
 Clark v. Spicer, 771
 Clark v. Union Ferry Co., 1605

- Clark v. Vermont and Canada R. R. Co., 510
 Clark v. Way, 96
 Clark v. Whytaker, 458
 Clark v. Wilcox, 780
 Clark v. Wilson, 519
 Clark v. Wilmington, 1315
 Classon v. Leopold, 612
 Clayton v. Butterfield, 616, 617
 Clayton v. Carey, 1274
 Cleghorn v. Central and Hudson River R. R. Co., 490
 Cleaveland v. Detweiler, 926, 960
 Cleveland v. Grand Trunk R. R. Co., 306
 Cleveland v. Jones, 374
 Cleveland, Columbus & Cincinnati R. R. Co. v. Elliott, 325, 328
 Cleveland, Painesville and Ashtabula R. R. Co. v. Curran, 470
 Cleveland v. St. Paul, 1312
 Clemence v. City of Auburn, 1312
 Clemence v. Clemence, 281
 Clemence v. Steere, 284
 Clinton v. M'Kenzie, 98
 Clinton v. Myers, 77, 92, 145
 Cloon v. Gerry, 728, 743, 764
 Clooson v. Staples, 743
 Clossen v. Roberts, 752
 Clute v. Wiggins, 609
 Cobb v. Dows, 395
 Cobb v. Portland, 1303
 Coburn v. Hesswell, 540
 Cochran v. Butterfield, 981
 Cochran v. Miller, 1193
 Cody v. Quinn, 799
 Coffin v. Anderson, 444, 450
 Coffin v. Nantucket, 1306
 Cogburn v. Spence, 799, 800
 Cohen v. Kyler, 293
 Cohen v. Simmons, 371
 Coker v. Birge, 192, 194
 Cook v. City of Milwaukee, 131
 Cook v. Champlain Transportation Co., 279, 300
 Cook v. Cook, 975
 Cook v. Ellis, 733
 Cook v. Hull, 78
 Cook v. Husted, 414
 Cook v. Loomis, 458
 Cook v. Stearns, 99
 Cook v. Walker, 742
 Colby v. Sampson, 797
 Cole v. Cole, 1061
 Cole v. Curtis, 747, 764
 Cole v. Drew, 323, 332, 380
 Cole v. Goodwin, 571, 579, 587
 Cole v. Medina, 1304, 1305
 Cole v. Muscatine, 49, 1308
 Cole v. Sprowl, 241
 Colgrove v. New York & New Haven and New York & Harlem R. R. Co., 472, 479, 511
 Coleman's Appeal, 159
 Coleman v. Playsted, 955
 Cooley v. Westbrook, 1313
 Coolidge v. Brigham, 1190
 Coolidge v. Williams, 132
 Collard v. Gay, 744, 747
 Collier v. Moulton, 732
 Collins v. Benbury, 132, 346
 Collins v. Council Bluffs, 1321
 Collins v. Hayte, 747
 Collins v. Marcy, 99
 Collins v. Prentice, 103, 105, 106, 165
 Collins v. Todd, 736
 Collis v. Bowen, 443
 Colton v. Cleveland & Pittsburg R. R. Co., 587
 Colter v. Lower, 722
 Colten v. Ellis, 1262
 Colton v. Beardsley, 1172
 Columbus v. Jaques, 261, 1315
 Columbus v. Woollen Co., 1314
 Col. & Ind. Central R. R. Co. v. Farrell, 471
 Columbus, etc., R. R. Co. v. Watson, 1157
 Colquitt v. Kirkman, 537
 Colyar v. Taylor, 533
 Combs v. New Bedford Cordage Co., 225, 226, 489
 Combs v. Purrington, 476
 Comeford v. Dupuy, 326, 328
 Commissioners of Hamilton County v. Mighels, 1299
 Commercial Bank v. Jones, 458
 Commonwealth v. Atlantic, etc., R. R. Co., 1262
 Commonwealth v. Baird, 1320
 Commonwealth v. Boston, 1317
 Commonwealth v. Clapp, 928
 Commonwealth v. Carey, 698
 Commonwealth v. Chace, 413
 Commonwealth v. Commissioners, 1280
 Commonwealth v. Cole, 265
 Commonwealth v. Commissioners Alleghany, 1265
 Commonwealth v. Farren, 263
 Commonwealth v. Hunt, 14
 Commonwealth v. Hopkinsville, 1322
 Commonwealth v. Low, 263
 Commonwealth v. Mohn, 264
 Commonwealth v. McLaughlin, 698
 Commonwealth v. Maylor, 121
 Commonwealth v. Milliman, 264
 Commonwealth v. Nichols, 263
 Commonwealth v. Odell, 952, 959
 Commonwealth v. Perkins, 1296
 Commonwealth v. Pittsburg, 1277
 Commonwealth v. Roxbury, 132
 Commonwealth v. Stacey, 941
 Commonwealth v. Smith, 263
 Commonwealth v. Supervisors of Colley Township, 1264
 Commonwealth v. Upton, 196, 252
 Commonwealth v. Weatherbee, 607
 Commonwealth v. Wilmington, 1309

- Compton's Petition, 265
 Comstock v. Van Deusen, 182
 Conduit v. Dicken, 761
 Coombs v. Rose, 938
 Conger v. Chamberlain, 1014
 Conger v. Chicago and Northwestern R. R. Co., 578
 Congregational Society v. Baker, 373
 Congress & Empire Springs Co. v. High Rock Congress Spring Co., 1054, 1050
 Congreve v. Morgan, 202, 249
 Congreve v. Smith, 1312
 Coughtry v. The Globe Woolen Co., 1102
 Conhocton Stone Co. v. Buffalo, etc., R. R. Co., 243, 1160, 1163
 Conkey v. Milwaukee, etc., R. R. Co., 596
 Conlin v. Charleston, 23, 494, 495.
 Connah v. Hale, 648
 Connally v. Davidson, 492
 Conolly v. Poillon, 223, 226
 Connolly v. Warren, 570
 Connell v. Kibbe, 172
 Connotoy v. Dozier, 698
 Continental National Bank v. National Bank of the Commonwealth, 1178
 Contra Costa, etc., R. R. Co. v. Moss, 571
 Conroe v. Conroe, 995
 Conway v. Jefferson, 265
 Conway v. Starkweather, 638
 Conway v. Taylor, 16
 Cooper v. Cooper, 1066
 Coon v. Syracuse and Utica R. R. Co., 490
 Coon v. Utica and Syracuse R. R. Co., 492
 Coats v. Cheever, 284
 Cooper v. Berry, 44
 Cooper v. Davis, 317
 Cooper v. Greely, 975
 Cooper v. Maupin, 105, 106
 Cooper v. Marlow, 983
 Cooper v. McJenkins, 727
 Cooper v. Newman, 397, 418
 Cooper v. Stone, 932
 Cooper v. Turrentine, 761
 Cooper v. Utterback, 728, 765
 Coot v. Morea, 326
 Cope v. Barber, 704
 Coquillard v. French, 1155
 Corbett v. Clutton, 398
 Corliss v. McLagin, 300
 Corning v. Lowerre, 261
 Corning v. Troy Iron and Nail Works, 10, 92, 93
 Corning v. Gould, 165
 Corning v. Corning, 736
 Corwin v. New York & Erie R. R. Co., 214, 215
 Corwin v. Walton, 733
 Cornwall v. Sullivan R. R. Co., 214, 469
 Cornelius v. Van Slyck, 956
 Cornish v. Cornish, 1064
 Cory v. Little, 392
 Cortelyou v. Van Brunt, 135
 Corrigan v. Union Sugar Refinery, 208
 Corwain v. Hames, 1321
 Cosgrove v. Ogden, 477
 Court v. Coroner, 1300
 Courtney v. Baker, 1176
 Courtney v. Carr, 1004
 County v. Simmons, 1321
 County Commissioners v. Duckett, 1311
 County Commissioners v. Gibson, 1311
 Courser v. Powers, 834
 Courter v. Wood, 760
 Cowell v. Hill, 395
 Cowell v. Thayer, 144
 Cowden v. St. John, 298
 Cowles v. Balzer, 327
 Cowles v. Garrett, 406, 1116
 Cowles v. Kidder, 77
 Cowles v. Pointer, 529
 Cox v. Bunker, 960
 Cox v. Keahey, 31
 Cox v. Sullivan, 497
 Cox v. Vanderkleed, 733
 Coxe v. Robbins, 325
 Coy v. Lyons City, 1277
 Craig v. Burnett, 771
 Craig v. Fox, 165
 Cragin v. New York Central R. R. Co., 537, 591, 592
 Cram v. Thissell, 447
 Cramer v. Mott, 655
 Cramer v. Noonan, 928, 992, 1194
 Crane v. State, 264, 281
 Crane v. Bingham, 293, 295, 300
 Crandall v. Amador, 1264, 1280
 Craswell v. Weed, 975
 Crawford v. Village of Delaware, 1307
 Crawford v. Melton, 955
 Creiger v. Bunton, 985
 Cressey v. Sawyer, 372
 Cresson v. Stout, 292
 Creed v. Hartmann, 511, 1131
 Crittenden v. Field, 93
 Crocker v. New London, Willimantic & Palmer R. R. Co., 603
 Crocker v. Mann, 633
 Crooker v. Hutchinson, 498
 Croft v. Alison, 515
 Crommelin v. Cox, 176, 193, 196, 241, 242
 Cromwell v. Stephens, 607
 Crone v. Angel, 955
 Crook v. Dowling, 761
 Cropsey v. Murphy, 192
 Cross v. Guthrey, 417
 Crosby v. Fitch, 575
 Crossett v. Jaynesville, 1300, 1301
 Crothy v. Morrissey, 983
 Crounse v. Wemple, 136, 164
 Crowell v. Lambert, 1267
 Crumb v. Oaks, 458

- Cuff v. Newark and New York R. R. Co., 246
 Cullem v. Latimer, 1264
 Cummerford v. McAvoy, 964
 Cumings v. Clark, 1172
 Cummings v. Thompson, 1038
 Cunningham v. Dorsey, 151, 258
 Cunningham v. Hall, 1021
 Currie v. Worthy, 797
 Currier v. Boston and Maine R. R. Co., 546
 Currier v. Lowell, 1317
 Curry v. Collins, 955
 Curtis v. Ayrault, 147
 Curtis v. Carson, 732
 Curtis v. Fay, 815
 Curtis v. Groat, 410
 Curtis v. Hoyt, 85, 357
 Curtis v. Keesler, 135
 Curtis v. Nooman, 100
 Curtis v. Ward, 462
 Curtis v. Winslow, 260
 Curtis v. Rochester and Syracuse R. R. Co., 23, 468, 471, 472, 1192
 Curran v. Warren Chemical Manufacturing Co., 494
 Cushman v. Ryan, 736
 Cusick v. Norwich, 1309, 1317
 Cuthbert v. Lawton, 138, 154
 Cutting v. Cox, 85
 Cutting v. Grand Trunk R. R. Co., 628
 Cutts v. Brainerd, 596
 Cutler v. Adams, 1038
 Cutler v. Cutler, 1061, 1064
- D
- Daily v. Gaines, 983
 Daily v. Palmer, 55
 Dailey v. Grimes, 635
 Dailey v. Reynolds, 5, 960
 Dain v. Wyckoff, 44, 1091, 1093
 Dale v. Wood, 732
 Daley v. Norwich R. R. Co., 26, 494
 Dalglish v. Grandy, 633
 Dalton v. Higgins, 955
 Dame v. Kinney, 995
 Damon v. Moore, 1096
 Dana v. Valentine, 92, 155, 258, 260
 Danforth v. Pratt, 550
 Daniels v. People, 271
 Daniels v. Pond, 293
 Darby v. Callaghan, 1108
 Dark v. Johnson, 98, 99, 116
 Dart v. Walker, 1177
 Darling v. Boston & Worcester R. R. Co., 596
 Darlington v. Mayor, etc., 1300
 Dargan v. Mobile, 1303
 Dargan v. Waddill, 194, 195, 199
 Davis v. Bangor, 1322
 David v. David, 1061
 Davis v. Bradley, 543
 Davis v. Burlington, etc., R. R. Co., 216, 217
 Davis v. Brigham, 135
 Davis v. Buffum, 299
 Davis v. Clancy, 371
 Davis v. Campbell, 393
 Davis v. Detroit & Milwaukee R. R. Co., 491
 Davis v. Davis, 993, 957, 1061, 1063, 1064
 Davis v. Farrington, 954
 Davis v. Fuller, 77
 Davis v. Gilliam, 284
 Davis v. Gale, 138
 Davis v. Johnson, 985
 Davis v. Lambertson, 81, 257
 Davis v. Lottich, 1116
 Davis v. Mayor, etc., of New York, 1315
 Davis v. Michigan, etc., R. R. Co., 570
 Davis v. Moss, 299
 Davis v. Nash, 85
 Davis v. New York Central & Hudson R. R. Co., 473
 Davis v. Ruff, 958
 Davis v. Smith, 1020
 Davis v. Taylor, 455
 Davis v. Webb, 398
 Davenson v. Lamson, 379
 Davidson v. Graham, 587
 Davidson v. Nichols, 1103
 Davidson v. Goodall, 1091, 1094
 Davenport v. Lynch, 747
 Davenport v. Ruckman, 1312
 Day v. Allender, 265
 Day v. Milford, 1311
 Day v. Pool, 1013
 Dayton and Dayton & Michigan R. R. Co. v. Pontius, 596
 Dayton v. Pease, 1298, 1304
 Dean v. Gridley, 1172
 Deal v. Harris, 770
 Dearborn v. Dearborn, 498
 De Armond v. Armstrong, 984
 Dearth v. Baker, 30
 De Benedetti v. Manchin, 1177
 Decatur v. Paulding, 1266
 Decatur v. Fisher, 1321
 Decker v. Mathews, 403
 Decker v. Gammon, 230
 Deering v. Austin, 397, 418
 Deitz v. Langfelt, 742
 Delaware and Hudson Canal Co. v. Torrey, 9, 90, 172
 Delaware, etc., R. R. Co. v. Stump, 132, 261
 Delaware & Hudson Canal Co. v. Clark, 1050, 1051
 Delamatyr v. Railroad Co., 470
 Delahoussaye v. Judise, 136, 138
 Deming v. Foster, 1022
 Deming v. Grand Trunk R. R. Co., 628
 De Marentille v. Olliver, 690
 Demarest v. Harrington, 959, 969

- Den v. Judges, 1272
 Dennitt, petitioner, 1261
 Dennett v. Cutts, 546
 Dennehey v. Woodsum, 759
 Dennis v. Eckardt, 199, 260
 Dennis v. Ryan, 742, 750
 Denery v. Fox, 396
 Dent v. McGrath, 1008
 Denton v. Jackson, 1300
 De Puy v. Strong, 85, 1115
 Deparnett v. Haynes, 373
 Derby v. Gallup, 452
 Derwent v. Loomer, 469
 Dermont v. Detroit, 1305
 Desmond v. Brown, 983
 Detroit v. Blakely, 1308, 1311
 Detroit v. Detroit, etc., R. R. Co., 265
 Detroit v. Corey, 1300
 Detroit Daily Post Co. v. McArthur, 989
 992
 Detroit and Milwaukee R. R. v. F. and M. Bank, 596
 Dewey v. Detroit, 1312
 Dewey v. Osborn, 374
 De Witt v. Perkins, 404
 Devoe v. Brandt, 35, 1031
 Devaugh v. Heath, 9, 322, 382
 De Voss v. Richmond, 1300
 Dexter v. Adams, 798
 Dexter v. Paugh, 819
 Dexter v. Sullivan, 374
 Dexter v. Cole, 9
 Dexter v. Spear, 978, 979
 Dexter v. Syracuse, Binghamton and New York Central R. R. Co., 570
 Deyo v. Van Valkenburg, 720
 Deyell v. Odell, 396
 Dial v. Holler, 955
 Dibble v. Brown, 570
 Dickey v. Franklin Bank, 397
 Dickey v. Maine Telegraph Co., 272
 Dicken v. Shepard, 973, 990
 Dickenson v. Winchester, 613
 Dickinson v. Maynard, 742
 Dickson v. McCoy, 29, 250
 Dickerson v. Rodgers, 607
 Dickinson v. Jones, 281, 316
 Dickenson v. Worcester, 72
 Dimon v. People, 268
 Dininny v. New York & New Haven R. R. Co., 599
 Disbrow v. Tenbroeck, 395
 Dispatch Line of Packets v. Bellamy Man. Co., 292
 Dix v. Brown, 493
 Dixon Crucible Co. v. Griggenhiem, 1054
 Doan v. Doan, 1061
 Doane v. Badger, 104, 106, 171
 Dodge v. McClintock, 136
 Dodge v. Stacey, 265
 Dole v. Erskine, 691, 693, 732
 Dole v. Lyon, 964, 979
 Dolan v. Fagan, 736
 Dolloff v. Danforth, 372
 Donahue v. New York, 1314, 1315
 Donahoe v. Shed, 799
 Donnelly v. Harris, 733
 Doolittle v. McCullough, 462
 Doolittle v. Supervisors, 1315
 Dorr v. New Jersey Steam Navigation Co., 587, 591
 Dorlan v. Brooklyn, 1312
 Dorman v. Ames, 80, 243, 256
 Dorman v. City of Jacksonville, 49, 1315
 Dorsey v. Manlove, 322, 1193
 Dottarer v. Bushey, 956
 Doughty v. Brill, 272
 Douglass v. State, 260, 264
 Douglass v. Kraft, 460
 Douglass v. Tousey, 993
 Douglas v. Wiggins, 280, 318
 Doupe v. Genin, 211
 Dowd v. Wadsworth, 401
 Dows v. Greene, 422
 Dows v. Morewood, 540
 Downing v. Herrick, 770, 828
 Downing v. Wilson, 5, 926, 961
 Doyle v. Jessup, 1095, 1098
 Doyle v. Kiser, 570
 Drake v. Lowell, 1311
 Drake v. Wells, 98, 118, 120, 377
 Draper v. Noteware, 1265
 Drew v. Sixth Avenue R. R. Co., 520, 1192
 Drew v. Spaulding, 450
 Drennon v. People, 699
 Driggs v. Burton, 728, 759, 764, 765
 Driscoll v. Newark and Rosendale Lime and Cement Co., 205
 Drown v. Smith, 281
 Druse v. Wheeler, 100, 382
 Dubois v. Allen, 1099
 Dubois v. Beaver, 352, 356
 Dubois v. Budlong, 192, 195
 Dubuque v. Maloney, 349
 Ducker v. Barnett, 529
 Dudley v. Booles, 475
 Dudley v. Tilton, 9, 172
 Dudley v. Mayhew, 51
 Duffy v. Thompson, 570
 Duffy v. New York, etc., R. R. Co., 215
 Dufalt v. German, 601
 Duggins v. Watson, 31, 32
 Du Laurans v. First Division of the St. Paul and Pacific R. R. Co., 603
 Dumont v. Smith, 323
 Dunlap v. International, etc., R. R. Co., 570
 Dunlap v. Snyder, 231
 Dunlap v. Thorn, 616
 Dunn v. Branner, 523
 Dunning v. Aurora, 257
 Dunning v. Chicago, etc., R. R. Co., 216
 Dung v. Parker, 18, 35, 1104
 Dunham v. Powers, 968
 Dunson v. New York Central R. R. Co., 576

Duncan v. Spear, 452, 455
 Duncan v. Brown, 969, 994
 Duncan v. Commonwealth, 692
 Duncan v. Hayes, 257, 258
 Durant v. Palmer, 197, 198, 244
 Durel v. Boishblanc, 150
 Durgin v. Lowell, 269
 Durkin v. City of Troy, 1310
 Durst v. Burton, 1027, 1036
 Dutro v. Wilson, 256
 Du Val v. Du Val, 168
 Dwight v. Brewster, 571, 580
 Dwight v. Benton, 399, 455
 Dyer v. Depuy, 160
 Dyer v. Smith, 829, 831
 Dyer v. Sanford, 100, 161, 162

E

Eagan v. Gantt, 978
 Eames v. Morgan, 1004
 Eames v. Salem, etc., R. R. Co. 214, 215, 216
 Eames v. State, 699
 Earl v. Van Alstyne, 250
 Earl v. Tupper, 1188
 Earl v. De Hart, 72
 Earl v. Hall, 176
 Earle v. Van Buren, 398
 Earley v. Moss, 983
 Earing v. Lansing, 475
 Earhart v. Youngblood, 8
 East Tennessee, etc., R. R. Co. v. Nelson, 568, 574, 593, 596
 Eastland v. Caldwell, 995, 996
 Eastman v. Keason, 747
 Easton v. European and Northern R. R. Co., 245, 246, 508
 Eason v. Petway, 740
 Eaton v. Hill, 1126
 Eaton v. R. R. Co., 308, 1307
 Eaton v. Winnie, 30
 Eden v. Legare, 954
 Edelman v. Yeakel, 323
 Edgerly v. Swain, 974
 Edick v. Grinnell, 1020
 Edwards v. Lord, 467, 169
 Edsall v. Camden, etc., R. R. & Trans. Co. 591, 625
 Edson v. Munsell, 137, 157
 Edson v. Weston, 523
 Eccles v. Shannon, 955
 Eighth National Bank of New York v. Fitch, 801
 Ege v. Ege, 635
 Eggleston v. New York & Harlem R. R. Co., 98
 Ela v. American M. U. Express Co., 594
 Elder v. Allison, 1005
 Elder v. Burns, 346
 Elford v. Clark, 648
 Elkins v. Athearn, 1256, 1259
 Elkinton v. Deacon, 760
 Ellis v. American Telegraph Co. 535
 Ellis v. Carey, 346
 Ellis v. Duncan, 79, 82
 Ellis v. Dempsey, 1177
 Ellis v. Thilman, 760
 Ellis v. Paige, 299
 Ellis v. Wole, 450, 458, 46C
 Ellis v. Zeilin, 1050, 1055
 Ellison v. Commissioners, 257
 Ellington v. Ellington, 1096
 Elliot v. Ailsbury, 926
 Elliott v. Brown, 693
 Elliott v. Concord, 1317
 Elliott v. Fitchburg R. R. Co., 172
 Elliott v. Jackson, 44
 Elmore v. Naugatuck R. R. Co., 596
 Elliott v. Rhett, 100
 Ellsworth v. Thompson, 736
 Elsworth v. Potter, 12, 1193
 Elwood v. Western Union Telegraph Co., 536
 Elwell v. Burnside, 290, 1116
 Elwell v. Chamberlain, 1036
 Elwell v. Martin, 1127
 Ely v. Supervisors of Niagara Co., 234, 355
 Ely v. Thompson, 770
 Emerson v. Badger, 1053
 Emerson v. Brigham, 1030
 Emery v. Prescott, 974
 Emery v. Hapgood, 800
 Emery v. Chesley, 697
 Emery v. Lowell, 1305, 1314
 Emmons v. Shelden, 1202
 Enright v. San Francisco, etc., R. R. Co., 216
 Empree v. Empree, 1061
 Empire Transportation Co. v. Wamsutta Oil Co., 580
 Ernst v. Hudson River R. R. Co., 473, 493
 Ernst v. Kunkle, 49
 Estep v. Estep, 211
 Esmay v. Fanning, 398
 Etz v. Daily, 332
 Eustis v. Parker, 1321
 Ewell v. Greenwood, 261, 265
 Evans v. Herring, 639
 Evans v. Tibbins, 974
 Evans v. Dana, 138
 Evans v. Merriweather, 78
 Evans v. Smith, 964, 983
 Evansville, etc., R. R. Co. v. Baum, 32, 33
 Evansville, etc., R. R. Co. v. Young, 587
 Everett v. Coffin, 395, 408, 541
 Everett v. Saltus, 408, 618
 Everett v. Hydraulic, etc., Co., 83
 Exchange Fire Insurance Co. v. Delaware and Hudson Canal Co., 221
 Eyre v. Higbee, 416
 Ezell v. Franklin, 1037

F

- Faber v. Faber, 1050, 1055
 Fahn v. Reichart, 3
 Fairbault v. Sater, 1014
 Fairchild v. Bentley, 250, 329
 Fairchild v. California Stage Co., 467, 468
 Fairchild v. Case, 798
 Fall v. Paine, 16
 Fallenstein v. Boothe, 969
 Fairish v. Reighle, 468
 Farrar v. Cooper, 160
 Farrar v. Rollins, 445
 Farrand v. Marshall, 12, 73
 Farrington v. Payne, 398
 Farmers and Mechanics' Bank v. Champlain Transportation Co., 569, 596
 Farnham v. Camden and Amboy R. R. Co., 587
 Farwell v. Boston and Worcester R. R. Co. 490, 492
 Fassett v. Smith, 420
 Faulkner v. South Pacific R. R. Co., 573, 574
 Faulkner v. Wright, 571
 Fauval v. New Orleans, 1306
 Faust v. McDaniel, 760, 764
 Fawcett v. Charles, 933
 Feazle v. Simson, 761
 Felton v. Memphis, 1272
 Felton v. Simpson, 138
 Fenner v. Buffalo and State Line R. R. Co., 594, 595, 600
 Fensler v. Meyer, 1094
 Fera v. Fera, 1064
 Ferren v. Knipe, 78
 Ferguson v. Brent, 575, 576
 Ferguson v. Davol Mills, 1050
 Ferguson v. Hamilton, 1037
 Ferguson v. Miller, 413
 Ferris v. Morris, 1256
 Ferris v. Brown, 135
 Fero v. Buffalo and State Line R. R. Co., 305, 306, 307
 Fero v. Rusco, 978
 Fratt v. Clark, 44
 Fidler v. Delavan, 97
 Field v. Ireland, 697
 Field v. N. Y. Central R. R. Co., 306, 307, 313
 Fields v. Rouse, 1023
 Fielder v. Maxwell, 401, 447
 Fifty Associates v. Tudor, 183
 Fightmaster v. Beasley, 452
 Finney v. Watkins, 297
 Fink v. Justh, 994
 Finley v. Thayer, 261
 Filber v. Dantermann, 954, 957
 Filbert v. Hoff, 1117
 Filer v. New York Central R. R. Co., 1108, 1192
 Filley v. Fassett, 1050, 1052
 Fillmore v. Horton, 399
 Firemans Insurance Co. *Ex parte*, 1275
 First National Bank of Greenfield v. Marietta and Cincinnati R. R. Co., 624
 Fish v. Dodge, 192, 199
 Fish v. Ferris, 395, 1126
 Fish v. Skut, 30, 231
 Fisher v. Beard, 91
 Fiske v. Bailey, 1124
 Fisher v. Boston, 1303, 1306
 Fisher v. Bridges, 693, 732
 Fisher v. Clark, 5, 30
 Fisher v. Farmers' Loan, etc., Co., 216
 Fisher v. Geddes, 595
 Fisher v. Glisbee, 606
 Fisher v. New York Central & Hudson R. R. Co., 603
 Fisher v. Rottorean, 956
 Fisher v. Smith, 350
 Fisher v. Thirkell, 211
 Fisk v. Newton, 594
 Fisk v. Tank, 1021
 Fitch v. Diarmid, 1264, 1265
 Fitts v. Hall, 1031, 1126
 Fitzgerald v. Blake, 396
 Fitzgerald v. Redfield, 958
 Fitzsimmons v. Southern Express Co., 594
 Flagg v. Worcester, 1315
 Flanagan v. Philadelphia, 345, 346
 Fleet v. Hollenkeep, 496, 511
 Fleming, *Ex parte*, 1260
 Fletcher v. Burroughs, 995
 Flint v. Rawlings, 537
 Flike v. Boston & Albany R. R. Co., 490, 491
 Flower v. Pennsylvania R. R. Co., 493
 Floyd v. State, 697
 Flynn v. San Francisco & San Jose R. R. Co., 306
 Folger v. Robinson, 346
 Foley v. Wyette, 174
 Fondren v. Durfree, 1044
 Ford v. Cobb, 262, 291, 294, 297, 397
 Ford v. Ford, 1061
 Ford v. Foster, 1050
 Ford v. Johnson, 6, 926, 954
 Forrist v. Leavitt, 699
 Forshee v. Abrams, 996
 Forsyth v. Beveridge, 546
 Forsyth v. Hooper, 227, 508, 509
 Fort v. Groves, 261
 Fort Plain Bridge Co. v. Smith, 43, 208
 Fortner v. Flamagan, 799
 Forward v. Adams, 960
 Foreman v. Neilson, 442
 Foss v. Hildreth, 991
 Foshay v. Furguson, 728
 Foster v. Browning, 98
 Foster v. Essex Bank, 501, 523
 Foster v. Kennedy's Adm'r, 1005
 Foster v. Scofield, 1097
 Foster v. Tucker, 40, 417
 Foot v. Brown, 959

- Foot v. New Haven & Northampton Co., 98
 Foote v. Nichols, 12, 1131
 Foote v. Stoops, 531
 Fowler v. Gilman, 461
 Fowler v. Lock, 478
 Fowler v. Pierce, 1266
 Fowles v. Bowen, 926, 944, 957, 989
 Fox v. Holt, 537
 Fox v. Northern Liberties, 1302
 Fox v. Stevens, 1096
 Fox v. Webster, 1038
 Fox v. Vanderbeek, 983
 Francis v. Schoellkopf, 241, 256
 Francisco v. Manhattan Ins. Co., 1259
 Frailey v. Waters, 104
 Frankfort, etc., Turnpike Co. v. Philadelphia, etc. R. R. Co., 307
 Fraser v. Freeman, 31, 32, 1061
 Fraser v. Davil, 634
 Frazer v. Kimlar, 511
 Frazer v. Pennsylvania R. R. Co., 225, 491
 Frazier v. Brown, 78, 82
 Freeholders v. Strader, 1311
 Freeman v. Price, 5, 961
 Freeman v. Tinsley, 994
 Freemont v. Crippen, 1264
 Frederick v. Devol, 300
 Frederick v. Gilbert, 732
 French v. Marstin, 182
 French v. Morris, 104
 Frenzell v. Miller, 1005, 1016
 French v. Lawrence, 636
 French v. Owen, 98
 French v. White, 1121
 Frink v. Coe, 468
 Frink v. Potter, 469, 1193
 Frisbie v. Fowler, 5, 961
 Frizzle v. Patrick, 257
 Frost v. Grand Trunk R. R. Co., 471
 Fry v. Bennett, 950, 990, 1030, 1031
 Fry v. Breckinridge, 639, 643
 Fry v. Baxter, 462
 Fry v. Jones, 634
 Fryatt v. Sullivan Co., 397
 Fuhr v. Dean, 99
 Fund v. Baily, 773
 Fuller v. Dean, 995
 Fuller v. Hampton, 1321
 Fuller v. Naugatuck R. R. Co., 469, 571
 Fuller v. Plainfield Academic School, 1282
 Fuller v. Tabor, 395
 Fuller v. Talbot, 469
 Fullerton v. Warrick, 736
 Fullam v. Stearns, 785, 300
 Fullenwider v. McWilliams, 742
 Fulton v. Alexander, 523
 Fulton Fire Ins. Co. v. Baldwin, 221
 Fulton v. Fulton, 1065
 Fulton v. Sellers, 1050
 Fulton Village v. Mehrenfield, 265, 267
 Funk v. Dillon, 458
 Furr v. Moss, 832
 Furman v. Van Sise, 44
- G
- Gaffield v. Hapgood, 297
 Gage v. Epperson, 395
 Gage v. Shelton, 956
 Gage v. Whittier, 447
 Gailher v. Blowers, 732
 Gallaher v. Thompson, 496
 Gallagher v. Warring, 1023
 Gale v. Ward, 292
 Galesburg v. Higbie, 1317
 Galena v. Amy, 1277
 Galena & Chicago R. R. Co. v. Fay, 469, 601
 Galena, etc., R. R. Co. v. Griffin, 216, 217
 Gallimore v. Ammerman, 722
 Gallin v. London & Northwestern R. R. Co., 470
 Galpin v. Chicago, etc., R. R. Co., 215
 Gambling v. Prince, 362
 Gammon v. Chandler, 546
 Gannon v. Hargadon, 79
 Gandy v. Humphries, 992
 Garr v. Selden, 934, 956
 Garrett v. Dickerson, 989
 Garrett v. Freeman, 308
 Garrett v. Gilbert, 945
 Garrigan v. Berry, 476
 Gardner v. Finley, 300
 Gardner v. Heartt, 305
 Garrison v. Rudd, 116, 117
 Garfield v. Douglass, 828
 Gay v. Winter, 494
 Gaskill v. Dudley, 1322
 Gates v. Blancoe, 235
 Gates v. Bowker, 980
 Gates v. Meredith, 994
 Gandy v. Chicago & Northwestern R. R. Co., 307
 Gaul v. Fleming, 955
 Gayety v. Bethune, 104, 135, 136, 151, 159, 161, 165
 Gear v. Barnum, 350
 Genet v. Howland, 443
 Genesee Chief v. Fitzhugh, 346
 Gent v. Lynch, 85
 Gentleman v. Soule, 265, 270
 George v. Fisk, 357
 George v. Van Horn, 1090
 Gerald v. Boston, 1310
 Gerber v. Grubell, 114, 150
 Gerber v. Monie, 455
 Gerrish v. Brown, 208, 241, 262
 Gerrish v. Clough, 3, 210
 Gerome v. Ross, 387
 Getty v. Rountree, 1021
 Gevanger v. Summers, 155
 Gibson v. Culler, 594
 Gibson v. Hatchett, 529

- Gibson v. Pacific R. R. Co., 226
 Gidden v. Bennett, 293
 Gifford v. New Jersey R. R. Co., 1229
 Gilbert v. Dickerson, 406
 Gilbert v. Felton, 375
 Gilbert v. Kennedy, 357, 384
 Gilbert v. People, 934
 Gilbert v. Showerman, 258
 Gilchrist v. McGee, 138
 Gilchrist v. McLaughlin, 361
 Giles v. Elsworth, 643
 Giles v. Fauntleroy, 613
 Giles v. Simonds, 377
 Giles v. State, 928, 980
 Gillenwaier v. Madison and Indianapolis R. R. Co., 492
 Gillespie v. Dew, 371
 Gillespie v. Palmer, 37
 Gillespie v. Wood, 1260
 Gillott v. Esterbrook, 1050
 Gillet v. Mason, 413
 Gillham v. Madison Co. R. R. Co., 73
 Gillett v. Treganza, 310
 Gillis v. Nelson, 104
 Gilmartin v. Philadelphia, 1316
 Gilman v. Bassett, 1270
 Gillman Eastern R. R. Co., 491
 Gilman v. Emery, 392
 Gilman v. Hill, 397
 Gillon v. Wilson, 730
 Gilmore v. Newton, 397, 418
 Gilshannon v. Stoney Brook, 490
 Given v. Webb, 760
 Glascock v. Bridges, 747
 Glascock v. Commissioner of General Land Office, 1260
 Glassey v. Hestonville M. & F. R. R. Co., 26
 Glasco v. New York, etc., R. R. Co., 570
 Glaze v. McMillion, 393
 Gleason v. Gleason, 1064
 Gleason v. Gary, 243
 Gleason v. Tuttle, 80
 Glenn v. Garrison, 455
 Gliden v. Unity, 1321
 Gloninger v. Franklin Coal Co., 120
 Gooch v. Gregory, 780
 Goodale v. Tuttle, 72, 79
 Goodall v. Thurman, 1200
 Goddard v. Grand Trunk R. R. Co., 12, 31, 33, 721, 733
 Goodman v. Walker, 497
 Goodrich v. Burbank, 116
 Goodrich v. Chicago, 1316
 Goodwin v. Baltimore, etc., R. R. Co., 575, 600
 Goodwin v. Daniels, 976
 Goodwin v. Glazier, 780, 1264
 Goodwin v. Snyder, 44
 Goetz v. Ambs, 382
 Goff v. Hutchinson, 1317
 Goff v. Kילו, 413
 Godfrey v. City of Alton, 346
 Goggans v. Monroe, 766
 Goings v. Mills, 1256
 Goings v. White, 1042
 Gonzales v. New York and Harlem R. R. Co., 473, 494
 Gore v. Norwich, etc., Transportation Co., 570, 599
 Gorham Manufacturing Co. v. Fargo, 579
 Gorham Co. v. White, 57
 Gorman v. Pacific R. R. Co., 326, 328
 Gorman v. Sutton, 993
 Gordon v. Hostetter, 40
 Gordon v. Jenny, 411
 Gorton v. De Angelis, 759
 Gorton v. Erie R. R. Co., 473
 Gorton v. Falkner, 651
 Gorton v. Frizzle, 799
 Gosling v. Morgan, 974
 Goughtry v. Globe Woolen Co., 489
 Gould v. Hudson River R. R. Co., 345
 Grace v. Mitchell, 799, 803
 Grady v. Woodsner, 243, 244
 Graham v. Plate, 10, 1051
 Graham v. Houston, 371
 Graham & Co. v. Davidson, 587
 Grangiac v. Arden, 414
 Grant v. Brooklyn, 1311
 Grant v. Chase, 4, 104, 165, 168, 169
 Grant v. Drew, 16
 Grant v. Erie, 1303
 Grant v. Lyman, 172
 Grant v. Moore, 728, 759
 Grant v. Mosely, 495
 Graver v. Sholl, 90, 172
 Graves v. Berdan, 112
 Graves v. Otis, 1307
 Gray v. Baldwin, 317
 Gray v. Harris, 83
 Gray v. Ottolengui, 18
 Gray & Bell v. Scott and wife, 27
 Gray v. Durland, 1091, 1092, 1094
 Gray v. Pentland, 935
 Grayson v. Wilkinson, 498
 Great Western R. R. Co. v. Hawkins, 592
 Great Western R. R. Co. v. Morthland, 216
 Great Western R. R. Co. v. McComar, 625
 Green v. Bethea, 268, 271
 Greene v. Bishop, 53
 Green v. Wood, 1264
 Green v. Oakes, 261, 265
 Green v. Craig, 1193
 Green v. Purnell, 1256
 Green v. Southern Express Co., 579
 Green v. Clark, 618, 619
 Green v. Putnam, 122
 Green v. Canaan, 265
 Greenville, etc., R. R. Co. v. Partlow, 322
 Greenwood v. Greenwood, 1091
 Greenfield Bank v. Leavitt, 458
 Greenly v. Hall, 311

- Greenleaf v. Francis, 74, 79, 82
 Greenwade v. Mills, 742, 764
 Grey v. Ohio and Pennsylvania R. R. Co., 257
 Gregory v. C. C. & C. R. R. Co., 773
 Gregg v. Gregg, 325
 Gregory v. Thomas, 766
 Gregory v. Brown, 772
 Grieff v. Cowgnill, 543
 Grier v. Ward, 392
 Grier v. Cowan, 336, 634
 Grier v. Sampson, 475
 Griffin v. Foster, 188
 Griffin v. Bixby, 352
 Griffin v. Chubb, 743
 Griffin v. Mayor, etc., of New York, 1313
 Griffith v. McCullum, 208
 Griffiths v. Godson, 225
 Grigsby v. Breckinridge, 13, 416
 Grigsby v. Clear Lake Water Co., 241, 242
 Grinnell v. Cook, 609, 616
 Grippen v. New York Central R. R. Co., 473
 Griswold v. Haven, 1027
 Grover v. Dill, 1097
 Grove v. City of Fort Wayne, 1316
 Grove v. Hodges, 35
 Grover v. Hodges, 120
 Gross v. Kierski, 1020, 1064
 Gross v. Guttery, 40
 Grosvenor v. New York Central R. R. Co., 624
 Grubbs v. Kyser, 972, 983
 Grubb v. Bayard, 120
 Grube v. Nichols, 265
 Guard v. Risk, 926, 960, 1194
 Guengerech v. Smith, 733
 Guernsey v. Morse, 736
 Guerin v. Hunt, 799, 803
 Guillaume v. Hamburg & American Packet Co., 594
 Guille v. Swan, 8, 199, 1132
 Guilford v. Smith, 541
 Gulladge v. Howard, 523
 Gunther v. Attwell, 1024
 Gunn v. Pulaski County, 1256
 Gustard's Case, 1295
 Guthrie v. New Haven, 265
- H**
- Haas v. Chousard, 80, 138
 Habersham v. Savannah, etc., Canal Co., 222, 1274
 Hadley v. Cross, 22, 475
 Hadley v. Upshaw, 612
 Hodson v. Millward, 799
 Haffick v. Stober, 299
 Hafford v. New Bedford, 1218, 1303, 1306
 Hagan v. Hendy, 978
- Haygood v. Justices, 1299
 Hahn v. Thornberry, 92
 Haight v. Keokuk, 345, 346
 Haight v. Price, 80
 Haight v. Turner, 1259
 Haines v. Welling, 964
 Hair v. Little, 1131
 Hall v. Augsburg, 93, 144
 Hall v. Choffer, 99
 Hall v. Corcoran, 525
 Hall v. Connecticut River Steamboat Co., 469
 Hall v. Hawkins, 743, 744
 Hall v. Mayo, 359
 Hall v. McLeod, 104, 136, 269, 270
 Hall v. Plasson, 1024
 Hall v. Renfro, 605
 Hall v. Robinson, 398
 Hall v. Suydam, 743
 Hall v. Supervisors of Oneida, 1256
 Hale v. Burton, 634
 Hale v. New Jersey Steam Navigation Co., 571
 Halett v. Lee, 812
 Haley v. Earle, 27, 494, 495
 Halford v. Tetherow, 1117
 Halleck v. Miller, 975
 Halleck v. Mixer, 44
 Haldeman v. Bruckhart, 79
 Haley v. Chicago R. R. Co., 23
 Halty v. Markel, 532
 Holtzcluw v. Duff, 531
 Halsey v. Woodruff, 1195
 Halligan v. Chicago and Rock Island R. R. Co., 373
 Hame v. Mayor, etc., 1302
 Hamer v. Hathaway, 458
 Hammon v. Fisher, 810
 Hammond v. Hopping, 1173
 Hammond v. Zehner, 181
 Hamilton v. Fulton, 1195
 Hamilton v. Lomax, 1094
 Hamilton v. Third Avenue R. R. Co., 12, 1184, 1193
 Hamilton v. Williams, 770
 Hamilton v. Windolf, 657
 Hamilton v. White, 164
 Hamilton v. Whiteridge, 261
 Hampton v. Wilson, 964
 Hanna v. Phelps, 540
 Hancock v. Wentworth, 159, 161, 171
 Hanger v. Keating, 1237
 Hannibal R. R. Co. v. Swift, 573
 Hannibal and St. Joseph's R. R. Co. v. Kenney, 215
 Haulon v. Ingram, 305
 Hance v. Cayuga and Susquehanna R. R. Co., 216
 Hanson v. Millet, 414
 Hanson v. Taylor, 265
 Hard v. Vermont Central R. R. Co., 491
 Hardin v. Armstock, 934
 Hardins v. Borders, 761
 Harding v. Brooks, 954

- Harding v. Harding, 1064
 Harding v. Jasper, 267
 Harding v. Krelsinger, 1173
 Harding v. Town, 519
 Harding v. Townshend, 1198
 Hardenbergh v. Hardenbergh, 1064
 Hardcastle v. Maryland, etc., R. R. Co., 1265
 Hargone v. Stone, 1023, 1024
 Harrington v. Snyder, 524
 Harris v. Boggs, 648
 Harris v. Easall, 759
 Harris v. Harrington, 935
 Harris v. Haynes, 300
 Harris v. Northern Ind. R. R. Co., 592
 Harris v. Northern Indiana R. R. Co., 569
 Harris v. Whitcomb, 37
 Harrison v. Guill, 635
 Harrison v. Harrison, 732
 Harrington v. People, 693
 Harrower v. Ritson, 272
 Harrison v. Young, 138
 Harker v. Dement, 455
 Harper v. Erie R. R. Co., 23
 Harper v. Milwaukee, 1315, 1323
 Harpending v. Haight, 1262
 Hart v. Dubois, 799
 Hart v. Evans, 247
 Hart v. Mayor of Albany, 235, 387
 Hart v. Robinet, 1173
 Hart v. Skinner, 395
 Hart v. Trustees, etc., 265
 Hart v. Ten Eyck, 411
 Hart v. Western R. R. Co., 304, 306
 Hartfield v. Roper, 26
 Hartford Bank v. Hart, 1321
 Hartshorn v. Ellsworth, 1281
 Hartshorn v. South Reading, 261
 Hartsock v. Reddick, 934
 Harvey v. Derwoody, 262
 Harvey v. Duhlop, 3
 Harvey v. Harvey, 283, 317
 Harvey v. Rochester, 1301
 Harvey v. Rose, 606
 Harwood v. Lowell, 1322
 Harwood v. Marshall, 1264, 1272
 Harwood v. Tompkins, 4
 Haskins v. Paul, 648
 Haskin v. Woodward, 300
 Haskin v. Record, 118
 Hastings v. Halleck, 498
 Hastings v. Lusk, 934, 946, 966
 Hastings v. Livermore, 90, 172, 174
 Hastings v. Palmer, 963
 Hatfield v. Fullerton, 636
 Hathorn v. Ely, 594
 Hatch v. Dwight, 160
 Hatch v. Lane, 945
 Hatch v. Lewis, 517
 Hatch v. Vermont Central R. R. Co., 241
 Havens v. Erie R. R. Co., 473
 Haverstick v. Sipe, 114, 150
 Haveyreyer v. Mineral Point Supervisors, 1282
 Hawley v. Clowes, 290, 318
 Hawesville v. Lander, 350
 Hawk v. Ridgway, 322, 697, 1193
 Hawks v. Patton, 986
 Hawks v. Stanford, 928, 978, 991
 Hawkins v. Great Western R. R. Co., 592
 Hawkins v. Governor, 1261
 Hawksworth v. Thompson, 193
 Haycroft v. Lake Shore and Michigan Southern R. R. Co., 26
 Hayes, *Ex parte*, 1256
 Hays v. Blizzard, 765
 Hayes v. City of Oshkosh, 1303
 Hays v. Doane, 295
 Hays v. Riddle, 461
 Hayes v. Waldron, 145
 Hayes v. Western R. R. Co., 225, 490, 492
 Hayden v. Shad, 799
 Hayden v. Smithville, etc., Co., 223, 224, 225, 226, 489, 491
 Hayden v. Tucker, 258
 Haynes v. Ritchey, 926, 960, 961
 Haywood v. Charlestown, 265
 Hazman v. Hoboken Land & Improvement Co., 605
 Hazel v. Clark, 693
 Hazleton v. Putnam, 98
 Headam v. Rust, 326, 328
 Healey v. Mayor of New York, 28
 Hearn v. Kiehi, 1155
 Heath v. Cottenbox, 326
 Heath v. Ricker, 96, 146
 Heatherly v. Hadley, 1157
 Hedden v. Hedden, 1067
 Hedges v. Madison Co., 1300
 Heffernan v. Benkard, 510
 Hegan v. Eighth Avenue R. R. Co., 475
 Hegeman v. Western R. R. Co., 468, 469, 475
 Heil v. Glanding, 23
 Heirn v. M'Caughan, 1193
 Helser v. Pott, 634
 Hellman v. Holladay, 578, 600
 Heller v. Mayor, etc., Sedalia, 1303
 Heine v. Anderson, 408
 Heming v. Ball, 727
 Hemmenway v. Woods, 764
 Henderson, *Ex parte*, 1259
 Henderson v. Boyer, 642
 Henson v. Veatch, 991
 Hendrick v. Cook, 80, 90, 172
 Hendrickson v. Kingsbury, 1184, 1193
 Hepburn v. Sewell, 442
 Herdic v. Young, 1193
 Heermance v. Vernoy, 100
 Herrick v. Chapman, 931
 Herron v. Hughes, 740
 Herndon v. Bryant, 1044
 Hesler v. Degant, 988
 Hester v. Hagood, 759

- Hesseltine v. Stockwell, 411
 Hetfield v. Central R. R. Co., 362
 Hetfield v. Towsley, 770
 Hewey v. Nourse, 306
 Hewitt v. Prime, 1096
 Hewett v. Swift, 507
 Heydenfeldt v. Towns, 773
 Heyward v. Cuthbert, 749
 Hibbard v. Stewart, 448
 Hibbard v. New York & Erie R. R. Co., 33
 Hickey v. Huse, 1121
 Hicks v. Dorn, 799
 Hieatt v. Morris, 150
 Higert v. Greencastle, 1317
 Higby v. Williams, 1132
 Higgins v. Dewey, 12, 304, 306
 Higgins v. Watervliet Turnpike & R. Co., 31, 32, 33
 Higginson v. Nahant, 1309
 Higginbotham v. State, 690
 Hill v. Brinkley, 546
 Hill v. Brennan, 443
 Hill v. Covell, 398
 Hill v. Hill, 1060
 Hill v. Lord, 96, 135, 141
 Hill v. Morey, 360, 362
 Hill v. North, 1013
 Hill v. Palm, 764, 765
 Hill v. Rogers, 727
 Hill v. Sayles, 93
 Hill v. Sewald, 291, 294, 295
 Hill v. Sewall, 293
 Hill v. Board of Supervisors of Livingston County, 1319
 Hill v. Ward, 80
 Hill v. Wentworth, 294
 Hills v. Snell, 397
 Hillous v. Dunning, 928
 Hillaird v. Richardson, 176
 Hildreth v. Lowell, 1302
 Hinley v. Wyatt, 648, 651
 Hinchman v. Patterson Horse R. R. Co., 261
 Hinchman v. Whetstone, 1200
 Hinds v. Barton, 305
 Hines v. Lockport, 1312
 Hines v. McKinney, 398
 Hindsbrey v. Hinds, 271
 Hirschson v. Hamburg Packet Co., 570, 596
 Hirsch v. Quaker City, 600
 Hitchcock v. Baker, 798
 Hixon v. Lowell, 1311
 Hoadley v. Watson, 733, 1188
 Hoag v. Hatch, 955
 Hobbs v. Parker, 1016
 Hobkins v. Westcott, 570
 Hodgson v. Millward, 12
 Hoe v. Sanborn, 1021
 Hoffman v. Armstrong, 352
 Hoffman v. Cason, 395, 417
 Hoffman v. Kemerer, 1098
 Hoffman v. Union Ferry, 484
 Hofnagle v. New York Central and Hudson River R. R. Co., 490
 Hogan v. Wilmoth, 974
 Hogg v. Wilson, 956
 Hohannan v. Hammond, 575
 Holbrook v. Utica and-Schenectady R. Co., 23
 Holbrook v. Wright, 408
 Holcraft v. King, 267
 Holdane v. Coldspring, 265
 Holden's Case, 1295
 Holden v. Shattuck, 29, 332, 349
 Hollis v. Wells, 1094, 1095
 Hollister v. Nowlen, 571, 575, 579, 587, 598
 Hollenbeck v. Rowley, 332, 350, 362
 Hollingsworth v. Shaw, 955
 Holman v. Lord, 1038
 Holmes v. Clark, 1004
 Holmes v. Seeley, 97, 171, 105, 106, 165, 357, 379
 Holmes v. Tremper, 297
 Holsman v. Boiling Spring, etc., Co., 77, 80, 81, 93, 145, 146, 153, 257
 Holt v. Parsons, 949
 Holt v. Sargent, 182, 268
 Holton v. Binns, 1116
 Holton v. Muzzy, 978
 Homan v. Stanley, 508
 Home Ins. Co. v. Flint, 1238
 Homes v. Peck, 497
 Homer v. Coffey, 1322
 Homer v. Thwing, 395, 525, 1126
 Honesburgher v. Second Avenue R. R. Co., 26
 Hood v. New York and New Haven R. Co., 596
 Hooker v. Cummings, 132
 Hooper v. Holson, 107
 Hooksett v. Concord R. R., 304, 306
 Hooper v. Chicago and North Western R. R. Co., 619
 Hooper v. Wells, 575
 Hooper v. Wilkinson, 73
 Hootman v. Shriner, 820
 Hopkins v. Atlantic and St. Lawrence R. R. Co., 517, 1193
 Hopkins v. Westcott, 580, 587, 590
 Hopwood v. Patterson, 1156
 Horne v. Barney, 1259
 Horn v. Boon, 743
 Horn v. Cole, 1178
 Horton v. Banner, 994
 Horton v. Payne, 1124
 Hornketh v. Barr, 1091
 Hosley v. Brooks, 992
 Hosmer v. Loveland, 935
 Hostetter v. Vanwinkle, 1051, 1052
 Houck v. Wachter, 241, 242
 Houghton v. Cooper, 280, 281
 House v. House, 291, 955
 House v. Metcalf, 196, 252
 Houser v. Tully, 613
 Houston v. Levy Court, 1256

- Houston, etc., R. R. Co. v. Randolph, 1261, 1262, 1266
 Houx v. Seat, 120
 Hover v. Barkhoof, 21
 Hovey v. Mayo, 49, 1307, 1308
 Howe v. Newmarch, 32
 Howard v. Babcock, 524
 Howard v. Crawford, 798
 Howard v. Farr, 553
 Howard v. Gould, 1004
 Howard v. O'Neill, 136
 Howard v. Sexton, 988
 Howard v. Thompson, 931, 935, 941
 Howe v. Oswego, etc., R. R. Co., 575
 Howe v. Perry, 994
 Howell v. Buffalo, 1301, 1302
 Howell v. Howell, 994
 Howell v. McCoy, 192
 Howland v. Eldredge, 1259
 Howland v. Gardner, 1115
 Howland v. Vincent, 203
 Howth v. Franklin, 608
 Hoyt v. Van Alstyne, 455
 Hoyt v. City of Hudson, 72, 73
 Hubbard v. Bell, 346, 348
 Hubbard v. Briggs, 1004, 1006
 Hubbard v. Concord, 1309
 Hubbard v. Russell, 176, 242
 Hubbard v. Stewart, 462
 Hubbard v. Town, 4, 114, 150, 258
 Hubbell v. Meigs, 1016, 1017, 1041
 Hudson v. Garner, 985
 Hudson v. Hoyt, 1315
 Hudson River R. R. Co. v. Loeb, 257
 Huff v. McAuley, 98, 106
 Huff v. Bennett, 982
 Huff v. McCauley, 96
 Huffman v. Shumate, 983
 Hughes v. Boyer, 525
 Hughes v. Giles, 443
 Hughes v. Hughes, 1061
 Hulbert v. New York Central R. R. Co., 471, 472
 Hulett v. Swift, 609
 Hulme v. Shreve, 90, 99, 259
 Hull v. City of Kansas, 1312
 Hull v. Sacramento Valley R. R. Co., 307
 Hull v. Lowell, 1310
 Hume v. City of New York, 1311
 Hume v. Mayor, etc., of New York, 1312, 1313
 Humiston v. Smith, 44
 Humphrey v. Douglass, 392
 Humphrey v. Hathorn, 818
 Humphries v. Parker, 750, 992
 Humphreys v. County, 1321
 Hunt v. Bennett, 12, 935, 952, 1194
 Hunt v. Brooklyn, 1313
 Hunt v. Darling, 406
 Hunt v. Hall, 310
 Hunt v. Kane, 401
 Hunt v. Mayor of Albany, 1315
 Hunt v. Pennsylvania R. R. Co., 227, 510
 Hunt v. Rich, 371
 Hunter v. Hunter, 414
 Hunter v. Hudson River I. & M. Co., 395
 Hunter v. Winsor, 1304
 Hunting v. Russell, 372
 Huntington v. Gilmore, 414
 Huntington v. Hall, 1020
 Hunnewell v. Hobart, 323
 Hurd v. Hubbell, 458
 Hurd v. Shaw, 761
 Hurd v. West, 372
 Hurlburt v. Hurlburt, 1064
 Hurlburt v. Litchfield, 1304
 Huson v. Dale, 991, 994
 Hussey v. Hamilton, 1267
 Hutchins v. City of Boston, 1310
 Hutchins v. Hutchins, 740
 Hutchins v. King, 453
 Hutchins v. Olcott, 540
 Hutchings v. Western R. R. Co., 600
 Hutchings v. Western, etc., R. R. Co., 570
 Hutchinson v. Bank of Wheeling, 417
 Hutchinson v. Bobo, 395
 Hutchinson v. Commissioners of Canal Fund, 1256
 Hutchinson v. Peck, 11
 Hutchinson v. Sangster, 702
 Hutchinson v. Wheeler, 994
 Hutson v. Mayor, etc., of N. Y., 1312
 Hutts v. Tindall, 267
 Hutton v. Wetherald, 44
 Hyatt v. Taylor, 614
 Hyde v. Cooksoon, 104
 Hyde v. Jamaica, 104
 Hyde v. Stone, 406
 Hyland v. Sherman, 1031

I

- Idol v. Jones, 6, 926, 954
 Ihl v. Forty-second Street and Grand Street Ferry R. R. Co., 520
 Illinois, etc., R. R. Co. v. Baches, 474
 Illinois Central R. R. Co. v. Copeland, 596
 Illinois, etc., R. R. Co. v. Dickerson, 216, 221
 Illinois Central R. R. Co. v. Frankenburg, 596, 597
 Illinois Central R. R. Co. v. Frazier, 306
 Illinois Central R. R. Co. v. McClellan, 26, 628
 Illinois, etc., R. R. Co. v. McKee, 221
 Illinois Central R. R. Co. v. Mills, 306, 307
 Illinois, etc., R. R. Co. v. Middlesworth, 23
 Illinois Central R. R. Co. v. Jewell, 596
 Illinois Central R. R. Co. v. Johnson, 596
 Illinois Central R. R. Co. v. Nunn, 306
 Illinois, etc., R. R. Co. v. Phelps, 216

- Illinois Central R. R. Co. v. Phillips, 467, 469
 Illinois Central R. R. Co. v. Slatton, 471
 Illinois, etc., R. R. Co. v. Swaringen, 216, 221
 Illinois, etc., R. R. Co. v. Simmons, 1185, 1199
 Illinois Central R. R. Co. v. Welch, 224, 226
 Illinois Central R. R. Co. v. Waters, 572
 Imler v. City of Springfield, 1315
 Indianapolis, etc., R. R. Co. v. Allen, 587
 Indianapolis, Peru & Chicago R. R. Co. v. Anthony, 32
 Indianapolis, etc., R. R. Co. v. Caldwell, 495
 Indianapolis & Cincinnati R. R. Co. v. Love, 491
 Indianapolis, etc., R. R. Co. v. Cauldwell, 27
 Indianapolis, etc., R. R. Co. v. Guard, 215
 Indianapolis v. Huffner, 1313, 1314
 Indianapolis, etc., R. R. Co. v. Irish, 216
 Indianapolis, etc., R. R. Co. v. McKinney, 215
 Indianapolis, etc., R. R. Co. v. McClure, 216
 Indianapolis, etc., R. R. Co. v. Meek, 215
 Indianapolis v. Miller, 235
 Indianapolis, etc., R. R. Co. v. Oestel, 216, 217
 Indianapolis, etc., R. R. Co. v. Parker, 217
 Indianapolis, etc., R. R. Co. v. State, 1274
 Indianapolis, etc., R. R. Co. v. Townsend, 215
 Ingalls v. Bills, 469, 475
 Ingalls v. Buckley, 402
 Ingalls v. Lord, 462
 Ingallsbee v. Wood, 615
 Ingersol v. Buchanan, 1240
 Ingersoll v. Jones, 1091
 Ingersol v. N. Y. Central and Hudson River R. R. Co., 474
 Ingersoll v. Stockbridge and Pittsfield R. R. Co., 304, 306
 Ingerson v. Miller, 1199
 Ingraham v. Dunnell, 92
 Ingraham v. Hutchinson, 144, 145, 150
 Ingraham v. Hough, 136, 154
 Ingraham v. Treadgill, 345, 346
 Inhabitants of China v. Southwick, 83
 Inman v. Foster, 964
 Inman v. Fowler, 988
 Inskip v. Shields, 371, 372
 Ireland v. Elliott, 736
 Ireland v. McGarvish, 957
 Irons v. Field, 957
 Irwin v. Covode, 284
 Irwin v. Davidson, 388
 Irwin v. Sprigg, 205
 Irvin v. Wood, 242, 246
 Isaacs v. Third Avenue R. R. Co., 31, 32, 33, 34, 721
 Isbell v. New York, etc., R. R. Co., 216, 495
 Israel v. Brooks, 728, 742, 764, 765
 Ives v. Owens, 414
- J**
- Jacaway v. Dula, 736
 Jabine v. Midgett, 605
 Jacks v. Smith, 634, 636
 Jacks v. Stimson, 744
 Jackson v. Anderson, 350
 Jackson v. Brownson, 280
 Jackson v. Chicago and Northwestern R. R. Co., 307
 Jackson v. Hathway, 332
 Jackson v. Rutland and Burlington R. R. Co., 214, 215
 Jackson v. Sacramento, etc., R. R. Co., 529
 Jackson v. Stetson, 993
 Jackson v. Second Avenue R. R. Co., 32
 Jackson v. Tibbitts, 280
 Jarvis v. Barnard, 1304
 Jarnigan v. Fleming, 687, 969, 988, 991, 994
 Jacobs v. Andrews, 304
 Jacobs v. Allard, 81
 Jacobs v. Fyler, 955
 Jacobs v. Measurers, 784
 Jacobs v. Shorey, 1177
 James v. Caldwell, 393
 James v. Leroy, 1088
 Jamisson v. Milleman, 376
 Jansen v. Acker, 813
 Jansen v. Davison, 1258
 Janes v. Buzzard, 44
 Janes v. Jenkins, 102, 114
 Jasigi v. Brown, 1008
 Jagnith v. Richardson, 475
 Jean v. Sandiford, 359
 Jefcoat v. Knotts, 322
 Jeffries v. Ankeny, 37
 Jefferson v. Adams, 733
 Jeffersonville R. R. Co. v. Applegate, 215
 Jeffersonville, etc., R. R. Co. v. Dunlap, 215
 Jeffersonville R. R. Co. v. Dougherty, 215
 Jeffersonville R. R. Co. v. Hendricks, 471
 Jeffersonville v. Louisville, etc., Ferry Co., 223
 Jeffersonville R. R. Co. v. Rogers, 603
 Jeffersonville R. R. Co. v. Swift, 471
 Jellison v. Goodwin, 931
 Jenne v. Joslyn, 1177
 Jenner v. Jolliffe, 399

Jennings, *Ex parte*, 1278
 Jennings v. Inhabitants of Tisbury, 265
 Jennings v. Jennings, 1065
 Jennings v. Paine, 966
 Jenkins v. Steanka, 411
 Jenkins v. Waldron, 37
 Jersey City v. Morris Canal, etc., Co.
 269
 Jervis v. Jolliffe, 399, 455
 Jessup v. Loucks, 137, 154
 Jessop v. Miller, 338
 Jewell v. Mahood, 323
 Jewett v. Foster, 375
 Jewett v. Goodall, 722
 Jewett v. Jewett, 160
 Jewett v. New Haven, 1303
 Jewett v. Partridge, 398
 Job v. Harlon, 30, 231
 Johns v. Stevens, 90
 Johns v. Witherspoon, 328
 Johnson v. Couillard, 399
 Johnson v. Carter, 362
 Johnson v. Dicken, 956
 Johnson v. Lewis, 145
 Johnson v. Johnson, 284, 1061
 Johnson v. Jordan, 103
 Johnson v. Lucas, 1260
 Johnson v. Reynolds, 523, 616, 1266
 Johnson v. Robertson, 955, 958
 Johnson v. Stayton, 265
 Johnson v. Shields, 955
 Johnson v. Stebbins, 928
 Johnson v. Small, 475
 Johnson v. Sumner, 458
 Johnson v. Winona, etc., R. R. Co., 467
 Johnson v. Wiseman, 292
 Johnston v. Martin, 765
 Johnstown Co. v. Cambria Co., 120
 Jones v. Boston, 1295, 1311
 Jones v. Chapman, 964
 Jones v. Chantry, 208
 Jones v. Cook, 798
 Jones v. Crow, 145
 Jones v. Diver, 958
 Jones v. Dugan, 398
 Jones v. Gundrim, 634
 Jones v. Gregg, 44
 Jones v. Hungerford, 955
 Jones v. Jones, 697, 1061
 Jones v. Marrs, 955
 Jones v. New Haven, 1299, 1300
 Jones v. Nellis, 423
 Jones v. Percival, 96, 97, 122, 106
 Jones v. Pitcher, 575
 Jones v. Rivers, 984, 985
 Jones v. Sinclair, 452
 Jones v. Soulard, 210
 Jones v. Voorhees, 570, 571, 580
 Jones v. Wagner, 75
 Joannes v. Bennett, 939
 Jordan v. Foster, 1013
 Jordan v. Hanson, 770
 Jordan v. Woodward, 92
 Joselyn v. McAllister, 733

Judge v. Meriden, 1304
 Judson v. New York, etc., R. R. Co., 219
 Judson v. Western R. R. Co., 593, 596

K

Kahn v. Lovez, 211
 Kallman v. United States Express Co.,
 587
 Kangler v. Hummell, 984
 Kansas Pacific R. R. Co. v. Nichols, 592
 Karney v. Paisley, 992
 Katterman v. Stitzer, 764
 Kaufman v. Griesmer, 73
 Kay v. Pennsylvania R. R. Co., 494
 Keaggy v. Hites, 462
 Keating v. New York Central R. R. Co.,
 472
 Keegan v. Western R. R. Co., 224, 225
 Keener v. Kauffman, 361
 Keeney v. Grand Trunk R. R. Co., 573
 Keeler v. Eastman, 316
 Kegan v. Western R. R. Co., 489
 Keiffer v. Imhoff, 159
 Keisel v. Earnest, 1116
 Keith v. Easton, 1309, 1311
 Kellinger v. Forty-Second Street, etc.,
 R. R. Co., 883
 Kelsey v. Barney, 475
 Kelsey v. Griswold, 399
 Kelsey v. Durkee, 297
 Keller v. Weber, 640
 Keller v. Sedalia, 1303
 Kellogg v. Chicago & Northwestern R.
 R. Co., 304, 306
 Kellogg v. Northampton, 1309
 Kellogg v. Payne, 503
 Kellogg v. The T. D. Hine, 494
 Kelly's Case, 265
 Kelley v. Donnelly, 1094
 Kelley v. Owens, 44
 Kelly v. Pickett, 764
 Kelly v. Tilton, 229, 323
 Kelton v. Bevins, 742
 Kelsack v. Nicholson, 561
 Kendall v. Stone, 969, 971
 Kendall v. Stockton, 1266
 Kendall v. United States, 1262
 Keniston v. Little, 800
 Kennayde v. Pacific R. R. Co., 474
 Kennedy v. Ashcroft, 524, 525
 Kennedy v. Barnett, 828
 Kennedy v. Gifford, 988
 Kenned v. Lowry, 972, 983
 Kenny v. McLaughlin, 964
 Kenney v. Neil, 468
 Kennedy v. North Missouri R. R. Co.,
 1185, 1199
 Kennedy v. Strong, 455, 456
 Kennedy v. Whitwell, 458
 Kentgen v. Parks, 404
 Kentucky v. Dennison, 1256
 Keough v. Daniell, 298, 299

Kerby v. Quinn, 443
 Kerlin v. Heacock, 799
 Kerschbanger v. Slusser, 973
 Kerwhacker v. Cleveland, Columbus &
 Cincinnati R. R. Co., 27, 215, 216, 325,
 328
 Kerr v. Forgue, 26
 Kerr v. Mount, 799, 800, 810
 Kesse v. Chicago & Northwestern R. R.
 Co., 306
 Kessler v. McConachy, 651
 Kessler v. N. Y. Central R. R. Co., 597
 Kesler v. Smith, 503
 Ketchum v. American, etc., Express
 Co., 587, 589
 Ketchum v. Wells, 1021
 Keuren v. Johnson, 1300
 Keys v. Tait, 265
 Kidd v. Dennison, 281
 Kidder v. Barker, 798
 Kidder v. Kidder, 414
 Kidder v. Parkhurst, 728, 764, 934
 Kiggins v. Watervliet Turnpike Co., 32
 Kilburn v. Adams, 136
 Kilborn v. Rewee, 372
 Kimball v. Bath, 1311
 Kimball v. Boston, 1302
 Kimball v. Cochecho R. R., 103, 105
 Kimball v. Cushman, 34
 Kimball v. Harman, 740
 Kimball v. Lamphrey, 1267
 Kimmis v. Stiles, 955
 Kincaid's Appeal, 344
 King v. Baker, 374
 King v. Boston and Worcester R. R. Co.,
 490
 King v. Dunn, 359
 King v. Indian Orchard Canal Co., 550
 King v. Morris, 259
 King v. Morris & Essex R. R. Co., 243,
 260
 King v. Kline, 393
 King v. St. Landry, 1299
 Kinsey v. Wallace, 758
 King v. Wood, 954
 Kinney v. Central R. R. Co., of New
 Jersey, 470, 533
 Kinney v. Hosea, 992
 Kinney v. Nash, 957, 960, 974
 Kingsberry v. Kingsberry, 1062
 Kip, *Ex parte*, 1321
 Kirby v. Clark, 443
 Kirkman v. Handy, 192, 194
 Kiston v. Hildebrand, 609
 Kisseecker v. Monn, 323
 Kitredge v. Milwaukee, 1309
 Kitson v. Forest, 742
 Klauber v. American Express Co., 575,
 577
 Klauder v. McGrath, 511
 Klein v. Gehrung, 150
 Klinck v. Colby, 931, 932, 933, 941, 945,
 946
 Kline v. Shuler, 762

Klumph v. Dunn, 992
 Kolb v. Bankhead, 322
 Kollock v. Jackson, 544
 Kountz v. Brown, 1193
 Knapp v. Curtis, 529
 Knight v. Foster, 1194
 Knight v. Goodyear's India Rubber
 Glove Manufacturing Co., 204
 Knight v. Knight, 1061
 Knight v. New Orleans, etc., R. R. Co.,
 216
 Knight v. Portland, Sac. and Portland
 R. R. Co., 218
 Knight v. Wilcox, 1095
 Knowles v. Atlantic and St. L. R. R.
 Co., 529
 Knowles v. Dow, 359
 Knowing v. Manley, 448, 1124, 1125
 Knox v. Chaloner, 346
 Knox County v. Aspinwall, 1277
 Kresler v. Smith, 504, 516, 520
 Krohn v. Sweeny, 607
 Kroy v. Chicago, etc., R. R. Co. 225
 Kruneer v. Southern Express Co., 594,
 600
 Krulder v. Ellison, 619
 Kuler v. Beaman, 182
 Kutter v. Michigan Central R. R. Co.,
 573
 Kyle v. Laurens R. R. Co., 596

L

Lacey v. Arnett, 99
 Lacey v. Giloney, 293
 Lackey v. Stondert 1020
 Lacon v. Page, 1309
 Lacour v. Mayor, etc., of N. Y., 1304
 Ladue v. Griffith, 593
 Laffin v. Griffiths, 293, 300
 Lafayette, etc., R. R. Co. v. Huffman,
 26
 Lagrange v. State Treasurer, 1264
 Laing v. Colden, 467, 468, 472
 Lake Shore, etc., R. R. Co. v. Perkins,
 569, 592
 Lalor v. Chicago, Burlington and Quincy
 R. R. Co., 223, 489
 Lakeman v. Burnham, 182
 Lamar v. Marshall, 1256
 Lamb v. Crossland, 157
 Lambard v. Pike, 2
 Lambeth v. North Carolina R. R. Co.,
 471
 Lamphier v. Worcester and Nashua R.
 R. Co., 178
 Lampman v. Milks, 4, 102, 114, 258
 Lamos v. Snell, 995, 996
 Lane v. Dudley, 1037
 Lane v. Miller, 99
 Lane v. Old Colony, etc., R. R. Co., 601,
 603
 Lanahan v. Gahan, 1229

- Lander v. Miles, 728
 Lanett v. Hiltz, 720
 Laney v. Clifford, 346
 Langhoff v. Milwaukee, etc., R. R. Co., 474
 Langworthy v. New York and Harlem R. R. Co., 601
 Lannen v. Albany Gas-light Co., 24
 Lanning v. New York Central R. R. Co., 489, 490, 491
 Lansing v. Carpenter, 926, 952
 Lansing v. County Treasurer, 1276
 Lansing v. Wiswall, 117, 241
 Lapham v. Curtis, 83
 Larkin v. Saganaw County, 1298, 1308
 Larue v. Russell, 371, 882
 Larkin v. Taylor, 326
 Lasala v. Holbrook, 70, 73, 102
 Lathrop v. Blake, 444
 Laughlin v. Chicago, etc., R. R. Co., 597
 Laumier v. Francis, 73
 Laver v. Glacklin, 834
 Law v. Franks, 759
 Laws v. North Carolina R. R. Co., 215
 Lawson v. Hicks, 966
 Lawlor v. Androscoffin R. R. Co., 491
 Lawrence v. Combs, 324, 327
 Lawrence v. Kemp, 297
 Lawrence v. Lanning, 744
 Lawrence v. Maxwell, 395, 408, 526
 Lawrence v. Sherman, 1172
 Lawrence v. Wiona and St. Peters R. R. Co., 596
 Lawton v. Rivers, 105, 165
 Lay v. King, 132
 Lea v. Henderson, 1097
 Lea v. Lea, 1065
 Lea v. White, 934
 Leadbetter v. Fitzgerald, 371
 Leaird v. Davis, 747
 Leahey v. Michigan Central R. R. Co., 490
 Leavitt v. Leavitt, 1065
 Leavenworth v. Casey, 1314
 Ledyard v. Jones, 818
 Ledyard v. Ten Eyck, 349
 Lee v. Hodges, 1090, 1091, 1095
 Lee v. Hefley, 1097
 Lee v. Kane, 972
 Lee v. Lamprey, 1177
 Lee v. Robertson, 993
 Lee v. Sandy Hill, 1301
 Lee v. Walker, 496, 498
 Lee v. Woolsey, 736
 Leggett v. Blount, 764
 Legrand v. Page, 760
 Lemmon v. Chicago, etc., R. R. Co., 221, 216
 Lemon v. Hayden, 265
 Lenox v. Winisimmet Co., 5, 484, 495
 Leonard v. Fowler, 1024
 Leonard v. House, 1280
 Leonard v. Hendrickson, 571
 Leonard v. Leonard, 104, 105
 Leonard v. Snellbaker, 1164
 Leonard v. Winslow, 601
 Lespard v. Van Kirk, 1021
 Letton v. Young, 1185
 Levi v. Brannan, 743
 Levy v. Brush, 1104
 Levy v. Mayor, etc., of N. Y., 355
 Levy v. Mayor, 1305
 Lewenthall v. New York, 1314
 Lewis v. Carstairs, 117
 Lewis v. Chapman, 941, 945
 Lewis v. Henley, 1280
 Lewis v. Hawley, 958
 Lewis & Herrick v. Chapman, 941
 Lewis v. Johns, 1123
 Lewis v. McAfee, 525
 Lewis v. London, etc., R. R. Co., 470
 Lewis v. Ludwick, 575
 Lewis v. Stein, 81, 93, 192, 196, 198
 Lewiston v. Proctor, 265
 Lexington v. McConnell, 1320
 Leyman v. Abeel, 129
 Likehart v. Byrely, 974
 Like v. McKinstry, 970
 Lillard v. Whitaker, 458
 Lummis v. Kasson, 801
 Linville v. Earleywine, 974
 Linard v. Crossland, 371
 Lincoln v. Hapgood, 37
 Linden v. Graham, 969
 Linden v. Hepburn, 317
 Lindsay v. Auditor, 1262, 1266
 Lindsey v. Luckett, 1272
 Linney v. Maton, 926, 961
 Linney v. Meaton, 5
 Life v. Eisenlerd, 1091, 1094, 1096
 Lipford v. M'Colum, 764
 Little v. Barlow, 956
 Little v. Denn, 265
 Little v. Lathrop, 324
 Little Miami R. R. Co. v. Wetmore, 32, 721
 Little v. Moore, 770
 Little Rock, *Ex parte*, 1237
 Little Rock v. Willis, 1297
 Livingston v. McDonald, 73
 Livingstone v. Reynolds, 316
 Livingston v. Arrington, 1013
 Livingston v. Ketchum, 128
 Livingston v. Livingston, 388
 Livingston v. Reynolds, 282
 Lloyd v. Hulbert, 266
 Lloyd v. Mayor, etc., of New York, 1297
 Lobdell v. Stowell, 407
 Lockwood v. Bull, 448, 450
 Lockwood v. New York, etc., R. R. Co., 345
 Lobenstein v. Pritchett, 533
 Lockwood v. Railroad, 470
 Logan v. Austin, 691
 Logansport v. Dunn, 269
 Logan v. Gedney, 326, 328
 Logan v. Murray, 1090

Logan v. Steele, 956
 Londegan v. Hammer, 770
 Long v. Buchanan, 377
 Long v. Cross, 320
 Long v. Hickingbottom, 1020
 Long v. Rodgers, 743
 London v. Warfield, 319
 Loan v. Boston, 1309
 Looker v. Brookline, 1310
 Loomis v. Swick, 983
 Loomis v. Wilbur, 280, 284
 Loomis v. Terry, 229, 230
 Loop v. Litchfield, 18, 1103
 Loosey v. Orser, 820
 Loring v. Bacon, 112
 Lorman v. Benson, 248, 346
 Losee v. Clute, 18, 19
 Loughran v. Ross, 299
 Lorillard v. Monroe, 1304, 1305
 Louisville, etc., R. R. Co. v. Ballard, 216
 Louis County Court v. Sparks, 1272
 Louisville, etc., R. R. Co. v. Covington, 160
 Louisville, etc., R. R. Co. v. Hodge, 885
 Louisville, etc., R. R. Co. v. Mahan, 599
 Louisville, etc., R. R. Co. v. State, 264, 1264
 Lovejoy v. Darlon, 475
 Lovering v. Lovering, 1064
 Low v. Mumford, 1131
 Low v. Staples, 189
 Low v. Towns, 1261
 Lowder v. Hinson, 1193
 Lowell v. Spaulding, 1309
 Lowell Wire Fence Co. v. Sargent, 571
 Lowell v. Wyman, 1305, 1306
 Lowremore v. Berry, 404
 Downsedale v. Portland, 266, 270
 Lowry v. Barney, 797
 Lucas v. New Bedford and Taunton R. Co., 471
 Lucas v. Trumbull, 395
 Lucas v. Wasson, 406
 Luddington v. Peck, 799
 Lukehart v. Byrely, 969
 Luther v. City of Worcester, 1310
 Luther v. Winnisimmet Co., 78
 Lyfora v. Toothaker, 357
 Lyle v. Clason, 981
 Lyman v. Amherst, 1321
 Lyman v. Edgerton, 1304
 Lynch, *Ex parte*, 1264
 Lynch v. Lynch, 1062, 1064
 Lynch v. Smith, 26
 Lynn's Appeal, 282, 284
 Lyon v. Hancock, 36, 766
 Lyon v. Smith, 608

M

Mable v. Matteson, 116
 Macon, etc., R. R. Co. v. Baber, 215

Macon, etc., R. R. Co. v. Johnson, 493
 Macon, etc., R. R. Co. v. Lester, 215
 Macdougall v. Maguire, 1176
 Mac Kay v. New York Central R. R. Co., 474
 Mad River, etc., R. R. Co. v. Barber, 225, 491
 Maddox v. McGinnis, 760
 Maddox v. Graham, 1277
 M. E. Church of Cincinnati v. Wood, 1321
 Major v. Pulliam, 382
 Magee v. Stark, 955
 Magee v. Scott, 398
 Magill v. Magill, 1064
 Maghee v. Camden & Amboy R. R. Co., 576
 Maignan v. New Orleans, etc., R. R. Co., 595
 Magrath v. Magrath, 1064, 1065
 Magruder v. Swann, 1262
 Magruder and Brother v. Gage, 619
 Maguinay v. Sandek, 1094
 Mahan v. Green, 794
 Mahone, *Ex parte*, 1259
 Main v. Schwarzwalder, 294
 Maine v. North Eastern R. R. Co., 359
 Mahwin v. Harding, 1038
 Mali v. Lord, 477
 Mahone, *Ex parte*, 1259
 Malone v. Murphy, 728, 742, 743
 Malone v. Stewart, 5, 954
 Manchester v. Hartford, 1309
 Mandigo v. Mandigo, 1064
 Mangam v. Brooklyn R. R. Co., 26
 Mangold v. Thorpe, 799, 828
 Mangam v. Brooklyn R. R. Co., 494
 Manier v. Myers, 138
 Mann v. Marsh, 1108
 Manning v. M'Donnell, 359
 Manning v. Hollenbeck, 537, 616
 Mansfield v. Dorland, 546
 Mansfield v. Fuller, 1264
 Manufacturers Bank v. Hazard, 1178
 Mapes v. Weeks, 964, 996
 Marbury v. Madison, 1262
 Marcle v. Haskins, 1037
 Marcy v. Taylor, 265
 Mariner v. Shulte, 346
 Martinetti v. Maguire, 53, 55
 Markham v. Russell, 988
 Markham v. Jaudon, 458, 460
 Marsh v. Burt, 350
 Marsh v. Ellsworth, 934, 967
 Marsh v. Falker, 35, 1005, 1007, 1016, 1017, 1041, 1042
 Marsh v. Marsh, 1070
 Marsh v. Marshall, 404
 Marsh v. Jones, 230, 293
 Marsh v. Smith, 733
 Marsh v. Webber, 35, 1031
 Marshall v. Cohen, 197
 Marshall v. Drawhorn, 1013
 Marshall v. Giles, 634, 636

- Marshall v. Meech, 545
 Marshall v. Trumbull, 103
 Market v. St. Louis, 1317
 Marston v. Deyo, 764
 Masterton v. Mount Vernon, 1314
 Marye v. Dyche, 633
 Martin v. Hardesty, 767
 Martin v. Houghton, 376
 Martin v. Hooker, 995
 Martin v. Martin, 417
 Martin v. Nance, 345, 348
 Martin v. Payne, 1091
 Martin v. Riddle, 73
 Martin v. Waddell, 345
 Martin v. Western Union R. R. Co., 306, 307
 Mason County v. Minturn, 1256, 1259
 Mason v. Fenn, 299
 Mason v. Thompson, 609
 Matson v. Buck, 996
 Matthews v. Beach, 947
 Matthews v. Coe, 458
 Matthews v. Harsell, 412
 Matthews v. Menedger, 543, 550
 Matthews v. Terry, 727, 736
 Mauran v. Smith, 1261
 Maverick v. Eighth Avenue R. R. Co., 467
 Maxwell v. McAtee, 183
 Maximilian v. Mayor, etc., of N. Y., 1302
 May v. Brown, 996
 May v. Hanson, 605
 May v. May, 1061
 May v. Slade, 1115
 Mayer v. Schleichter, 926, 961
 Mayer v. Walter, 755
 Mayberry v. Concord R. R. Co., 214
 Maynard v. Esher, 114
 Mayor, etc., of Albany v. Cunliff, 1301, 1819
 Mayor of Georgetown v. Alexandria Canal Co., 261
 Mayor, etc., of Baltimore v. Marriott, 241
 Mayor of New York v. Baumberger, 257
 Mayor of Columbus v. Howard, 524, 525
 Mayor v. Lord, 1282
 Mayor, etc., of New York v. Lord, 1306
 Mayor, etc., of New York v. Furzer, 1257
 Mayor, etc., of New York v. Stone, 519
 Mayor of New York v. Bailey, 83, 1298, 1302
 Mayor, etc. v. Rainwater, 1256
 Mayor of Savannah v. Waldner, 1318
 Mayson v. Sheppard, 1199
 Mayor v. Sheffield, 1313
 Mayo v. Sample, 966
 McAdams v. Cates, 1031
 McAndrew v. Whitlock, 595, 600
 McAunrich v. Mississippi, etc., R. R. Co., 23, 494
 McAulay v. Birkhead, 1098
 McBean v. Richie, 742, 765
 McBrayer v. Hill, 926, 961
 McBride v. Ellis, 928
 McCabe v. Platter, 995
 McCabe v. Raney, 1178
 McCaleb v. Smith, 956, 957
 McCall v. Chamberlain, 215
 McCall v. McDowell, 1121, 1193
 McCahil v. Kipp, 8
 McCallum v. Germantown Water Co., 77, 145, 146, 153, 198, 251
 McCampbell v. Thornburgh, 991
 McCaskill v. Elliott, 230
 McCarty v. Bauer, 1304
 McCarty v. Barrett, 954, 957
 McCarty v. Wolfe, 532
 McCarthy v. City of Syracuse, 1312, 1313, 1314
 McCartney v. Garnhart, 1052
 McCaskill v. Elliot, 393
 McCauley v. Brooks, 1262, 1266
 McClintock v. Bryden, 75
 McClintock v. Crick, 983, 994
 McClure v. McDearmon, 537
 McClure v. Supervisors of Niagara Co., 355
 McCombs v. Akron, 1307
 McConnel v. Kibbe, 10, 112
 McConeghy v. McCaw, 396
 McCormick v. Sisson, 742
 McCormick v. Hudson River R. R. Co., 570
 McCoy v. Artcher, 1020
 McCoy v. California R. R. Co., 215
 McCoy v. Curtice, 1172
 McCoy v. Danley, 80
 McCoy v. McKown, 31
 McCoy v. Wait, 280, 316
 McCracken v. Hall, 297, 299
 McCready v. South Carolina R. R. Co., 307
 McCready v. R. R. Co., 307
 McCreery v. Claffin, 648
 McCullough v. Irvine, 284, 311
 McCullough v. Mayor of Brooklyn, 1264
 McCurrey v. Hooper, 562
 McDaniels v. Edwards, 1091
 McDaniels v. Robinson, 615
 McDonald v. Chicago & Northwestern R. R. Co., 218
 McDiarmid v. Fitch, 1267
 McDonald v. Edgerton, 616
 McDonald v. Gilman, 176
 McDonald v. Lindall, 104, 161
 McDonald v. Snelling, 1103
 McDonald v. Todd, 1036
 McDonald v. Walter, 1202
 McDonald v. Wilkie, 799, 803
 McDonald v. Woodruff, 979
 McDonough v. Virginia City, 1317
 McDonough v. Gilman, 242
 McDowell v. Bowles, 955
 McDowell v. Rissel, 1177

- McDuffie v. Rail Road, 572
 McEntee v. New Jersey Steamboat Co., 594
 McElroy v. Dice, 657
 McElroy v. Goble, 10
 McElroy and Wife v. Nashua & Lowell R. R. Co., 469
 McEwen v. Taylor, 16
 McFarland v. Wheeler, 550
 McGartrick v. Wason, 226
 McGary v. Lafayette, 1302, 1321
 McGill v. Ash, 357
 McGlynn v. Brodie, 224, 225
 McGreary v. Osborne, 292, 293
 McGregor v. Brown, 280, 281
 McGregor v. Boyle, 1305, 1314
 McGregor v. Comstock, 545
 McGrew v. Cato, 40
 McGrew v. Stone, 29
 M'Gowen v. Manifee, 969
 M'Gran v. Bookman, 371
 McGuire v. Grant, 12
 McGune v. Palmer, 387
 McGuire v. Shelby, 562, 563
 McHugh v. Pundt, 799
 McIlvoy v. Cockram, 693
 McIntosh v. Matherly, 7, 981
 McIntyre v. New York Central R. R. Co., 504, 516, 520
 McKay v. Hamblin, 523
 M'Kenzie v. Nevins, 544
 M'Kee v. Ingalls, 956, 994
 McKeon v. See, 192, 194
 McKim v. Mason, 294, 300
 McKinley v. Rob, 978
 McKinney v. Neil, 468
 McKinney v. Reynolds, 1266
 McKown v. Hunter, 742, 744, 766
 McLaren v. Birdsong, 766
 McLaughlin v. Russell, 986
 McLaughlin v. City of Corry, 1310
 McLaughlin v. Charlotte & South Carolina R. R. Co., 241
 McLaughlin v. Waite, 412
 McLean v. Burtant, 467
 McLean v. Cook, 799
 McLellan v. Jenness, 1115
 McLeod v. Jones, 377, 381
 McMahan v. Green, 701
 McMahan v. Mayor, etc., of New York, 26
 McMannis v. Butler, 270
 McManus v. Carmichael, 346
 McManus v. Finan, 2
 McManus v. Lee, 1123
 McMeechen, *Ex parte*, 1237
 McMillan v. Birch, 954, 959
 McMillan v. Michigan Southern and Northern Indiana R. R. Co., 596
 McMillen v. Smith, 1256, 1259
 McNamara v. Shannon, 955, 956
 McNeal v. Emerson, 377
 McNear v. Atwood, 404
 McNeely v. Driskell, 749
 McNeeley v. Hunton, 809, 1123
 McNeills v. Brooks, 525
 McNerse v. Herring, 742
 McNutt v. Young, 995
 McPadden v. New York Central R. R. Co., 467, 468, 469
 McRoberts v. Washburne, 16
 McTavish v. Carroll, 103
 McQueen v. Fulgham, 5, 926
 McQueen v. Middletown Manufacturing Co., 1319
 Meagher v. Driscoll, 344
 Mealing v. City Council, 1242
 Mears v. Wilmington, 1307
 Mebane v. Sellars, 955
 Mebane v. Patrick, 157
 Mechanicsburgh v. Meredith, 1308
 Mechanics' Bank v. New York & New Haven R. R. Co., 1027
 Medford v. Pratt, 136
 Meeds v. Carver, 722
 Meeker v. Van Rensselaer, 235, 262
 Meigs' Appeal, 294, 295
 Meier v. Pennsylvania R. R. Co., 468, 469, 472
 Melvin v. Whiting, 132, 137
 Memphis & Charleston R. R. Co. v. Whitfield, 470
 Mendez v. Dugart, 349
 Mercer v. Jackson, 227
 Mercy Docks v. Gibbs, 1297
 Mercy Docks v. Penhollow, 1297
 Merch v. Concord R. R. Co., 494
 Merrifield v. Lombard, 81, 93
 Merrifield v. Worcester, 1318
 Merrick v. Van Santvoort, 1117
 Merriam v. Mitchell, 743, 744
 Merriam v. Willis, 372
 Merriam v. Vaughn, 1031
 Merrill v. Grinnell, 570
 Merritt v. Brinkerhoff, 145
 Merritt v. Judd, 299
 Mersereau v. Norton, 406
 Merritt v. Earle, 575
 Merritt v. St. Paul, 799
 Metcalf v. Baker, 479
 Metcalf v. Stryker, 820
 Meyer v. Amidon, 1016, 1017, 1041
 Meyer v. Pacific R. R. Co., 23, 494
 Meyer v. People's R. R. Co., 495
 Meyer v. North. Missouri R. R. Co., 216
 Michigan Southern R. R. Co. v. Hale, 587
 Michigan, etc., R. R. Co. v. Heaton, 587
 Michigan, etc., R. R. Co. v. Leahey, 23, 494
 Michigan Southern, etc., R. R. Co. v. McDonough, 592, 569, 624
 Mickle v. Miles, 640
 Michaels v. New York Central R. R. Co., 575
 Michigan, etc., R. R. Co. v. Oehr, 570
 Michigan, etc., R. R. Co. v. Shurtz, 593
 Middleton v. Franklin, 257

- Middleton v. Low, 1262
 Milam v. Burnside, 935
 Milhan v. Sharp, 261
 Milburn v. Gilman, 799
 Miles v. Harrington, 994
 Miles v. Vanhorn, 961
 Milford v. Holbrook, 511
 Miller v. Auburn & Syracuse R. R., 120
 Miller v. Adams, 720
 Miller v. Bristol, 106, 379
 Miller v. Miller, 78, 956, 983
 Miller v. Resigue, 452
 Miller v. Thompson, 1090
 Miles v. Vanhorn, 926
 Millikin v. Armstrong, 300
 Millison v. Holmes, 361
 Millon v. Sawlsbury, 524
 Miltonberger v. St. Louis County Court, 1259
 Mills v. City of Brooklyn, 1312, 1314
 Mills v. Michigan Central R. R. Co., 596
 Mills v. Richardson, 356
 Mills v. St. Clair Co., 16
 Miller v. Burch, 234
 Miller v. Brown, 751
 Miller v. Butler, 928
 Miller v. Decker, 375
 Miller v. Fenton, 1195
 Miller v. Foley, 701
 Miller v. Garlock, 133, 164
 Miller v. Garther, 1022
 Miller v. Kerr, 964
 Miller v. Lanback, 72, 79
 Miller v. Lapham, 159, 165, 168
 Miller v. Manice, 442, 451
 Miller v. McElroy, 1230
 Minnis v. Johnson, 1195
 Minot v. Curtis, 1319
 Misner v. Lighthall, 326
 Mississippi Central R. R. Co. v. Kennedy, 600
 Missouri Valley R. R. Co. v. Caldwell, 587, 588, 589
 Mitchell v. Billingsley, 9, 322
 Mitchell v. Mattingly, 759
 Mitchell v. New York Central and Hudson R. R. Co., 473
 Mitchell v. Parks, 138
 Mitchell v. Rockland, 1321
 Mitchell v. Zimmerman, 1015
 Mitchinson v. Cross, 743
 Mix v. Clute, 700
 Mobile, etc., R. R. Co. v. Hopkins, 587, 599
 Moberly v. Preston, 5, 964
 Moffett v. Brewer, 235
 Mohawk Bridge Co. v. Utica & Schenectady R. R. Co., 258
 Monongahela Bridge Co. v. Kirk, 346
 Montgomery v. Erwin, 451
 Montgomery v. Gilmer, 193
 Montfort v. Hughes, 507
 Monument National Bank v. Globe Works, 721
 Monumoi v. Rogers, 360
 Moody v. Baker, 11, 960
 Moody v. Fleming, 1256
 Moody v. McClelland, 12
 Mooney v. Hudson River R. R. Co., 479
 Mooney v. Kennett, 1193
 Moran v. Dawes, 1095
 Moore, Matter of, 775
 Moore v. Abbott, 1321
 Moor v. Ames, 770
 Moore v. Appleton, 1195
 Moore v. Bennett, 975
 Moore v. Bond, 983
 Moore v. Butler, 931, 932
 Moor v. Campbell, 371
 Moore v. Goedel, 83
 Moore v. Levert, 324, 326
 Moore v. Masseni, 316
 Moore v. Minneapolis, 1312
 Moore v. Noble, 1038
 Moore v. Sanborne, 346
 Moore v. Smith, 297
 Moores v. Moores, 1065
 Morehouse v. Cotheal, 281
 Morey v. Newfane, 1299, 1300
 Morford v. Woodworth, 256
 Morgan v. Bliss, 6
 Morgan v. Dudley, 772, 828
 Morgan v. King, 348
 Morgan v. Gongton, 538
 Morgan v. Livingston, 988
 Morgan v. Monmouth Plankroad Co., 1264
 Morgan v. Reading, 346
 Morgan v. Rhodes, 40
 Morgan v. Skidmore, 1009
 Morrill v. Aden, 1127
 Morrill v. Graham, 499
 Morris v. Brower, 192, 194
 Morris v. Berkley, 442
 Morris v. Thomson, 450
 Morris v. Morris, 1061
 Morris v. Platt, 3
 Morris Canal & Banking Co. v. Ryerson, 176
 Morrison v. Chapin, 138
 Morrison v. Lawrence, 1302
 Morrison v. Marquardt, 114, 150, 265, 267
 Morrison v. Morrison, 1065
 Morrison v. Ponder, 545
 Morrissey v. Wiggins Ferry Co., 27, 495
 Morse v. Boston, 1310, 1316
 Morse v. Brainerd, 596
 Morse v. Copeland, 100, 161
 Morse v. Marshall, 141
 Morse v. Rutland & Burlington R. R. Co., 214
 Morse v. Ranno, 267
 Morton v. Scull, 1036, 1185
 Moses v. Boston & Maine R. R. Co., 587
 Moses v. Mead, 1024
 Moses v. Walker, 398
 Mosier v. Caldwell, 79, 82

Mott v. Comstock, 958
 Motter v. Primrose, 1280
 Moulton v. Libbey, 132
 Mousler v. Harding, 994
 Mouse's Case, 1306
 Mower v. Leicester, 1298
 Mowry v. Miller, 758
 Mowry v. Walsh, 420
 Moyer v. Moyer, 995
 Mueller v. St. Louis, etc., R. R. Co., 383
 Mullin v. Stricken, 114, 150
 Mulligan v. Elias, 192, 195, 258
 Mulvehall v. Millward, 1091
 Mumford v. Wardwell, 345
 Mumford v. Whitney, 96, 98, 99
 Murdock v. Gifford, 291, 292, 294
 Murdock v. Warwick, 1321
 Murray v. Burling, 395
 Murray v. South Carolina R. R. Co., 328, 490
 Murray v. Murray, 961
 Murray v. Long, 742, 743
 Murray v. New York Central R. R. Co., 214, 216, 221
 Murphy and wife v. Deane, 28, 493, 494, 495, 516
 Murphy v. Gloucester, 1309
 Murphy v. Redler, 742
 Murphy v. Stout, 993
 Murphy v. Troutman, 820
 Munch v. New York Central R. R. Co., 215
 Munger v. Hess, 398
 Munns v. Dupont, 728
 Munro v. Dupont, 764
 Munro v. Gairdner, 1016
 Munroe v. Stickney, 90
 Munson v. Hungerford, 135
 Murtaugh v. St. Louis, 1303
 Muse v. Vidal, 828
 Mussey v. Perkins, 444
 Myers v. Gemmel, 150
 Myers v. Mayfield, 634, 639
 Myers v. Myers, 1069
 Myers v. Walker, 529
 Myrick v. Downer, 1132
 Mizell v. Sims, 1038

N

Nadenbousch v. Sharer, 1121
 Nagle v. Mullison, 322, 382, 1193
 Naugatuck R. R. Co. v. Waterbury Button Co., 596
 Napier v. Bulwinkle, 150
 Nash v. Orr, 764
 Nashua Lock Co. v. Worcester & Nashua R. R. Co., 596
 Nashville & Chattanooga R. R. Co. v. Peacock, 215
 Nashville, etc., R. R. Co. v. Elliott, 226
 Neal v. Gillett, 8, 26
 Neal v. Salys, 96

Neal v. Weare Bank, 404
 Neel v. Neel, 284
 Nebraska City v. Campbell, 1309
 Neff v. Clute, 462
 Neil v. Allenhofen, 926
 Nelson v. Musgrave, 928
 Nelson v. Borchenius, 926, 957
 Nellis v. New York Central R. R. Co., 603
 Neth v. Crofut, 799
 Nettleton v. Sikes, 377
 Nevins v. Bay State, etc., Co., 570.
 Nevair v. Roup, 539
 New Albany, etc., R. R. Co. v. Aston, 215
 New Albany, etc., R. R. Co. v. Bishop, 215
 New Albany etc., R. R. Co. v. Peterson, 82
 Newberry v. New York, 1305, 1306
 Newell v. Downs, 743
 Newbit v. Statuck, 955
 Newbraugh v. Curry, 928
 New Boston Coal, etc., Co. v. Pottsville Water Co., 261
 New Brunswick Co. v. Tiers, 575, 576
 New England Express Co. v. Maine Central R. R. Co., 572, 631
 Newhall v. Ireson, 10, 172, 350
 New Ipswich Factory v. Batchelder, 102
 New Jersey R. R. Co. v. Kennard, 969
 Newkirk v. Dalton, 397, 417
 Newkirk v. Sabler, 100
 New Orleans, etc., R. R. Co. v. Harrison, 493
 New Orleans, etc., R. R. Co. v. Stat-ham, 1193
 Newman, *Ex parte*, 1258
 Newman v. Alvord, 1050, 1051
 Newman v. Tiernan, 834
 New York & Erie R. R. Co. v. Skinner, 215, 216
 Newson v. New York Central R. R. Co., 219
 New York Life Ins. & Trust Co. v. Miller, 105, 165
 New York & Washington Printing Telegraph Co. v. Dryburgh, 535, 536
 Newport v. Taylor, 16
 Newsum v. Newsum, 398
 Nichols v. Aylor, 136, 154
 Nichols v. Guy, 957
 Nichols v. Holliday, 537, 616
 Nichols v. Luce, 106, 165
 Nichols v. Michael, 1031
 Nichols v. Packard, 974
 Nichols v. Pinner, 395
 Nichols v. Valentine, 2
 Nims v. Mayor, etc., of Troy, 1314
 Nitingale v. Scannell, 821
 Noble v. Bosworth, 293
 Noble v. Smith, 414
 Nogees v. Nogees, 1061, 1063
 Nolen v. Colt, 407

Nolton v. Western R. R. Co., 470
 Norris v. Elliott, 988
 Norris v. Farmers' & Teamsters' Co., 16
 Norristown v. Moyer, 1312
 North Lebanon v. Arnold, 1322
 North Pennsylvania R. R. Co. v. Mahoney, 26, 494, 511, 1158
 North Penn. R. R. Co. v. Robinson, 506
 North Penh. R. R. Co. v. Rehman, 215
 Northern, etc., R. R. Co. v. State, 494, 495
 Northrop v. Hill, 1164
 Norton v. Hooten, 1028
 Norton v. Gordon, 983
 Northern Indiana R. R. Co. v. Martin, 216
 Norton v. Sewell, 496, 1103
 Norton v. Valentine, 80
 Norwich v. Breed, 201, 205
 Noyes v. Colby, 324, 327, 359
 Noyes v. Rutland and B. R. R. Co., 596
 Noyes v. Smith, 225, 491
 Noyes v. Stillman, 174, 178, 244, 249
 Noyes v. Ward, 733
 Nutting v. Connecticut R. R. Co., 596
 Nye v. Merriam, 35, 972, 1004, 1042, 1193
 Nye v. Otis, 956, 972

O

Oakley v. Farrington, 954, 960
 Oakley v. Harrington, 926
 O'Bar v. Alexander, 499
 Oberlander v. Spiess, 1007, 1016, 1017, 1041
 Obier v. Neal, 727
 O'Brien v. St. Paul, 1314
 Occum Co. v. Sprague, etc., Co., 6
 Ochus v. Sheldon, 773
 Odell v. Stephens, 1097
 Odiorne v. Bacon, 954
 Odiorne v. Keyser, 954
 O'Donaghue v. McGovern, 935
 Odour v. Odour, 1061
 Certel v. Wood, 13
 O'Fallon v. Daggett, 346
 O'Farrill v. Nance, 639
 Ogden v. Grove, 114
 Ogden v. Riley, 957, 969
 Ogg v. City of Lansing, 1303
 O'Hanlon v. Myres, 954
 Ohio & Mississippi R. R. Co. v. Shauefelt, 306
 Okeson v. Patterson, 138
 Oldfield New York and Harlem R. R. Co., 519, 520
 Oldham v. Sparks, 498
 Oliver v. Chapman, 1193
 Oliver v. Worcester, 1299, 1300, 1309, 1316
 Olmsted v. Brown, 7, 964
 Olmstead v. Miller, 961, 983

Olmstead v. Partridge, 747
 O'Maley v. Dorn, 475
 Omara v. Hudson River R. R. Co., 471
 O'Marer v. Hudson River R. R. Co., 520
 Ombony v. Jones, 295, 298, 299
 Oneida Manufacturing Co. v. Lawrence, 1023
 O'Neil v. Sears, 495
 Onimit v. Henshaw, 570
 Onstott v. Murray, 265
 Oraam v. Franklin, 952
 Orange Bank v. Brown, 571
 Oregon Iron Co. v. Trullinger, 114, 183
 Orleans Navigation Co. v. Mayor of New Orleans, 117
 Ormsby v. Douglass, 941
 Orr v. Bank of the United States, 721
 Orr v. City of Brooklyn, 355
 Orr v. Orr, 1064
 Orr v. Skofield, 957
 Ottawa Gas Light Co. v. Thompson, 81
 Osborn v. Union Ferry Co., 605
 Osgood v. Manhattan Co., 1321
 Osincup v. Nichols, 30, 231
 Osterhout v. Roberts, 442
 Oswald v. Grenet, 268, 271
 Othema Lodge v. Lewis, 112
 Ousiy v. Hardin, 1193
 Overend & Co. v. Gibbs, 502
 Overton v. Phelan, 1021
 Overton v. Williston, 397, 443
 Overseers of Crown Point v. Warner, 607
 Overseers of Washington v. Overseers of Beaver, 831
 Owings v. Jones, 176, 196, 197, 198, 244
 Owen v. Boyle, 648
 Owen v. Field, 116
 Owen v. Hudson River R. R. Co., 494
 Owens v. Connes, 634
 Owings v. Emery, 282
 Owsley v. Montgomery, etc., R. R. Co., 759, 1118
 Oxford v. Peter, 32

P

Pacific R. R. Co. v. Governor, 1262
 Packard v. Northcraft, 609, 612
 Paddock v. Fletcher, 1009, 1010
 Paddock v. Salisbury, 995
 Paddock v. Strobbridge, 1032
 Padelford v. Padelford, 284, 308
 Page v. Hollingsworth, 326
 Page v. Olcott, 329
 Paige v. O'Neal, 398, 813
 Page v. Parker, 1177
 Paine, *Ex parte*, 1271
 Pallet v. Sargent, 993, 995
 Palmer v. Andover, 1309
 Palmer v. Avery, 751
 Palmer v. Concord, 932, 950

- Palmer v. De Witt, 13, 51, 55
 Palmer v. Harris, 1055
 Palmer v. Haskins, 992
 Palmer v. Palmer, 1064
 Palmer v. Portsmouth, 1309
 Palmer v. Silverthorn, 176
 Palmer v. Skillenger, 730
 Palmer v. Tuttle, 359
 Pangburn v. Bull, 742, 752
 Painter v. Baker, 393
 Paris v. People, 1323
 Paris v. Waddell, 764
 Parrish v. Stephens, 261, 269
 Park v. Baker, 292
 Park v. McDaniels, 403
 Parks v. City of Newburyport, 72
 Parker v. Boston & Maine R. R., 79
 Parker v. Chambliss, 308
 Parker v. Cutler Mill Dam Co., 132
 Parker v. Farley, 765
 Parker v. Farmingham, 158
 Parker v. Foote, 90, 138, 150, 172, 974
 Parker v. Griswold, 9, 90, 172
 Parker v. Hotchkiss, 78, 144
 Parker v. Macon, 1316
 Parker v. Meader, 955
 Parker v. People, 272
 Parker v. Winnipiseogee Lake, etc., Co., 257, 258
 Parkhurst v. Ketchum, 995
 Parmer v. Anderson, 957
 Parrott v. Barney, 308
 Parrott v. Dubignore, 443
 Partridge v. Gilbert, 111, 171
 Parsons v. Brown, 694
 Parsons v. Winchell, 507
 Parsons v. Hopper, 760
 Passinger v. Thornburn, 1187
 Passenger R. R. Co. v. Young, 32, 33
 Patch v. Covington, 1303
 Pattee v. Gilmore, 448
 Patton v. Freeman, 417
 Patten v. Gurney, 740
 Patten v. Halstead, 798
 Patterson v. North Carolina R. R. Co., 555
 Patterson v. Railroad Co., 491
 Patterson v. Thompson, 1091
 Patterson v. Wilkinson, 926, 974
 Paul v. Halferty, 11
 Pawlet v. Rutland & Washington R. R. Co., 246
 Pawley v. Holly, 510, 566
 Payne v. Lowell, 1310
 Peak v. Hayden, 189
 Peak v. Oldham, 956
 Pearce v. Atwood, 795
 Pearsoll v. Chapin, 44
 Pearsall v. Post, 135
 Peck v. Batchelder, 292
 Peck v. Ellis, 1195
 Peck v. Freeholders of Essex,
 Peckham v. Tomlinson, 719
 Peck v. Austin, 1305
 Peck v. Elder, 1229
 Peck v. Smith, 349
 Peeler v. Guilkey, 414
 Peet v. Chicago, etc., R. R. Co., 574
 Pegram v. Cleveland County, 1276
 Pegram v. Styron, 957
 Pegram v. Stoltz, 983
 Peirce v. Benjamin, 448
 Pelluz v. Bullerdelck, 296
 Pemberton v. Smith, 449
 Pemberton v. Van Rensselaar, 639
 Pendleton v. Davis, 733
 Penn v. Buffalo and Erie R. R. Co., 574
 Penn v. Ward, 732
 Pennington v. Meeks, 983, 988
 Pennoyer v. Saganaw, 244
 Pennewill v. Cullen, 576
 Penrose v. Curren, 1126
 Pennsylvania R. R. Co. v. Brooks, 1177
 Pennsylvania R. R. Co. v. Butler, 587
 Pennsylvania and Ohio Canal Co. v. Graham, 222
 Pennsylvania R. R. Co. v. Henderson, 470
 Pennsylvania R. R. Co. v. Heller, 504
 Pennsylvania R. R. v. Kerr, 29, 304, 306
 People v. St. Louis, 346
 People v. Albany, 1315
 People v. Canal Appraisers, 345
 Peoria Bridge Association v. Loomis, 33
 People v. Bacon, 1262
 People v. Bennett, 1276
 People v. Bissell, 1261, 1262
 People v. Board of Police, 1272
 People v. Booth, 1256
 People v. Brooks, 1281
 People v. Carey, 263
 People v. Canal Appraisers, 346
 People v. Chicago, 1265
 People v. Circuit Court of Branch County, 1259
 People v. Clerk of Marine Court, 1261
 People v. Clute, 1240
 People v. Collins, 1275
 People v. Common Council of Brooklyn, 1257
 People v. Common Council of New York, 1282
 People v. Cunningham, 199
 People v. Corporation of New York, 1272
 People v. Curyea, 1278
 People v. Detroit, 1272
 People v. Dowling, 1256
 People v. Edmonds, 1265
 People v. Erwin, 263
 People v. Fauerbuck, 263
 People v. Hatch, 1256, 1264, 1265
 People v. Hawkins, 1264, 1265
 People v. Head, 1264, 1266, 1272
 People v. Hubbard, 1256, 1259
 People v. Jackson, 269
 People v. Jones, 265, 267, 607, 608
 People v. Judges of Dutches, 1258

- People v. Judges of Dutchess, 1259
 People v. Justices of Chenango, 1259
 People v. Justices of Delaware, 1259
 People v. Kilduff, 1266
 People v. Kingman, 269
 People v. Loucks, 1261
 People v. Mayor of New York, 1264
 People v. Mead, 1264
 People v. Marine Court, 1240, 1242
 Peoria, etc., R. R. Co. v. McIntyre, 555
 People v. Medical Society, 1271
 People v. Norton, 1264
 People v. Olds, 1264
 People v. Pacheco, 1265
 People v. Regents of the University, 1275
 People v. Romero, 1280
 People v. Solomon, 1277
 People v. Sands, 262
 People v. Scrugham, 1272
 People v. Secretary of State, 1266
 People v. Sexton, 1259
 People v. Steele, 1270, 1273
 People v. Stevens, 1264, 1272
 People v. Supervisors of Chenango, 1265
 People v. Supervisors of Dutchess, 1256
 People v. Supervisors of New York, 1319
 People v. Supervisors of Otsego County, 1257
 People v. Supervisors of Westchester, 1256
 People v. Tibbetts, 345, 347
 People v. Thompson, 1264, 1266
 People v. Throop, 1274
 People v. Van Alstyne, 269
 Pesterfield v. Vickers, 1302, 1303
 People v. Walker, 1274
 People v. Warren, 799, 803
 People v. Wayne, 1240
 People v. Weston, 1259
 People v. Williams, 1277
 People v. Winnehammer, 1306
 People v. Yates, 1262
 Percy v. Clary, 1195
 Perdue v. Burnett, 955
 Perdu v. Connerly, 758
 Perkins v. Dow, 78
 Perkins v. Dunham, 160
 Perkins v. Mitchell, 929, 935
 Perkins v. New York Central R. R. Co., 533
 Perkins v. Portland, Saco & Portsmouth R. R. Co., 596
 Perkins v. Towle, 9, 322, 382
 Perkins v. Wright, 599
 Perley v. Eastern R. R. Co., 304, 306
 Perley v. Chandler, 332, 349
 Perley v. Georgetown, 1302
 Perley v. Langley, 116, 135
 Perrin v. Garfield, 137, 156
 Perrin v. New York Central R. R. Co., 350
 Perrin v. Oliver, 16
 Perrin v. Blanchard, 1194
 Perrine v. Serrel, 1014
 Person v. Warren R. R. Co., 1274
 Perrott v. Sheare, 519
 Perry v. Marsh, 223
 Perry v. Phipps, 231
 Perry v. Ricketts, 225
 Peter v. Bloeker, 1088
 Peters v. New Orleans, etc., R. R. Co., 592
 Peterson v. Gresham, 1184, 1199
 Pettigrew v. Chellis, 1038
 Pettigrew v. Village of Evansville, 72
 Pettingill v. Porter, 103
 Pettingill v. Rideout, 40, 417
 Pfau v. Reynolds, 1315
 Phealing v. Kenderdine, 1096, 1097
 Phelps v. Sill, 770
 Phelps v. Wait 507
 Phifer v. Cox, 380
 Philadelphia, Wilmington & Baltimore R. R. Co. v. Quigley, 933, 972, 1193
 Philadelphia & Reading R. R. Co. v. Derby, 31, 32, 469, 477
 Philadelphia, etc., R. R. Co. v. State, 196
 Philadelphia, etc. R. R. Co. v. Spearen, 26
 Philbrick v. Foster, 693, 732
 Phillips v. Allen, 285
 Phillips v. Bonham, 747
 Phillips v. Bowers, 350
 Phillips v. Bridge, 498
 Phillips v. Brigham, 376
 Phillips v. Commonwealth, 1323
 Phillips v. Condon, 523
 Phillips v. Earle, 579
 Phillips v. Hoeffer, 958
 Phillips v. Oyster, 326
 Phillips v. Phillips, 375, 1063, 1070, 1202
 Phillips v. Rhodes, 141
 Phillips v. Ronald, 818
 Phillips v. Veazie, 1317
 Phinckle v. Vaughn, 955, 974
 Phinizy v. City Council of Augusta, 1315
 Phoenix v. Clark, 317
 Phoenix Water Co. v. Fletcher, 146
 Pickens v. Diecker, 34
 Pickard v. Collins, 176, 196, 244
 Pickett v. Crook, 1193
 Picquet v. McKay, 452, 540
 Pierce v. McCloud, 136
 Pierce v. Dart, 241, 242
 Pierce v. Fernald, 137, 138, 150, 158
 Pierce v. Hall, 9
 Pierce v. Pierce, 1064
 Pierce v. Selleck, 105
 Pierce v. Scott, 649
 Pierson v. Post, 413
 Pike v. Bright, 44
 Pike v. Dilling, 1193
 Pike v. Elliott, 359
 Pike v. Hanson, 697
 Pillau v. Love, 297

- Pillsbury v. Moore, 160, 176, 196, 243,
 1116, 1160, 1163
 Pillsbury v. Webb, 398
 Pinney v. Andrus, 1013
 Pinkerton v. Woodward 606
 Piper v. Manny, 613
 Piper v. Pearson, 829
 Piscataqua Bank v. Turnley, 417
 Pitts v. Pace, 987
 Pitts v. Pitts, 1070
 Pittsburgh City v. Grier, 223
 Pittsburgh, etc., R. R. Co. v. Gilleland,
 219
 Pittsburgh, etc., R. R. Co. v. Vining, 26
 Pittock v. O'Niell, 996
 Pixley v. Clark, 79, 80, 83
 Pledger v. Hathcock, 961
 Plympton v. Converse, 155, 159
 Plummer v. Harbut, 20
 Plummer v. Green, 744
 Plumleigh v. Dawson, 90, 172
 Poe v. Grever, 956
 Poer v. Peebles, 634
 Polk v. Allen, 398
 Pollard v. Barnes, 136, 154, 155
 Pollard v. Hagan, 345
 Pollard v. Woburn, 1321
 Pollett v. Long, 7
 Polly v. McCall, 136, 138
 Pool v. Devers, 993
 Poor v. Oakman, 295
 Poor v. Poor, 1061
 Pope v. Tucker, 443
 Pope v. Welsh, 996
 Pophan v. Wilcox, 1052
 Porch v. Frees, 285, 318
 Porcher v. North Eastern R. R. Co.,
 568, 575
 Port v. Williams, 1023
 Porter v. Botkins, 994
 Porter v. Nekervis, 1319
 Porter v. New York Central R. R. Co.,
 603
 Porter v. Seiler, 1193
 Porter v. Sullivan, 359
 Post v. Pearsall, 116, 126
 Potiers, Exr. v. Burden, 93
 Potter v. Cromwell, 293, 294
 Potter v. Luther, 1172
 Potter v. Mayo, 546
 Potter v. Seale, 743
 Potter v. Thompson, 983
 Potts v. Imlay, 752
 Pottstown Gas Co. v. Murphy, 198
 Pound v. Plumstead Board of Works,
 332
 Pow v. Beckner, 700, 703, 709
 Powell v. Bagg, 136, 154
 Powell v. McAshan, 297
 Powell v. Monsen Co., 292
 Powell v. Mills, 571, 575, 606
 Powell v. Myers, 575, 580, 587, 598
 Powell v. Pennsylvania R. R. Co., 592
 Powers v. Presgraves, 994
 Powers v. Sawyer, 448
 Pratt v. Gardner, 770
 Pratt v. Hill, 834
 Pratt v. Ogdensburgh, etc., R. R. Co.,
 592
 Pray v. Jersey City, 1308, 1311
 Preble v. Brown, 132
 Prell v. McDonald, 36
 Prentiss v. Shaw, 733
 Prescott v. Gonser, 1260, 1264, 1268
 Prescott v. Norris, 1126, 1127
 Prescott v. Wright, 448
 Prescott v. White, 104, 106
 Prescott v. Williams, 104, 106
 President, etc., of Odell v. Shroeder,
 1301
 Preston v. Briggs, 292
 Preston v. Cooper, 742
 Preston v. Navasotee, 268
 Price v. Hartshorn, 575
 Price v. New Jersey R. R. Co., 215
 Price v. Oswego & Syracuse R. R. Co.
 594
 Price v. Powell, 618
 Price v. Whitely, 992
 Proffit v. Henderson, 278
 Proctor v. Lewiston, 271
 Propeller Monticello v. Gilbert Mollison,
 519
 Prosser v. Wapello Co., 16
 Providence Gas Co. v. Thurber, 294, 297
 Providence v. Clapp, 1309, 1310
 Pruitt v. Cox, 1096
 Puckett v. White, 1260
 Pue v. Pue, 136, 138, 161, 162
 Pugh v. McCarty, 993, 996
 Pulver v. Harris, 545
 Purcell v. Archer, 983
 Purcell v. Southern Express Co., 587
 Purcell v. Thomas, 634
 Purdy v. People, 1300
 Purfel v. Sands, 643
 Purple v. Horton, 983
 Purvis v. Coleman, 609, 614
 Putney v. Day, 118
 Putnam v. Payne, 231
 Pynchon v. Stearns, 280, 281
 Pyle v. Pennock, 294
- Q
- Quimbo Appo v. People, 1237
 Quincy Canal Co. v. Newcomb, 241
 Quinn v. O'Gara, 955, 957
 Quimit v. Henshaw, 599
- R
- Raddle v. Ruckgaber, 760
 Radcliff's Executors v. Mayor, etc., of
 Brooklyn, 73, 74, 80, 150, 882, 1307,
 1308

- Radway v. Briggs, 223
 Rail v. Potts, 37
 Railroad v. Blocher, 33
 Railroad Co. v. Barrows, 597
 Railroad v. Finney, 33
 Railroad v. Hurst, 1193
 Railroad v. Harris, 597
 Railroad v. Vandiver, 33
 Railroad Co. v. Aspell, 467, 469
 Railroad Co. v. Gladman, 1321
 Railroad Co. v. Manufacturing Co., 587, 625
 Railroad Co. v. Rogers, 32
 Railroad Co. v. Reeves, 575
 Rainey v. Dunning, 798
 Rainy v. Bravo, 983, 984
 Raisler v. Springer, 1177
 Ranger v. Goodrich, 5, 961, 994
 Ramsden v. Boston and Albany R. R. Co., 32, 721
 Ramaley v. Leland, 609, 614
 Randall, petitioner, 1259
 Randall v. McLaughlin, 103
 Randall v. Railroad Co., 1311
 Rank v. Rank, 462, 448
 Rapbo v. Moore, 1311, 1312
 Rathbun v. Rathbun, 1067
 Rawson v. Pennsylvania R. R. Co., 599
 Ray v. Lynes, 194
 Ray v. Sellers, 176, 196, 242
 Raymond v. Lowell, 1309
 Raymond v. Williams, 1185, 1203
 Rayne v. Taylor, 991
 Raynes v. McNarry, 406
 Rea v. Tucker, 1096
 Reed v. Spaulding, 576
 Reading v. Commonwealth, 1264
 Reaves v. Waterman, 577
 Re Bahia and San Francisco Railroad Co., 1295
 Redington v. Chase, 407
 Redlon v. Barker, 392
 Redmond v. Liverpool, New York and Philadelphia Steamship Co., 595
 Redway v. Gray, 955
 Reed v. Belfast, 1309, 1322
 Reed v. Leeds, 349
 Reed v. Northfield, 1313
 Reed v. Reed, 284, 1061
 Reed v. Pacific Ins. Co., 544
 Reed v. Spaulding, 414
 Reed v. Purdy, 733, 1193
 Reeside v. Walker, 1266
 Reed v. Williams, 1098
 Reeves v. McKenzie, 634
 Regnier v. Cabott, 995
 Rehauser v. Scherger, 973
 Reid v. Gifford, 92
 Reid v. Reid, 1064
 Reigholds v. Edwards, 379
 Reilly v. Cavanaugh, 497
 Reimer v. Stuber, 137, 157
 Reimold v. Moore, 107
 Reinhard v. New York, 1312
 Relf v. Rapp, 24
 Renck v. McGregor, 700, 1199
 Reno v. Wilson, 768
 Rennoyer v. Saginaw, 1298
 Requa v. City of Rochester, 1312, 1313
 Rerick v. Kern, 99
 Rerel v. Carnsi, 55
 Respublica v. Caldwell, 264
 Respublica v. Davis, 982
 Respublica v. De Longchamps, 682
 Respublica v. Oswald, 775
 Respublica v. Passmore, 775
 Respublica v. Sparhawk, 1306
 Reston v. Morris, 406
 Reubens v. Joel, 319
 Revell v. Blake, 454
 Revill v. Pettitt, 771, 829
 Revek v. Newark, 1308
 Rex v. Horn, 974
 Rey v. Toney, 532
 Reynolds v. Hindman, 226
 Reynolds v. Shreveport, 1307
 Reynolds v. Shuler, 299
 Reynolds v. Taylor, 1266
 Rhea v. White, 1195
 Rhodes v. Cincinnati, 1307
 Rhodes v. Dunbar, 258
 Rhodes v. McCornick, 112
 Rhodes v. Otis, 346
 Rhodes v. Whitehead, 154, 160
 Ricard v. Williams, 138
 Rice v. Hathaway, 359
 Rice v. Hollenbeck, 460
 Rice v. Ruddiman, 349
 Rice v. Worcester, 349
 Richards v. Enfield, 1309
 Richards v. Fugua, 605
 Richards v. Rich, 601
 Richards v. Richards, 1061
 Richards v. State, 690
 Richards v. Torbet, 281
 Richards v. Westcott, 24
 Richardson v. Bigelow, 174
 Richardson v. Borden, 291, 292, 293, 294
 Richardson v. Fouts, 1097
 Richardson v. Milburn, 325
 Richardson v. New York Central R. R. Co., 474
 Richardson v. Palmer, 373
 Richardson v. Pond, 150, 153, 181, 182
 Richardson v. Roberts, 5, 926, 993
 Richmond v. Long, 20
 Richmond v. Long's Adm'rs, 1297, 1303
 Richmond v. Sacramento, etc., R. R. Co., 27, 495
 Richmond, etc., Co. v. Rogers, 16
 Ricker v. Freeman, 510
 Ripley v. Davis, 406, 458
 Ridgely v. Bond, 373
 Riddle v. Driver, 410
 Riddle v. Welden, 648
 Riggs v. Denniston, 959
 Riggs v. State, 39
 Riley v. Whittaker, 797

- Riley v. Nugent, 993
 Ring v. Wheeler, 934, 966
 Ringle v. Weston, 1157
 Riopelle v. Gillmour, 138
 Rittenhouse v. Independent Line of
 Telegraph, 536
 Ritchey v. Davis, 742, 743
 Ritger v. Parker, 151, 159, 167
 Roath v. Driscoll, 74, 79, 82
 Roberts v. Berdell, 1164
 Roberts v. Bye, 112
 Roberts v. Chicago, 1307
 Roberts v. Connelly, 1090
 Roberts v. Dillon, 418
 Roberts v. Dauphin Deposit Bank, 300
 Roberts v. Mason, 1193
 Roberts v. Muir, 1203
 Roberts v. Roberts, 94
 Roberts v. Smith, 225
 Roberts v. Tennell, 634, 636
 Robertson v. Crane, 402
 Robertson v. Spring, 742
 Robertson v. Wellsville, 265, 266, 267
 Robeson v. Pittenger, 150
 Robbins v. Fletcher, 972, 988
 Robbins v. Robbins, 1063
 Robbins v. Treadway, 928, 952
 Robinson v. Barrows, 458
 Robinson v. Chamberlain, 21, 221
 Robinson v. Calp, 40, 417
 Robinson v. Cone, 26
 Robinson v. Drummond, 993
 Robinson v. Douchy, 420
 Robinson v. Hartridge, 399, 450, 455,
 458
 Robinson v. Holt, 411
 Robinson v. Hawkins, 693
 Robinson v. Pioche, 28
 Robinson v. Renwick, 317
 Robinson v. Wheeler, 310
 Robson v. Northeastern R. R. Co., 470
 Robinett v. Ruby, 965
 Rockwell v. Brown, 767, 1159
 Rochester v. Anderson, 736
 Rochester White Lead Co. v. City of
 Rochester, 20, 772, 1298, 1304
 Rodelbaugh v. Hollingsworth, 985
 Rodgers v. Lacey, 5, 961
 Roehlen v. Aid Society, 1273
 Rogan v. Perry, 371, 372
 Rogers v. Brown, 653
 Rogers v. Gelinger, 294
 Rogers v. Lamb, 767
 Rogers Locomotive, etc., Works v. Erie
 R. R. Co., 572, 631
 Rogers v. Rogers, 1065
 Rogers v. Stewart, 246, 260
 Rogers v. Taintor, 1054
 Rogers v. Weir, 399, 402, 403
 Rogers v. Wheeler, 593
 Roll v. Augusta, 1307
 Rollins v. Clay, 358
 Rome v. Omberg, 1307
 Rome R. R. Co. v. Sullivan, 596
 Romeo v. Chapman, 1319
 Romaine v. Van Allen, 458, 460
 Rooney v. Second Avenue R. R. Co.,
 546
 Rood v. N. Y. and Erie R. R. Co., 307
 Root v. Bonnama, 411
 Root v. French, 395, 420
 Root v. Great Western R. R. Co., 596
 Root v. King, 993
 Rowand v. Bellinger, 247
 Rowe v. Addison, 1304
 Rowe v. Smith, 327, 1036, 1124
 Rowe v. Granite Bridge Co., 261, 262
 Rowell v. Lowell, 1309
 Rowley v. Houghton, 1052
 Rose v. Burn, 101
 Rose v. Hurley, 1012
 Rosenstein v. Brown, 751
 Ross v. Innis, 728, 747, 1185, 1199
 Ross v. Butler, 192, 257
 Ross v. Madison, 1298
 Ross v. Mather, 1012, 1038
 Ross v. Randolph, 261
 Rossiter v. Hall, 53
 Rotan v. Fletcher, 455
 Rotch v. Hawes, 395 525,
 Roth v. Buffalo and State Line R. R. Co.,
 575, 598, 599
 Roth v. Wells, 411
 Rounds v. Mansfield, 1319
 Roundtree v. Brantley, 90
 Royce v. Guggenheim, 115, 150
 Ruckman v. Outwater, 293
 Ruffner v. Williams, 700, 1121
 Runkle v. Meyer, 979
 Runkle v. Winemiller, 1270
 Runyon v. Bordine, 1316
 Runyon v. Central R. R. Co., 493
 Rusch v. Davenport, 1321
 Rush v. Cavanaugh, 954, 959
 Russell & Annis v. Livingston & Wells,
 594
 Russell v. Elliott, 1259
 Russell v. Haddock, 545
 Russell v. Hudson River R. R. Co., 490,
 492
 Russell v. Kearney, 461
 Russell Manufacturing Co. v. New Ha-
 ven Steamboat Co., 595
 Russell v. Mayor, etc., of New York,
 1306
 Russell v. Turner, 820
 Russell v. Richards, 397
 Rust v. Dow, 96
 Rust v. Low, 149
 Rutledge v. Rutledge, 1065
 Ryan v. Capes, 1315
 Ryan v. Cumberland Valley R. R. Co.,
 492
 Ryan v. Fowler, 224, 225
 Ryan v. New York Central R. R. Co.,
 29, 304, 306
 Ryan v. Lawrence, 293
 Ryburn v. Pryor, 458

Ryland v. Peters, 571
 Ryder v. Hathaway, 410

S

- Sackett v. Sackett, 308
 Safford v. Basto, 371
 Sanford v. Bennett, 934
 Sanford v. Eighth Avenue R. R. Co., 33
 Sanford v. Gaddis, 955, 978, 983
 Sager v. Harpending, 695
 Salisbury v. Herchenroder, 202
 Salomon v. Clagett, 317
 Salt Springs National Bank v. Wheeler, 399, 450, 452, 455
 Salter v. Howard, 1088
 Saltonstall v. Stocton, 568
 Saltus v. Everett, 395, 418
 Sampson v. Burnside, 99
 Sampson v. Smith, 727
 Sanborn v. Hamilton, 395
 Sands v. Joeris, 979
 Sands v. Pfeiffer, 300
 Sands v. Robison, 988
 Sands v. Taylor, 1024
 Sanders v. Egerton, 442
 Sanders v. Johnson, 996
 Sanders v. Rollinson, 966
 Sanders v. Vance, 458
 Sanders v. Young, 605
 Sanderson v. Caldwell, 974, 989, 990, 992
 Sanderson v. Haverstick, 453
 Sanderson v. Hubbard, 974
 Sargent v. Ballard, 138
 Sarles v. New York, 319
 Sarles v. Sarles, 280, 281, 319
 Sarocco v. Geary, 1306
 Sassee v. Clark, 609, 613
 Savage v. Bangor, 1310
 Savage v. Holmes, 1260
 Saverin v. Eddy, 1320
 Sawin v. Guild, 65
 Sawyer v. Corse, 20
 Sawyer v. Eifert, 995, 996
 Sawyer v. Hammott, 118
 Sawyer v. Jackson, 231
 Sayles v. Briggs, 764
 Sayre v. Sayre, 995
 Scammon v. Chicago, 176, 1316
 Scarborough v. Reynolds, 1013
 Schopman v. Boston & Worcester R. R. Co., 597
 Schenley v. Commonwealth, etc., 137, 157
 Schemmer v. North, 295
 Schemerhorn v. L'Espinasse, 320
 Scheley v. Lyon, 460
 Schenck v. Strong, 525, 1126
 Schuneman v. Palmer, 11
 Schlencker v. Risley, 1175
 Schermernhorn v. Van Volkenburg, 455, 1305
 Schiellein v. Supervisors of Kings, 1305
 Schiellina v. Supervisors of Kings Co., 355
 School District v. Boston, etc., R. R. Co., 587
 School District v. Lynch, 136
 Schofield v. Whitelegge, 557
 Schrimper v. Heilman, 988
 Schroder v. Ehlers, 773
 Schurmeier v. St. Paul & Pacific R. R. Co., 346
 Schuyler v. Russ, 1013
 Schuchardt v. Mayor, etc., of New York, 397
 Scudder v. Trenton, 388
 Schwartz v. Gilmore, 508
 Scranton v. Baxter, 523
 Scribner v. Beach, 693, 732
 Scribner v. Kelley, 250, 230
 Scriven v. Gregorie, 165
 Scofield v. Ferrers, 745
 Scott v. Bay, 324
 Scott v. Boston, etc., Steamship Co., 628
 Scott v. Fletcher, 767
 Scott v. Fuller, 236, 634
 Scott v. Hunter, 7
 Scott v. Jester, 540
 Scott v. Mayor, etc., of Manchester, 1304
 Scott v. McKinnish, 983, 994, 995, 996
 Scott v. Rogers, 458
 Sears v. Dennis, 1309
 Seabrook v. King, 104
 Seaman v. New York, 223, 1316
 Secor v. Harris, 955, 958
 Seeley v. Blair, 952
 Seeley v. Bishop, 105, 165
 Seely v. Peters, 326
 Selden v. Delaware and Hudson Canal Co., 98
 Seldon v. Hickock, 496
 Self v. Dunn, 605, 571
 Selma, etc., R. R. Co., *Ex parte*, 1283
 Selman v. Wolfe, 208, 251, 238
 Sellars v. Kinder, 1154
 Seller v. Pacific, 587
 Sellers v. Western Union Telegraph Co., 586
 Severance v. Hilton, 995
 Sexton v. Pike, 546
 Sexton v. Todd, 964
 Seymour v. Ely, 1259
 Seymour v. Cook, 613
 Shafer v. Loucks, 728, 742
 Shea v. Lowell, 1310
 Shank v. Case, 993
 Sharpe v. O'Brien, 1202
 Sharile v. Minneapolis, 1321
 Shattuck v. Myers, 1098
 Shattuck v. Green, 1020
 Shaul v. Brown, 728, 744, 767
 Shaw v. Beebe, 1178
 Shaw v. Berry, 609
 Shaw v. Coffin, 44, 1127

- Shaw v. Davis, 799
 Shaw v. Howell, 1266
 Shaw v. Shaw, 1061
 Sheahan v. Collins, 995
 Shearman v. Shearman, 1064
 Sheckells v. Johnson, 950
 Sheffield v. Sheffield, 1062
 Sheffill v. Van Deusen, 994
 Sheldon v. Kalamazoo, 1301
 Shelfer v. Gooding, 966
 Shepard v. Buffalo, New York & E. R. Co., 214, 215
 Shepard v. Spaulding, 299
 Shepherd v. Hees, 327
 Shepherd v. McQuilkin, 1123
 Sheldon v. Carpenter, 767, 1154
 Sheldon v. Hudson River R. R. Co., 307
 Sheldon v. Rockwell, 320
 Shenley v. Commonwealth, 267, 268
 Sherbourne v. Yuba, 1300
 Sherman v. Dutch, 642, 643
 Sherman v. Fall River, etc., 198
 Sherman v. McKeon, 349
 Sherman v. Rochester & Syracuse R. R. Co., 490, 492
 Sherfey v. Bartley, 229
 Sherley v. Billings, 32, 33
 Sheridan v. Brooklyn City & Newtown R. R. Co., 471
 Sherred v. Cisco, 171
 Sherwood v. Burr, 138
 Sherwood v. Phillips, 635
 Sherry v. Picken, 398
 Shields v. Cunningham, 5
 Shieler v. Isenhower, 359
 Shipley v. Fifty Associates, 202
 Shipman's Case, 1295
 Shipman v. Baxter, 371
 Shinloub v. Ammerman, 955
 Shine v. Wilcox, 316
 Shinmer v. Merry, 605
 Shoecraft v. Bailey, 616
 Shoff v. Wells, 1202
 Short v. Barker, 417
 Shorter v. Smith, 16
 Shoulty v. Miller, 993
 Shroder v. Benneman, 379
 Sibley v. Aldrich, 609
 Sidgreaves v. Myatt, 5, 961
 Sikes v. Johnson, 1126
 Silsbury v. McCoon, 410, 460
 Silliman v. Lewis, 495
 Silver v. Cummings, 1319
 Siverthorne v. Warren R. R. Co., 1265
 Simar v. Canaday, 1018
 Simpson v. Justice, 93
 Simpson v. Keokuk, 1315
 Simpson v. Seavey, 144, 145
 Simpson v. Simpson, 1065
 Simpson v. Wiley, 980
 Simmons v. Cloonan, 102, 114
 Simmons v. Holster, 982, 988, 1032
 Simmons v. Sines, 103
 Sims v. Chance, 524
 Singleton v. Commissioners, 1272
 Sisk v. Hurst, 747, 749
 Skinner v. Hall, 596
 Skinner v. Powers, 978
 Skinner v. Skinner, 1061
 Slatten v. Des Moines Valley R. R. Co., 882
 Sleeper v. Parrish, 653
 Sleight v. Leavenworth, 720
 Sloan v. Petrie, 993
 Slocum v. Clark, 634
 Slomer v. People, 799
 Small v. Clewley, 974
 Small v. Danville, 1300
 Smalley v. Anderson, 5, 954
 Smallwood v. Norton, 498
 Smart v. Blanchard, 984, 986
 Smathers v. Hanks, 496
 Smith, *Ex parte*, 1237, 1240
 Smith v. Bensen, 397
 Smith v. Boston, etc., R. R. Co., 570, 600
 Smith v. Carroll, 293, 294
 Smith v. Causey, 30, 230
 Smith v. Colson, 634
 Smith v. Commonwealth, 263
 Smith v. McConathy, 195
 Smith v. Downing, 462
 Smith v. Dygert, 475
 Smith v. Felt, 1123
 Smith v. Fitzgerald, 258
 Smith v. Floyd, 121, 123, 127
 Smith v. Fyler, 634, 636
 Smith v. Gaffard, 987
 Smith v. Gardner, 475
 Smith v. Hannibal & St. Joseph R. R. Co., 307, 313
 Smith v. Hollister, 983
 Smith v. Howard, 967
 Smith v. James, 443
 Smith v. Kerr, 966
 Smith v. Kinard, 105, 134
 Smith v. Knapp, 820
 Smith v. Levinus, 345
 Smith v. Lovelace, 988
 Smith v. Mayor of New York, 1314, 1318
 Smith v. Milburn, 1097
 Smith v. McConathy, 192
 Smith v. Miles, 984, 985
 Smith v. Miller, 136, 154
 Smith v. Minor, 961
 Smith v. Montgomery, 230
 Smith v. Moore, 300, 1260
 Smith v. North Carolina R. R. Co., 580
 Smith v. New York Central R. R. Co., 533
 Smith v. New Haven, etc., R. R. Co., 492, 592
 Smith v. O'Connor, 26
 Smith v. Pettingill, 387
 Smith v. Silence, 5, 926, 960, 961
 Smith v. Shaw, 799
 Smith v. Sharpe, 310
 Smith v. Smith, 44, 606, 994, 995

- Smith v. State, 265, 297
 Smith v. Tracy, 1027, 1036, 1037
 Smith v. Washington, 1307
 Smith v. Wendell, 1309
 Smyth v. Harvie, 499
 Smyles v. Hastings, 103, 160, 164, 186
 Smyth v. Tankersley, 406
 Smoot v. Hook, 455
 Snediker v. Poorbaugh, 926, 961
 Snedeker v. Warrington, 293, 294
 Snider v. Myers, 360, 371
 Sneddy v. Foster, 818
 Snow v. Judson, 15
 Snow v. Parsons, 81
 Snow v. Wichter, 5, 978
 Snowden v. Wilas, 99
 Suydam v. Moore, 507
 Snyder v. Andrews, 981
 Snyder v. Fulton, 950, 992, 1194
 Snyder v. Kunkleman, 643
 Snyder v. Rockport, 1307
 Snyder v. Vaux, 410
 Society for Establishing Useful Manu-
 factures v. Morris Canal, 319
 Sadowsky v. M'Farland, 523
 Soper v. Henry County, 1300, 1311
 South, etc., R. R. Co., *Ex parte*, 1256
 South Carolina R. R. Co. v. Moore, 203
 South v. Denniston, 1090
 Southern Express Co. v. Caperton, 618,
 619
 Southern Express Co. v. Crook, 593,
 587, 590
 Southern Express Co. v. McVaugh, 571
 Southern Express Co. v. Moon, 575, 587
 Southern Express Co. v. Newby 571,
 575, 587, 593
 Southern Express Co. v. Shea, 587, 589
 Southern Express Co. v. Womack, 575
 Soulard v. St. Louis, 1302
 Southard v. Morris Canal, 259
 Southwick v. Estes, 31, 32
 Southwick v. Southwick, 1064
 Southwick v. Stevens, 929
 Southwood v. Myers, 608
 S. W. and W. R. R. Co. v. Baddely,
 471
 Soultter v. Madison, 1277
 Spafford v. Goodell, 778
 Sparhawk v. Salem, 1309
 Sparhawk v. Union, etc., R. R. Co., 194,
 261
 Sparks v. State Bank, 300
 Sparks v. Purdy, 394, 462
 Sparks v. Messick, 1042
 Spaulding v. Adams, 550
 Spaulding v. Brewster, 418
 Spence v. Chicago, etc., R. R. Co., 215
 Spencer v. McMasters, 5, 993
 Spencer v. McGowen, 651
 Spencer v. McMillan, 560
 Spence v. Perry, 829
 Spooner v. Keeler, 575, 955, 993
 Spooner v. Mattoon, 523
 Sprague v. Birchard, 803
 Sprague v. Smith, 597
 Sprague v. Steere, 259
 Springfield v. Le Claire, 1312
 Stackley v. Pierce, 555
 St. John v. Mayor, etc., of New York,
 1315, 1316
 St. John v. Standing, 406
 St. John v. O'Connell, 398
 St. Louis, Alton & Chicago R. R. Co. v.
 Dalby, 721
 St. Louis v. Gurno, 1307
 St. Louis, etc., R. R. Co. v. Linder, 216
 St. Luke's Church v. Slack, 1267
 St. Paul v. Kerby, 1185
 St. Paul v. Kuby, 1200
 St. Peter's Church v. Beach, 382, 1193
 Stadhecker v. Combs, 571
 State v. Auditor, 1266, 1272
 State v. Atkinson, 263
 State v. Bailey, 263
 State v. Baker, 292
 State v. Baldwin, 264
 State v. Barker, 1262
 State v. Bertheol, 199, 263
 State v. Bridgman, 1264
 State v. Buckley, 263
 State v. Burbank, 1257
 State v. Burlington, 1309, 1323
 State v. Burnham, 979
 State v. Canal, etc., R. R. Co., 1276
 State v. Campbell, 772
 State v. Capp, 770
 State v. Carroll, 834
 State v. Chambers of Commerce, 1279
 State v. Chase, 1262
 State v. Church, 690
 State v. Clark County Court, 1238
 State v. Coffin, 350
 State v. County Judge, 1260
 State v. Crow, 265
 State v. Davenport, 1277
 State v. Davis, 692
 State v. Donaldson, 14
 State v. Dougherty, 1264
 State v. Elliott, 299
 State v. Ely, 1260
 Staat v. Evans, 44
 State v. Franklin Falls Co., 239
 State v. Fletcher, 1262
 State v. Freeport, 262
 State v. Freyburg, 1313
 State v. Gamble, 1266
 State v. Gibson, 693
 State v. Glasgow, 1323
 State v. Glen, 132
 State v. Gorham, 1322
 State v. Governor, 1261, 1280
 State v. Graham, 264
 State v. Graves, 1256
 State v. Haines, 199, 263
 State v. Halford, 798
 State v. Hart, 264
 State v. Hartford, etc., R. R. Co., 1274

- State v. Henderson, 938
 State v. Hudson County, 1322
 State v. Hull, 1280
 State v. Hunter, 265
 State v. Jacobus, 1265
 State v. Jeandell, 982, 988
 State v. Jersey City, 345
 State v. Johnson, 832
 State v. Judge of Sixth District Court
 of New Orleans, 1264
 State v. Judge of Second District Court,
 1259, 1260
 State v. Justices, etc., 1323
 State v. Keokuk, 1278
 State v. Kirke, 1259
 State v. Kirkley, 1301
 State v. Knight, 1259
 State v. La Crosse, 1240
 State v. Layfarth County Court, 1259
 State v. Lehere, 1257, 1280
 State v. Maffit, 1262
 State v. Malcolm, 690
 State v. Manchester and Lawrence R.
 R., 27, 28
 State v. Marble, 269
 State v. Mayor, 1322
 State v. Mayor of Mobile, 261
 State v. McArthur, 1259
 State v. McAuliffe, 1264
 State v. McCullough, 1272
 State v. McAuliffe, 1264
 State v. McCullough, 1272
 State v. McIver, 1275
 State v. McNally, 799
 State v. Meiley, 1264
 State v. Merritt, 780
 State v. Milwaukee, 1277
 State v. Miskimmons, 263
 State v. Moore, 200
 State v. Nathan, 1242
 State v. Nicholson Pavement Co., 1264,
 1265
 State v. Northeastern R. R. Co., 1274
 State v. Northumberland, 379
 State v. Otherton, 265
 State v. Patten, 398
 State v. Perrine, 1260
 State v. Phipps, 263
 State v. Porter, 828
 State v. Purse, 262, 264
 State v. Riggs, 988
 State v. Robinson, 1256
 State v. Shean, 1098
 State v. Sims, 690
 State v. Smith, 263, 690
 State v. Southern Minnesota R. R. Co.,
 1257, 1274
 State v. Stockwell, 1264
 State v. Sutherland, 1098
 State v. Taylor, 192, 1258
 State v. Thibean, 1177
 State v. Third District Court, 1247
 State v. Thomas, 267
 State v. Trask, 269
 State v. Vannoy, 690
 State v. Vermont Central R. R. Co, 264
 State v. Waterman, 1257
 State v. Warmouth, 1261, 1262, 1256
 State v. Warren, 1265
 State v. Wetherall, 195, 262
 State v. Whittingham, 1322
 State v. Wilson, 265, 1256, 1259
 State v. Woods, 798
 State v. Wright, 1259
 State v. Wrotnowski, 1262
 State v. Yarrell, 263
 State v. Zanesville, etc., Co., 1265
 Stackpole v. Healy, 332
 Stambaugh v. Hollabaugh, 362
 Stamps v. Gilman, 651
 Stanley v. Webb, 947
 Stansbury v. Fogle, 728, 758
 Stanton v. Springfield, 1308, 1310
 Starkey v. Starkey, 1064
 Steam v. Anderson, 371
 Steamboat New World v. King, 469
 Stearns v. Janes, 96
 Stearns & Wife v. Sampson, 695
 Stetlar v. Nellis, 736
 Steele v. Brannon, 947
 Steele v. Burkhardt, 494, 495
 Steele, Matter of, 283
 Steel v. Thompson, 634, 636
 Steele v. Townsend, 587
 Steel v. Williams, 759
 Steever v. Beehler, 994
 Steffy v. Carpenter, 181
 Stein v. Ashby, 86
 Stein v. Burden, 90, 172
 Steiber v. Wensel, 5
 Steinman v. McWilliams, 995
 Stern v. Burden, 10, 78
 Stephens v. Benson, 99
 Stephens v. Wilkins, 799, 803
 Stevens v. Beekman, 387
 Stevens v. Boston, etc., R. R. Co., 601
 Stevens v. Bennett, 1178
 Stevens v. Fassett, 747
 Stevens v. Hartwell, 963, 989
 Stevenson v. Hayden, 926
 Stevens v. Nashua, 265
 Stevens v. Paterson & Newark R. R.
 Co., 345
 Stevens v. Oswego & Syracuse R. R.
 Co., 473
 Stevens v. Smith, 558
 Stevens v. Somerindyke, 9
 Stevens v. Walker, 497, 498
 Stephenson v. Little, 411, 452
 Stevenson v. Belknap, 1193, 1200
 Steere v. Field, 797
 Sterling v. Garritee, 452
 Sterling v. Thomas, 1308
 Stetson v. Croskey, 1185
 Stetson v. Day, 283, 308
 Stetson v. Faxon, 241
 Stetson v. Goldsmith, 800
 Stewart v. Bremer, 573

- Stewart v. Flowers, 546
 Stewart v. L. & N.-West R. R., 580
 Stewart v. New Orleans, 1303
 Stewart v. Parsons, 614
 Stewart v. Stewart, 1065
 Stieber v. Wensel, 974
 Strickler v. Todd, 135
 Stickney, *Ex parte*, 1256
 Stiles v. Davis, 399
 Stille v. Jenkins, 1195
 Stilwell v. Barter, 979
 Stimson v. Connecticut, etc., R. R. Co.
 600
 Stimson v. Gardiner, 1309
 Stimson v. New York Central R. R. Co.,
 533
 Stinson v. New York Central R. R. Co.,
 219
 Stitzell v. Reynolds, 987, 988
 Stockbridge Iron Co. v. Hudson Iron
 Co., 144
 Stockwell v. White Lake, 773
 Stokes v. Appomattox Co., 138
 Stokes v. Saltonstall, 468
 Stone v. Augusta, 772
 Stone v. Brooks, 269
 Stone v. Clough, 404
 Stone v. Crocker, 764
 Stone v. Graves, 772
 Stone v. Hubbardston, 1310
 Stone v. Knapp, 323
 Stone v. Matthews, 648
 Stone v. Proctor, 293
 Stone v. Stevens, 742
 Stone v. Varney, 995
 Stonebraker v. Stonebraker, 1051
 Stoneman v. Erie Railway Co., 571
 Stonor v. Shugart, 326, 328
 Storer v. Gowen, 533
 Storer v. Hunter, 299
 Storm v. Mann, 319
 Storrs v. Utica, 1311
 Story v. Hammond, 417
 Story v. Odin, 4, 114, 115, 258
 Stout v. Woody, 1088
 Stout v. Wren, 691
 Stowell v. Lincoln, 10
 Strauss v. Meyer, 934
 Strauss v. Young, 743, 747
 Street v. Gallatin County Comm'rs, 1275
 Street v. Holyoke, 1321
 Streety v. Wood, 933
 Streight v. Bell, 767
 Strickland v. Barrett, 397
 Strong v. Colter, 406
 Strout v. Berry, 360
 Stuart v. Clark, 345, 346
 Stuart v. Hawley, 305
 Stucke v. Milwaukee, etc., R. R. Co., 27
 Studwell v. Shapter, 44, 1031
 Stumps v. Kelly, 230, 392
 Sturgenegger, v. Taylor, 926
 Sturgess v. Bissell, 627
 Sturoc, Matter of, 775
 Sturtevant v. Merrill, 324
 Sudbury v. Stearns, 1267
 Sullivan v. Philadelphia and Reading
 R. R. Co., 467, 468, 472
 Sullivan v. Sullivan, 1063
 Summers v. Vaughn, 1014
 Sunderlin v. Bradstreet, 941, 943
 Supervisors of Galway v. Stimson, 1320
 Supervisors v. United States, 1257
 Sutton v. Board, 1308
 Sutton v. Board of Police, 1303
 Sutton v. Huffman, 1095
 Swan v. Buck, 1266
 Swails v. Butcher, 993
 Swartwout v. Evans, 406
 Swan v. Gray, 1256
 Swan v. Rary, 978
 Swan v. Saddlemire, 740
 Sweet v. Barney, 571, 594, 618
 Sweet v. Cutts, 72, 74, 78, 79, 82, 96
 Sweetland v. Illinois and Mississippi
 Telegraph Co., 535, 536
 Swift v. Dickerman, 994, 995
 Swift v. Thompson, 292, 294
 Swigert v. Graham, 524
 Swindell v. Warden, 1172
 Sykes v. Manhattan, etc., Drying Co.,
 1230
 Symonds v. Carter, 961, 1194
 Symonds v. Harris, 293
 Snyder v. Warford, 105

T

- Tabor v. Bradley, 102
 Taber v. Huston, 733
 Tabor v. Missouri Valley R. R. Co.,
 474
 Taft v. Howard, 974
 Talbot v. Whipple, 299
 Tallman v. Syracuse, Binghamton and
 New York R. R. Co., 214, 216
 Tappan v. Burnham, 372
 Tappan v. Powers, 740
 Tappen v. Wilson, 929
 Tarpley v. Blahey, 996
 Tarver v. State, 690
 Tarwater v. Hannibal, etc., R. R. Co.,
 215
 Tash v. Adams, 320
 Taylor v. Armstrong, 349
 Taylor v. Atlantic Mut. Ins. Co., 249
 Taylor v. Church, 941, 971
 Taylor v. Doremus, 772
 Taylor v. Elexander, 799
 Taylor v. Godfrey, 764
 Taylor v. Grand Trunk R. R. Co., 12,
 467, 469, 473, 475, 517
 Taylor v. Henry, 1267
 Taylor v. Kneeland, 988
 Taylor v. Moran, 972, 983, 987
 Taylor v. Peckham, 1310, 1311
 Taylor v. Plymouth, 1306

- Taylor v. Robinson, 994
 Taylor v. St. Louis, 1307
 Taylor v. Townsend, 296
 Taylor v. Williams, 773
 Taylor v. Wilmington & Manchester R. Co., 16
 Teaff v. Hewitt, 292, 294
 Teall v. Barton, 304
 Teall v. Felton, 22, 401
 Teal v. Sears, 596
 Tefft v. Ashbough, 803
 Telfer v. Northern R. R. Co., 473
 Terhune v. Dever, 1005
 Terpenning v. Gallup, 371
 Terrell v. Bennett, 1038
 Terry v. Bright, 5, 960
 Terry v. Fellows, 948, 967
 Terry v. New York, 1316
 Terry v. Robbins, 267
 Terwilliger v. Wands. 961, 963, 989
 Thames Steamboat Co. v. Housatonic R. R. Co., 32
 Thayer v. Arnold, 96, 194, 324, 325
 Thayer v. Boston, 241, 1298, 1301, 1302, 1304, 1315
 Thayer v. Brooks, 256
 Thayer v. Lewis, 1319
 Thayer v. Payne, 102, 103
 Thayer v. St. Louis, Alton & Terre Haute R. R. Co., 491
 Thebaut v. Canova, 257, 258
 The Daniel Ball, 346
 The Governor v. Justices, 1295
 The Pacific, 587
 Thickston v. Howard, 609
 Thomas v. Beebe, 1038
 Thomas v. Bertram, 103
 Thomas v. Boston R. R. Co., 594
 Thomas v. Brackney, 78, 90
 Thomas v. Blanchard, 135
 Thomas v. Rouse, 752
 Thomas v. Russell, 766, 767
 Thomas v. Sternheimer, 1177
 Thomas v. Thomas, 1062
 Thomas v. Winchester, 18, 496, 511, 1103
 Thompson v. Bertrand, 1014, 1044
 Thompson v. Ford, 443
 Thompson v. Fargo, 618, 619
 Thompson v. Harlow, 525
 Thompson v. Miner, 102
 Thorn v. Blanchard, 935
 Thorn v. Moser, 955
 Thorpe v. Balliett, 765
 Thorp v. Burling, 443, 448
 Thornton v. Smith, 176, 242
 Thurst v. West, 442
 Thurston v. City of St. Joseph, 1316
 Thurston v. Hancock, 73, 1308
 Thurston v. Mink, 115
 Tibbets v. Moore, 300
 Tift v. Tift, 250, 1126
 Tift v. Horton, 397
 Tilden v. Sacramento County, 1256
 Tilley v. Hudson River R. R. Co., 504, 516, 520
 Tilson v. Clark, 979
 Tillotson v. Smith, 10, 90
 Tincum Fishing Co. v. Carter, 116
 Tinsman v. Belvidere R. R. Co., 174, 175, 178
 Tinsman v. Railroad Co., 244
 Titsworth v. Winnegar, 529
 Titus v. Sumner, 988
 Tobias v. Cohn, 85, 91, 357
 Tobias v. Harland, 975
 Tobin v. Portland, Saco and Portland R. R. Co., 218
 Todd v. Birdsall, 1300
 Todd v. Jackson, 360
 Toledo, etc., R. R. Co. v. Daniels, 216, 221
 Toledo, etc., R. R. Co. v. Fowler, 216, 221
 Toledo, etc., R. R. Co. v. Goddard, 23, 494
 Toledo, etc., R. R. Co. v. Thomas, 216
 Toledo, Peoria and Warsaw R. R. Co. v. Pindar, 304, 306
 Toledo, Wabash and Western R. R. Co. v. Hamond, 570
 Toledo R. R. Co. v. Wickery, 215
 Tobin v. Addison, 799
 Toll Co. v. Betsworth, 1321
 Tomlin v. Dubuque, etc., R. R. Co., 345, 346
 Tompkins v. Haile, 398
 Tomlinson v. Darnall, 1172
 Torrance v. Hurst, 928
 Torrey v. Field, 978
 Totten v. Cole, 393
 Towle v. Lovet, 443
 Town v. Stetson, 1050
 Towne v. Wiley, 1126
 Town of Duanesburgh v. Jenkins, 1319
 Town of Galen v. Clyde Plank Road Co., 1300
 Town of Waltham v. Kemper, 1308
 Townsend v. McDonald, 160
 Towson v. Havre de Grace Bank, 609
 Trabue v. Mayes, 957, 964, 993
 Tracy v. Atherton, 138, 154, 157
 Tracy v. Swartwout, 20
 Tracy v. Troy & Boston R. R. Co., 217
 Trall v. Smiley, 979
 Traloff v. New York, etc., R. R. Co., 570
 Trammell v. Little, 230
 Trammell v. Trammell, 98
 Trask v. Patterson, 104
 Traum v. Heiffer, 558
 Travis v. Barger, 1094, 1095, 1097
 Travis v. Smith, 764
 Travis v. Thompson, 601
 Treadwell v. Commissioners, 1298
 Treadway v. Sharon, 291, 295
 Treat v. Barber, 411
 Treat v. Browning, 983, 996
 Treat v. Lord, 107, 346

Tribble v. Frame, 361
 Trieber v. Knabe, 648
 Tripp v. Lyman, 1310
 Trow v. Vermont Central R. R. Co., 27, 28
 Trowbridge v. Carlin, 1061
 Trowbridge v. Chapin, 624
 True v. Melvin, 1279
 True v. Plumley, 992, 1192
 Trull v. Howland, 795
 Truman v. Taylor, 5, 926, 960, 969
 True v. International Telegraph Co., 535, 536
 Trustees of the Village of Delhi v. Youmans, 72
 Trustees of Jordan v. Otis, 269
 Trustees v. State, 1264
 Trustees v. Patnam, 1300
 Trustees, etc. v. Walsh, 344, 1230
 Tryon v. Whitmarsh, 1016
 Tucker v. Pacific R. R. Co., 574
 Tuckerman v. Stephens, etc., Transportation Co., 596
 Tuley v. Tucker, 444
 Turner v. Turner, 1061, 1066
 Turner v. Walker, 172, 742, 746, 760, 764
 Turpin v. Remy, 761
 Turrill v. Dolloway, 984, 985
 Tuttle v. Robinson, 294
 Tuttle v. Turner, 1177
 Tuttle v. Wilson, 798
 Twitchell v. Shaw, 799
 Tyler v. Alford, 770
 Tyler v. Hammond, 159, 167
 Tyler v. Wilkinson, 10
 Tyson v. Shuery, 371

U

Uliman v. Barnard, 461
 Umlauf v. Bassett, 532
 Underhill v. Manchester, 1306
 Underhill v. Welton, 5, 92, 961
 Underwood v. White, 1272
 Updegrove v. Zimmerman, 994
 Usher v. Severance, 984, 985
 Union Bank v. Campbell, 1036
 Union Bank v. Emerson, 300
 Union Church v. Sanders, 1273
 Union Mill v. Ferris, 138
 United States v. Appleton, 114
 United States Express Co. v. Rush, 596
 United States v. Guthrie, 1266
 United States v. Hart, 264
 United States v. Muscatine County, 1276
 United States v. Ortega, 692
 United States v. Seaman, 1266

V

Vale v. Bliss, 201, 205, 229
 Valentine v. Jackson, 634

Van Aiken v. Caler, 956
 Van Bergen v. Van Bergen, 92, 93
 Van Brunt v. Schenck, 323
 Vance v. Beatty, 372, 373
 Vance v. Erie R. R. Co., 759
 Vance v. Throckmorton, 612
 Vandenburg v. Truax, 8
 Vanderbilt v. Mathis, 743
 Vanderbilt v. Richmond Turnpike Co., 477
 Vanderheyden v. Young, 770
 Vanderpoel v. Van Allen, 292
 Vandewalker v. Osmer, 1014
 Vanderveer v. Sutphin, 978, 979, 994, 996, 998
 Vandever v. Mullocks, 702
 Vanderzee v. McGregor, 931, 935
 Van Deusen v. Young, 280, 357
 Vanduyzer, v. Linderman, 752
 Van Epps v. Commissioners, 1298
 Vanhorn v. Freeman, 1093
 Vanleer v. Earle, 1013
 Van Leuven v. Lyke, 30, 250
 Vanness v. Pacard, 297
 Van Rensselaer v. Brice, 128
 Van Rensselaer v. Radcliff, 128
 Van Rensselaer v. Sheriff of Albany, 1256
 Van Tassel v. Capron, 952, 954, 957, 960
 Vansee v. Lee, 934
 Van Santfoord v. St. John, 596
 Van Vechten v. Hopkins, 974
 Van Vroclin v. Fonda, 1030
 Vanderwinkle v. Curtis, 261
 Van Wormer v. Mayor of Albany, 235
 Van Wyck v. Aspinwall, 931, 933
 Vason v. South Carolina R. R. Co., 882
 Vaughn v. Haldeman, 292
 Vaughn v. Webster, 524
 Veazie v. Dwinel, 346
 Veazie v. Mayo, 219
 Veghte v. Raritan Water Power Co., 99, 100, 186
 Verrier v. Sweitzer, 571
 Viall v. Carpenter, 104, 165
 Vicksburg and Jackson R. R. Co. v. Patton, 215, 1193
 Vicksburg, etc., R. R. Co. v. Ragsdale, 627, 629
 Village of Delhi v. Youmans, 79, 82, 83, 93
 Villepigue v. Shular, 1091
 Vincent v. Cook, 211
 Vincent v. Cornell, 397
 Vincent v. Stinehour, 466
 Vining v. Baker, 452
 Vinal v. Dorchester, 1317
 Virginia, etc. v. Sanger, 571
 Vinton v. Weaver, 700, 710
 Von Kettler v. Johnson, 760
 Von Latham v. Libby, 719, 743, 749
 Voorhees v. Freeman, 294
 Voorhees v. McGinnis, 291, 292, 293, 294, 300

Vossel v. Cole, 1094, 1095
 Vrooman v. King, 184
 Vrooman v. Lawyer, 250

W

Wachter v. Queenzer, 979, 985, 994
 Wade v. Hamilton, 544
 Wade v. Walden, 728, 742, 764, 765, 766
 Wade v. Wheeler, 593
 Wadley v. Jauvein, 293, 294
 Wadsworth v. Smith, 346
 Wadsworth v. Tilletson, 78
 Waffle v. N. Y. Central R. R. Co., 72, 79
 Wagenblast v. McKean, 408
 Wagner v. Bissell, 326, 328
 Wagner v. Hanna, 116, 117
 Wagner v. Long Island R. R. Co., 72
 Wakeman v. Dalley, 1007, 1010, 1011, 1014, 1016, 1017
 Walcott v. Swampscott, 1302, 1304
 Walker v. Board of Public Works, 346
 Walker v. Bolling, 32, 491
 Walker v. Cronin, 1088
 Walker v. Herron, 23
 Walker v. Johnson, 648
 Walker v. Newhouse, 379
 Walker v. Pierce, 171
 Walker v. Shepardson, 261, 346
 Walker v. Watrous, 326, 327, 328
 Walker v. Westfield, 28, 495
 Walkley v. Muscatine, 1277
 Wall v. Gordon, 13
 Wall v. Hinds, 297
 Wall v. Lee, 704
 Wallace v. Douglas, 231
 Wallace v. Fletcher, 157, 158
 Wallace v. Miller, 1123
 Wallace v. New York, 1312
 Walling v. Shreveport, 1301, 1302
 Walling v. Potter, 607, 615
 Walter v. Wicomico County, 243
 Walton v. Cody, 1021
 Walton v. Middlesex R. R. Co., 32
 Wann v. Western Union Telegraph Co., 535
 Ward, *Ex parte*, 1295
 Ward v. Bartlett, 360
 Ward v. Colghan, 974
 Ward v. Neal, 150
 Ward v. New York Central R. R. Co., 628
 Ward v. Schenectady & Saratoga R. R. Co., 596
 Warfield v. Campbell, 545, 758
 Waring v. Mason, 1024
 Warner v. Reddiford, 697
 Warner v. Burlington, etc., R. R. Co., 599
 Warner v. N. Y. Central R. R. Co., 23
 Warner v. Erie R. R. Co., 219, 225, 489, 490, 492
 Warren v. Leland, 118

Warner v. Paine, 934
 Warner v. Shedd, 799
 Warner v. Western Transportation Co., 579
 Warren v. Chambers, 349
 Warren v. Cochran, 371
 Warren v. F. R. R. Co., 470
 Warren v. Norman, 954
 Warren v. State, 690
 Washburne v. Cooke, 941, 943
 Washburn v. Sproat, 296
 Washburn v. Tracy, 475
 Washburn v. Washburn, 1064
 Wasson v. Canfield, 728
 Watkins v. Hall, 975
 Watkins v. Peck, 137, 157
 Wateer v. Brown, 615
 Water Lot Co. v. Bucks, 320
 Waters v. Grace, 546
 Water Commissioners v. Hudson, 261
 Waterbury v. Lockwood, 799
 Waterman v. Johnson, 349
 Watt v. Potter, 458
 Watts v. Coffin, 126, 127
 Watts v. Greenleaf, 974
 Watson v. Bioren, 117
 Watson v. Cross, 616
 Watson v. McCarthy, 957
 Watson v. Music, 972
 Watson v. Muirhead, 499
 Way v. Davidson, 444
 Weaver v. Hendrick, 975
 Webb v. Cecil, 972
 Webb v. Portland Manuf. Co., 10
 Webb v. Rome, Watertown & Ogdensburg R. R. Co., 12, 29, 304, 306, 307, 885
 Webb v. Sturtevant, 371
 Webb v. Thompson, 1185, 1203
 Webber v. Chapman, 138
 Webber v. Davis, 397
 Webber v. Shearman, 635
 Weber v. Zimmerman, 1256
 Webster v. Hodgkins, 1014
 Webster v. Hudson R. R. Co., 472
 Weed v. Barney, 594, 600
 Weed v. Bibbins, 974
 Weed v. Case, 1005, 1006, 1017
 Weed v. Panama R. R. Co., 476
 Weeden v. Town Council, 1258
 Weeks v. Milwaukee, 1315
 Weger v. Pennsylvania R. R. Co., 492
 Weil v. Schmidt, 954
 Weir v. Hoss, 980
 Weise v. Smith, 346
 Weisenberg v. Appleton, 1313, 1322
 Weisenger v. Taylor, 612
 Weitsyler v. Marr, 373
 Welch v. Durand, 2, 1193
 Weld v. Bartlet, 818
 Welsh v. Eakle, 985
 Welsh v. Pittsburg, etc., R. R. Co., 592
 Weld v. Chapman, 16
 Weld v. Oliver, 406, 458

- Wells v. Hatch, 546
 Wells v. Hornish, 634, 636
 Wells v. New York Central R. R. Co., 533
 Wells v. Parsons, 761
 Wells v. Steam Navigation Co., 509, 571
 Wells v. Wilmington, etc., R. R. Co., 624
 Wellington v. Downer Kerosene Oil Co., 1103
 Welton v. Martin, 90, 172
 Weinberger v. Shelly, 764
 Wendell v. Troy, 1314
 Wentworth v. McDuffie, 1126
 Wentworth v. Poor, 144
 Wesling v. Noonan, 544
 Wessler v. Hershey, 105
 Wesson v. Seaboard, etc., R. R. Co., 31
 Wesson v. Washburn Iron Co., 43
 West v. Brockport, 1312
 West v. Martin, 495
 West v. Louisville R. R. Co., 242, 885
 West Point Iron Co. v. Reymert, 316, 388, 389
 West. Sav. Fund Soc. v. Philadelphia, 1300
 Western College v. Cleveland, 1305, 1306
 Western Transportation Co. v. Newhall, 596
 Western, etc., R. R. Co. v. Newhall, 587
 Western Union Telegraph Co. v. Buchanan, 536
 Western Union Telegraph Co. v. Caren, 535
 Western Union Telegraph Co. v. Graham, 536
 Weston v. Alden, 78
 Weston v. Dane, 1265
 Weston v. Lumley, 994
 Weston v. Sampson, 132
 Wetherbee v. Marsh, 996
 Wetherbee v. Green, 410, 411
 Weymouth v. Chicago, etc., R. R. Co., 455
 Whalen v. Gloucester, 211
 Whalen v. Keith, 192
 Wheatley v. Abbott, 414
 Wheatley v. Baugh, 74, 79, 82
 Wheatley v. Chrisman, 81
 Wheaton v. North Beach, etc., R. R. Co., 467, 1184, 1185, 1199
 Wheeler v. Cincinnati, 1303
 Wheeler v. Nesbitt, 728, 761
 Wheeler v. Rowell, 359
 Wheeler v. Spinola, 348, 349
 Wheeler v. Westport, 1309, 1321
 Wheelock v. Wheelwright, 395, 525
 Wheeler v. Wheeler, 406
 Whitacre v. Culver, 1178
 Whitaker v. Brown, 101
 Whittaker v. Burhans, 133
 Whitaker v. Eighth Avenue R. Co., 34
 Whitaker v. Freeman, 972
 Whitbeck v. Dubuge, etc., R. Co., 215
 Whitbeck v. Holland, 594
 White v. Campbell, 1097
 White v. Cannada, 1185
 White v. Carroll, 958, 968, 998
 White v. Chapin, 96
 White v. County of Bond, 1308
 White v. Brooks, 1115, 1116
 White v. Demary, 447
 White v. Fort, 417
 White v. Merritt, 1006
 White v. Nellis, 1090, 1091
 White v. Nichols, 928, 931, 932, 941
 White v. Osborn, 406
 White v. Tucker, 766
 White Water Canal Co. v. Comegys, 319
 White v. Winisimmet Co., 606
 White v. Yazoo City, 1304
 Whiting v. Smith, 972, 983
 Whitfield v. Westbrook, 764
 Whiting v. Brastow, 296
 Whitmore v. Allen, 1121
 Whitmore v. Bowman, 605
 Whitmore v. Steamboat Caroline, 570
 Whitney v. Elmer, 1097
 Whitney v. Peckham, 751
 Whitney v. Slauson, 399
 Whitney v. Union R. R. Co., 320
 Whipple v. Dewey, 299
 Whipple v. Cumberland Manuf. Co., 10, 172
 Whipple v. Fuller, 752
 Whipple v. Walpole, 517, 1193
 Whittier v. Cochecho Manufacturing Co., 114
 Whirley v. Whiteman, 223
 Whirley v. Whittemore, 26
 Whittle v. Newman, 545
 Wicks v. Hunt, 1232
 Wickersham v. Orr, 99
 Wierbach v. Trone, 926
 Wiggin v. Coffin, 2, 7, 43, 74, 498
 Wiggins v. McClary, 160
 Wightman v. Providence, 1185, 1199
 Wilcox v. Rome, Watertown & Ogdensburg R. R. Co., 473, 498
 Wilbert v. New York & Erie R. R. Co., 573
 Wilbur v. Brown, 86
 Wilburn v. Odell, 983
 Wilde v. New Orleans, 1298, 1302
 Wilder v. St. Paul, 160
 Wilder v. Wilder, 325, 329
 Wilds v. Hudson River R. R. Co., 23
 Wiley v. Campbell, 955
 Wiley v. Keokuk, 733
 Wiley v. Manatowah, 733
 Wilgus v. Gettings, 295
 Withers v. State, 1259
 Wilhort v. Hancock, 1164
 Wilkes v. Slaughter, 797
 Wilkins v. Earle, 609, 610, 611
 Wilkinson v. Parrott, 230, 255
 Willard v. Newbury, 1317

- Willard v. Rice, 411
 Willes v. Noyes, 744
 Willey v. Enre, 820
 Willetts Adm'r v. Buffalo & Rochester R. R. Co., 606
 Williams v. Carnes, 926, 928
 Williamson v. Canaday, 1037
 Williams v. Clough, 225
 Williams v. Cummington, 265
 Williams v. Dunkirk, 1302
 Williamson v. Fischer, 1123
 Williamson v. Foreman, 1157
 Williams v. Grant, 575
 Williams v. Haig, 995
 Williams v. Harrison, 983
 Williams v. Hill, 961
 Williams v. Holdredge, 957
 Williams v. Ingram, 1013
 Williams v. Judge of Cooper County Court of Common Pleas, 1264
 Williams v. Merle, 395, 418
 Williams v. Michigan Central R. R. Co., 326
 Williams v. Miner, 983
 Williams v. Nelson, 138, 160, 406
 Williams v. New Albany, etc. R. R. Co., 215
 Williams v. New Orleans, 1306
 Williams v. Reil, 1193
 Williams v. Safford, 103, 173, 379
 Williams v. Saunders, 1261
 Williams v. Terboss, 639
 Williams v. Woodhouse, 764
 Wilmot v. Hurd, 1014
 Wilson v. City of New Bedford, 1316
 Wilson v. City of Watertown, 1312, 1317
 Wilson v. Chesapeake, etc., R. R. Co., 599
 Wilson v. Beighler, 926, 960
 Wilson v. Bushnell, 371
 Wilson v. Edmonds, 283
 Wilson v. Fitch, 932, 950
 Wilson v. Forbes, 345, 346
 Wilson v. Grand Trunk R. R. Co., 537, 651
 Wilson v. Hamilton, 606, 974
 Wilson v. Mayor of New York, 20, 772, 1304, 1315
 Wilson v. Moore, 1264
 Wilson v. Nations, 993
 Wilson v. Oliphant, 955
 Wilson v. Reed, 406
 Wilson v. Russ, 497
 Wilson v. Tatum, 956
 Winbigler v. Los Angeles, 1308
 Windsor v. Oliver, 958
 Wing Chung v. Los Angeles, 1305
 Wingate v. Smith, 410, 411
 Wintz v. Morrison, 1031
 Winne v. Hammond, 543
 Winnebiddle v. Porterfield, 744
 Winner v. Penniman, 407
 Wininger v. Banning, 443
 Winpenny v. Philadelphia, 1316
 Winship v. Pitts, 280
 Winslow v. Merchants' Ins. Co., 294, 300
 Winslow v. Vermont and Massachusetts R. R. Co., 594
 Winsor v. Lombard, 1030
 Winston v. Moseley, 1266
 Wilton Manufacturing Co. v. Butler, 799
 Wilton v. Middlesex R. R. Co., 470
 Witcher v. Richmond, 987
 Wintringham v. Lafoy, 9
 Wintz v. Morrison, 35
 Wissler v. Hershey, 178
 Witty v. Matthews, 211
 Woburn v. Henshaw, 222
 Wolcott v. Melick, 257, 258
 Wolf v. Chakler, 231, 329
 Wolf v. Rodifer, 983
 Wonder v. Baltimore & Ohio R. R. Co., 225, 491, 492
 Wood v. Abbott, 58
 Wood v. Cavin, 1020
 Wood v. Cobb, 509
 Wood v. Colvin, 418
 Woods v. Davis, 799
 Wood v. Griffin, 278, 300
 Wood v. Kelley, 155
 Wood v. La Rue, 393
 Wood v. Laycock, 759
 Wood v. Manley, 377
 Wood v. McClure, 523
 Wood v. Scott, 974
 Wood v. Williamsburgh, 85, 91, 357
 Wood v. Wier, 743, 744
 Wood v. Wood, 1064
 Woodbridge v. Conner, 1123
 Woodburn v. Miller, 982
 Woodbury v. Long, 398
 Woodman v. Hubbard, 395
 Woodman v. Somerset, 1256
 Woodman v. Tufts, 90, 172
 Woodruff v. Cook, 414
 Woodruff v. Woodruff, 690
 Woodward v. Aborn, 192
 Woodward v. Gates, 281, 282
 Woodward v. Suly, 98
 Woolen Manufacturing Co. v. Huntley, 540
 Wooley v. Edson, 1178
 Woolf v. Chakler, 30
 Woolsey v. Judd, 13, 416, 1231
 Woolson v. Northern R. R., 215
 Wormouth v. Cramer, 973
 Worcester v. Green, 122
 Worter v. Sherwood, 418
 Worth v. Butler, 961
 Wootten v. Callahan, 1038
 Wright v. Barrett, 118
 Wright v. Donnell, 382
 Wright v. Hart, 1024
 Wright v. Lindsay, 957
 Wright v. Madden, etc., R. R. Co., 26
 Wright v. Moore, 93, 138, 153, 182
 Wright v. New York Central R. R. Co., 224, 225, 226, 489, 490, 491

Wright v. Paige, 955, 987
 Wright v. Schroder, 995
 Wright v. Wilcox, 507
 Wright v. Wilson, 477
 Wright v. Wright, 149, 325
 Wyckoff v. Queens County Ferry Co.,
 606
 Wylie v. Smitherman, 9
 Wyman v. State, 265, 277
 Wynkoop v. Burger, 106, 171

Y

Yale v. Saunders, 450
 Yates v. Lansing, 770
 Yates v. Squires, 32
 Yeager v. Wallace, 398

Yerger v. Warren, 31, 32
 Young v. Bennett, 996
 Young v. Edwards, 217
 Young v. Mason, 396
 Young v. Miller, 955
 Young v. Wise, 799, 803
 Young v. Yarmouth, 1317
 Youngblood v. Lowery, 651
 Yolo County v. Sacramento, 43, 241

Z

Zabriskie v. Jersey, etc., R. R. Co.,
 261
 Zeig v. Ort, 972
 Zinc Co. v. Franklinite, 120
 Zinn v. New Jersey Steamboat Co., 600

TABLE OF ENGLISH CASES CITED

A

- | | |
|--|---|
| <p> Aaron v. Alexander, 804, 1132
 Abbott v. Weekly, 122
 Abbott v. Godoy, 1083
 Abbott v. Macfie, 26, 464
 Aberaman Iron Works v. Wickens, 1014, 1019
 Aberdeen Arc. Co. v. Sutter, 414
 Abernethy v. Hutchinson, 13, 1211
 Aberystwith Pier Ro. v. Cooper, 1138
 Abington v. Lipscomb, 399
 Abley v. Dale, 810, 1211
 Abraham v. Reynolds, 492
 Abrahams v. London (Lord Mayor, etc., of), 1230
 Absor v. French, 266, 366
 Ackland v. Paynter, 788
 Ackroyd v. Smith, 116
 Acton v. Blundell, 74, 82
 Adam v. Bristol, 1110
 Adams v. Adams, 1087
 Adams v. Andrews, 377
 Adams v. Bafeald, 1088
 Adams v. Broughton, 442
 Adams v. Cheverel, 1110
 Adams v. Crane, 648
 Adams v. Gt. West. Rail. Co., 1138
 Adams v. Lanc. and Yorks. Rail., 493, 518
 Adamson v. Jarvis, 1015, 1020, 1028, 1040
 Addison v. Overend, 446
 Adlam v. Colthurst, 344
 Aga Kurboolie Mahomed, 785
 Agra Bank, <i>Ex parte</i>, <i>Re</i> Worcester, 433
 Agra, The, and The Elizabeth Jenkins, 484
 Ainsworth v. Walmsley, 1052
 Aitkenhead v. Blades, 323
 Albert (Prince) v. Strange, 13, 1231
 Alderson v. Davenport, 783 </p> | <p> Aldred's case, 4, 192
 Aidred v. Constable, 396
 Aldridge v. Gt. West. Rail. Co., 305, 312, 588, 595, 597
 Aldworth v. Stewart, 728
 Alexander v. Alexander, 1060
 Alexander v. Gibson, 1037
 Alexander v. Jones, 1138
 Alexander v. N. E. Rail. Co., 972, 991
 Alexander v. Southey, 401
 Alford v. Vickery, 635
 Alfred v. Farlow, 955, 998
 Allan v. Gomme, 379
 Allardice v. Robertson, 968
 Allday v. Gt. West. Rail. Co., 590
 Allen, <i>Ex parte</i>, 410
 Allen v. Allen, 1070
 Allen v. Bonnett, 427
 Allen v. Clark, 500
 Allen v. Darcy, 1070
 Allen v. Flicker, 663
 Allen v. Hayward, 246, 890, 917
 Allen v. L. & S. W. Rail., 721
 Allen v. Smith, 537, 617
 Allen v. Walker, 331, 364, 693
 Allen v. Wright, 700
 Alleston v. Moor, 959
 Allison, <i>In re</i>, 852, 863
 Allsop v. Allsop, 1174
 Allwood v. Heywood, 415
 Alsager v. Close, 403, 457
 Alston v. Grant, 193
 Alston v. Scales, 357, 385
 Alton v. Mid. Rail. Co., 1089
 Amalia, The, 483
 Amann v. Damm, 940, 966
 Ambergate, etc., Rail. Co. v. Mid. Rail. Co., 669
 Amies v. Stevens, 605
 Amory v. Brown, 66
 Amys v. Creed, 233
 Ancaster v. Milling, 377, 381 </p> |
|--|---|

- Anderson, *Ex parte*, 1232
 Anderson v. Buckton, 4, 384
 Anderson v. Mid. Rail. Co., 634, 637
 Anderson v. Passman, 565
 Anderson v. Smith, 559
 Andrew, *Re*, 556
 Andrew v. Boughey, 1153
 Andrews v. Askey, 1096
 Andrews v. Buckton, 29
 Andrews v. Chapman, 497
 Andrews v. Dixon, 811, 817
 Andrews v. Elliott, 1145
 Andrews v. Morris, 777, 779, 813
 Anglo-Danubian Co. v. Rogerson, 1128
 Anichini v. Anichini, 190
 Annapolis, The, 481
 Anne and Mary, The, 504
 Ann Elliott, In the goods of, 1058
 Anon., 3 Atk. 771
 Anon., 2 Chitt. 1267
 Anon., 2 Chitt., 1260
 Anon., Cro. Eliz., 302
 Anon., 2 Dick., 546
 Anon., Dyer, pl., 30
 Anon., cited 16 East., 1168
 Anon., Keilw. 98, pl. 112
 Anon., Lofft, 785, 1013
 Anon., 6 Mod., 705, 751
 Anon., 7 Mod., 730, 785
 Anon., 11 Mod., 111
 Anon., 12 Mod., 1242
 Anon., Poph., 411
 Anon., 2 Rolle's Rep., 352
 Anon., 1 Salk., 831
 Anon., 2 Sim., N. S., 1074
 Anon., Skin., 42
 Anon., 2 Str., 1273
 Anon., 2 Swanst., 999
 Anon., cited 4 Taunt., 1031
 Anon., 3 Wils., 329
 Anon. v. Moor, 995
 Anon. v. Sabine, 39
 Anquez v. Anquez, 1060
 Ansett v. Marshall, 1023
 Anthony v. Brecon Markets Co., 194
 Anthony v. Haney, 381
 Arbouin v. Anderson, 405
 Ardeckne v. Kelk, 187, 189
 Archer v. Bennett, 103
 Archer v. James, 1220
 Archér v. Williams, 565, 566
 Arden v. Goodacre, 820
 Argentina, The, 422
 Aris v. Orchard, 1138
 Arkwright v. Gell, 142, 147
 Arlett v. Ellis, 125
 Armistead v. White or Wilde, 611, 614
 Armory v. Delamirie, 458, 562
 Arnsworth v. S. E. Rail Co., 519
 Armytage v. Haley, 1202
 Arnison, *Ex parte*, 652, 664
 Arnold v. Hamel, 874
 Arnold v. Blaker, 206
 Arthington v. Fawkes, 190
 Arthy v. Coleman, 890
 Arundell v. Tregon, 759
 Arundell v. White, 761
 Ash v. Dawnay, 787
 Ashbury, *Ex parte*, 300
 Ashby v. Harris, 9, 811
 Ashby v. White, 9, 37, 43, 172, 479, 1147
 Ashley v. Harrison, 6, 989
 Ashley's case, 1011
 Ashmore v. Hardy, 455
 Ashton, *In re*, 435
 Ashton v. Blackshaw, 434
 Ashworth v. Heyworth, 17
 Ashworth v. Stanwix, 223, 489, 493
 Aslin v. Parker, 386
 Assop v. Yates, 489
 Astley v. Younge, 934
 Aston v. Aston, 286
 Aston v. Heaven, 475, 513
 Aston v. Perkes, 1153
 Atkins v. Kilby, 867, 879
 Atkins v. Owen, 403
 Atkinson v. Marshall, 403
 Atkinson v. Matteson, 1168
 Atkinson v. Newcastle and Gateshead Waterworks, 51
 Atkinson v. Raleigh, 760
 Atkinson v. Warne, 732
 Attack v. Bramwell, 323, 393, 655, 656, 665, 687, 688
 Attersoll v. Stevens, 301, 384
 Att.-Gen. v. Birmingham (Borough of), 257, 260, 893, 920
 Att.-Gen. v. Bradford Canal, 258
 Att.-Gen. v. Cambridge Gas Co., 262
 Att.-Gen. v. Chambers, 136, 348
 Att.-Gen. v. Cleaver, 196, 258
 Att.-Gen. v. Colney Hatch Asylum, 259
 Att.-Gen. v. Dakin, 789
 Att.-Gen. v. Doughty, 4
 Att.-Gen. v. Ely, etc., Rail Co., 721
 Att.-Gen. v. Forbes, 261
 Att.-Gen. v. Gee, 259
 Att.-Gen. v. Hallett, 387
 Att.-Gen. v. Hatton, 1199
 Att.-Gen. v. Jones, 136, 347
 Att.-Gen. v. Leeds (Corporation of), 893
 Att.-Gen. v. Lonsdale (Earl of), 348
 Att.-Gen. v. Luton Local Board, 892
 Att.-Gen. v. Mathias, 113, 122, 135
 Att.-Gen. v. Metrop. Board, &c., 920
 Att.-Gen. v. Mid Kent Rail Co., 922
 Att.-Gen. v. Nichol, 92
 Att.-Gen. v. Norwich (Mayor of), 891
 Att.-Gen. v. Rees, 349
 Att.-Gen. v. Richmond, 258
 Att.-Gen. v. Sheffield Gas Co., 261
 Att.-Gen. v. Southampton Corp., 261
 Att.-Gen. v. Thames Conservators, 1229
 Att.-Gen. v. United Kingdom Tel. Co., 92, 262, 1234
 Att.-Gen. v. West Hartlepool Commissioners, 922

Att.-Gen. of New South Wales v. Macpherson, 775
 Attwood v. Ernest, 555
 Attwood v. Monger, 753
 Aubrey v. Fisher, 284
 Augustein v. Challis, 816, 817, 1170
 Austin v. Dowling, 1139
 Austin v. Great Western Rail. Co., 470, 1103
 Austin v. Mills, 1158
 Austria (Emperor of) v. Day, 105
 Avanzo v. Mudie, 52
 Avery v. Cheslyn, 297
 Avila v. Avila, 1066
 Ayles v. S. East. Rail. Co., 472
 Ayling v. Whicher, 1107
 Ayre v. Craven, 953, 959, 973

B

Barboneau v. Farrell, 985
 Bach v. Meats, 654
 Back v. Stacey, 183, 187
 Backhouse v. Bonomi, 75, 91, 179
 Backhouse v. Harrison, 405
 Bacon v. Bacon, 1073
 Bacon v. Jones, 1230, 1233
 Bacon v. Smith, 310, 1108
 Baddeley v. Denton, 1248
 Badger v. Ford, 166
 Badger v. South York. Rail. Co., 352
 Badkin v. Powell, 671
 Bagge v. Mawby, 636, 658
 Bagg's Case, 1269
 Baglehole v. Walters, 1034
 Bagnall v. London and N. W. Rail. Co., 111, 883, 884, 906, 909, 1192
 Bagot v. Bagot, 284, 285
 Bagot (Lord) v. Williams, 1159
 Bagshaw v. Seymour,
 Bagueley v. Hawley, 1020
 Bahia and San Francisco Rail. Co., *Re*, 1179, 1295
 Bail v. Mellor, 657, 676
 Bailey's Case, 846, 862
 Bailey, *Ex parte*, 1075, 1079
 Bailey v. Appleyard, 155
 Bailey v. Bidwell, 404, 405, 423
 Bailey v. Birtles, 1128
 Bailey v. Hobson, 290, 318
 Bailey v. Merrell, 35
 Bailey v. Stephens, 116, 127, 141, 365
 Bailey v. Sweeting, 583
 Baily v. Merrell, 1013, 1016
 Bain v. Fothergill, 19
 Baird v. Fortune, 168
 Baird v. Neilson, 66
 Baird v. Williamson, 83
 Baker v. —, 1106
 Baker v. Brown, 1199
 Baker v. Lond. & S. W. Rail Co., 1154
 Baker v. Morfue, 959
 Baker v. Pierce, 954
 Baker v. Wait, 1143
 Baker v. Webberly, 30
 Balch v. Symes, 546
 Baldwin v. Cole, 395, 398
 Baldwin v. Elphinston, 975
 Baldwin v. Girries, 1199
 Ball v. Ball, 1077
 Ball v. Herbert, 107
 Ballard v. Dyson, 182
 Ballinger v. Ferris, 713
 Balls v. Metrop. Board of Works, 1222
 Bamfield v. Massey, 1098
 Bamford v. Turnley, 194, 195
 Bancroft v. Mitchell,
 Bank of Bengal v. Macleod, 424
 Bank of Bengal v. Fagan, 424
 Bank of Ireland v. Trustees of Evans's Charity, 27, 29
 Bank of Hindustan, *Re*, 546, 1294
 Bank of Upper Canada v. Bradshaw, 501
 Bankart v. Houghton, 260
 Bankart v. Tennent, 186
 Banks v. Allen, 959
 Banks v. Bebbek, 1143
 Bannister v. Hyde, 660
 Bank de Credit Commercial v. de Gas, 1246
 Barber v. Lesiter, 44, 741
 Barber v. Nottingham and Grantham Rail. Co., 883, 908
 Barber v. Rollinson, 724, 876
 Barber v. Walduck, 61
 Barber v. Whiteley, 96, 328
 Barclay, *Ex parte*, 431
 Barker v. Braham, 720, 810
 Barker v. Richardson, 158
 Barley v. Walford, 1005, 1039
 Barlow, *In re*, 1264, 1271, 1272
 Barlow v. Rhodes, 168
 Barnabas v. Taunter, 962
 Barnardiston v. Chapman, 406, 446
 Barnes v. Barnes, 1067, 1072, 1074
 Barnes v. Holloway, 984
 Barnes v. Hunt, 362, 378
 Barnes v. Marshall, 1244
 Barnes v. Prudlin, 957
 Barnes v. Ward, 203, 205, 228
 Barnett v. Allen, 6, 955, 987
 Barnett v. Brandao, 545
 Barnett v. Crystal Palace Co., 399
 Barnett v. Guildford (Earl), 356, 374, 387
 Barnewell v. Williams, 560
 Barraclough v. Johnson, 266, 267
 Barratt v. Collins, 718, 971, 1115
 Barrett v. Long, 975, 979
 Barrington v. Turner, 393, 452, 457
 Barrington's Case, 118
 Barrow v. Arnaud, 565, 566
 Barrow v. Bell, 440
 Barry v. Arnaud, 20
 Barry v. Bebbington, 1175
 Barry v. Croskey, 1010, 1027, 1037, 1104, 1106

- Bartholomew v. Stevens, 1123, 1173
 Bartlett v. Baker, 209, 509
 Bartlett v. Wells, 1031
 Barton v. Bricknell, 870
 Barton v. Brown, 451
 Barton v. Gainer, 561
 Barton v. Gill, 801
 Barton Hill Coal Co. v. Reid, 489, 492
 Bartram v. Payne, 437
 Barwell v. Adkins, 988
 Barwell v. Winterstoke, 356
 Barwick v. Eng. Joint St. Bank, 1027
 Baseba v. Matthews, 760
 Basham v. Lumley, 1157
 Basset v. Maynard, 1118
 Bassett, *Ex parte*, 1265
 Bassett v. Mitchell, 378
 Basten v. Carew, 836, 852
 Bastow & Co., *Rs*, 789
 Batchelor v. Vyse, 794
 Bate v. Hill, 1098
 Bateman, *Rs*, 1047, 1237
 Bateman v. Bluck, 229, 237, 268
 Bateman v. Farnsworth, 791
 Bateman v. Hotchkin, 234
 Baten's Case, 192
 Bates v. Pilling, 810, 1124
 Bates v. Wingfield, 794
 Bateson v. Green, 131
 Bather v. Day, 615
 Batson v. Donovan, 24, 578, 1033
 Batten v. Butter, 495
 Batterbury v. Vyse, 1040
 Battishill v. Reed, 156, 159, 166, 174, 186, 256
 Batty v. Hill, 1050
 Bawden v. Bawden, 1067
 Bax v. Jones, 716
 Baxendale, *In re*, 630
 Baxendale v. Gt. East. Rail. Co., 582, 583, 687
 Baxendale v. Gt. West. Rail. Co., 574, 604, 630
 Baxendale v. Hart, 583
 Baxendale v. Lond. & S. W., 603, 1221
 Baxendale v. McMurray, 146
 Baxendale v. North Devon. Rail. Co., 630
 Baxter v. Taylor, 144, 358, 360
 Bayley v. Wolverhampton Water Works Co., 888, 917
 Baylis v. Baylis, 1069
 Baylis v. Lawrence, 997
 Baylis v. Le Gros, 1236
 Baylis v. Usher, 657, 685
 Bayliss v. Fisher, 457
 Baynes v. Brewster, 703
 Bazeley v. Forder, 1073
 Beachey v. Sides, 713, 913
 Beadell v. Perry, 188
 Beadell v. East Co. Rail, Co., 630
 Beal, *Ex parte*, 58
 Beal v. South Devon Rail. Co., 590
 Bealey v. Shaw, 145, 198
 Beard v. Hine, 1244
 Beard v. Knight, 804
 Beardmore v. Treadwell, 92, 195, 1229
 Beasley v. Clarke, 368
 Beaston v. Skene, 967
 Beaty v. Gibbons, 443
 Beauchamp v. Croft, 752, 947
 Beauchamp (Ld.) v. Gt. West. Rail. Co., 910
 Beauchamp v. Powley, 534
 Beaufort (D. of) v. Bates, 644
 Beaufort (D. of) v. Crawshaw, 1182
 Beaufort (D. of) v. Mayor, etc., of Swansea, 347
 Beaufort (D. of) v. Patrick, 99
 Beaulieu v. Finglam, 303
 Beavan v. Beavan, 1069
 Beavan v. Delahay, 635, 640
 Beaver v. Mayor of Manchester, 364, 918
 Becher v. Gt. East. Rail., 1102
 Beck v. Denbigh, 656
 Beck v. Dyson, 255
 Beck v. Rebow, 297
 Beckervaise v. Gt. West. Rail., 472
 Beckett v. Mid. Rail. Co., 901, 908
 Beckford v. Hood, 45, 50, 51
 Beckford v. Montague, 816
 Beckwith v. Corral, 405
 Beckwith v. Philby, 699, 700, 729
 Beckwith v. Shordike, 329
 Bedford v. Bagshaw, 1006, 1010, 1041
 Bedford v. Hunt, 68
 Bedford v. McKowl, 1096
 Bedingfield v. Onslow, 85, 358, 385
 Beechey v. Sides, 913
 Beeston v. Weate, 145
 Behn v. Kemble, 1004
 Behrens v. Gt. North. Rail. Co., 583, 585
 Belcher v. Bellamy, 431, 435
 Belcher v. Capper, 435
 Belfast and Ballymena Rail. Co. v. Keys, 600
 Bell v. Byrne, 984
 Bell v. Chaplain, 619
 Bell v. Mid. Rail. Co., 14, 1193
 Bell v. Oakley, 866
 Bell v. Parke, 940
 Bell v. Stone, 928
 Bell v. Twentymen, 193, 243
 Bell v. Walker, 1231
 Bell v. Wardell, 122, 379
 Bell v. Wilson, 103
 Bellamy v. Burch, 959
 Bellew v. Langdon, 131
 Bellingay v. Bellingay, 1087
 Bellingham v. Clark, 1133
 Benest v. Pipon, 137
 Benfield v. Solomons, 1112
 Bengal, The, 1144
 Bengal (Bank of) v. Macleod, 423
 Bengal (Bank of) v. Fagan, 423
 Bennet's Case, 793

- Bennett v. Allcott, 1096
 Bennett v. Bayes, 643, 1123
 Bennett v. Bennet, 996
 Bennett v. Deacon, 940
 Bennett v. Lond. and N. W. Rail. Co., 1205
 Bennett v. Man., Sheff. and Linc. Rail. Co., 631
 Bennett v. Mellor, 611
 Bennett v. Reeve, 126
 Bennett v. Robins, 641
 Bennett v. Thompson, 1014
 Bennison v. Cartwright, 154
 Benson v. Chester, 129
 Benson v. Frederick, 1194
 Benson v. Paul, 1290
 Bent v. Bent, 1073, 1087
 Berkeley v. Earl of Pembroke, 1185
 Bermondsey Vestry v. Brown, 270, 272
 Bermondsey Vestry v. Ramsey, 49
 Bernstein v. Baxendale, 584
 Berresford v. Geddes, 1181
 Berridge v. Ward, 350
 Berrie v. Howitt, 547
 Berriman v. Peacock, 352
 Berry v. Heard, 444
 Berryman v. Wise, 990
 Berthon v. Cartwright, 1188
 Bertie v. Beaumont, 174, 335, 446
 Berton v. Lawrence, 812
 Bessant v. Gt. West. Rail. Co., 214
 Bessell v. Wilson, 869
 Bessey v. Wyndham, 817
 Best v. Drake, 388
 Best v. Hayes, 557
 Beta, The 483
 Betts v. De Vitre, 34, 1228
 Betts v. Gallais, 1228
 Betts v. Neilson, 61, 64, 67
 Betts v. Thompson, 125, 190
 Betts v. Willmott, 66, 1231
 Bevan v. Waters, 538
 Bewick v. Whitfield, 285, 411
 Bibbey v. Carter, 87, 88, 179
 Bickett v. Morris, 80, 849
 Bickford v. Darcy, 497
 Bickford v. Skewes, 64
 Biddle v. Bond, 402, 559, 562
 Biddulph v. St. George's Vestry, 919
 Biederman v. Stone, 19
 Biggins v. Goode, 688
 Biggs v. Mitchell, 262
 Biglin v. Wylie, 276
 Bignell v. Buzzard, 630
 Bignell v. Clark, 670
 Bignold v. Waterhouse, 624
 Bilbao, The, 1143
 Bilbee v. Lond. and Bright. Rail. Co., 473
 Billiter v. Young, 396
 Bills v. Smith, 426
 Binckes v. Pash, 164
 Binks v. S. Yorkshire and River Dun Co., 201, 205, 222
 Binns v. Pigot, 616
 Birch, *In re*, 1238
 Birch v. Wright, 386
 Birchley's Case, 959
 Birch-Wolfe v. Birch, 317
 Bird, *Ex parte*, 1259
 Bird v. Elwes, 223
 Bird v. Gt. Eastern Rail. Co., 899
 Bird v. Gt. Northern Rail. Co., 472
 Bird v. Hollrook, 200
 Bird v. Jones, 698
 Bird v. Peagram, 1107
 Bird v. Randall, 1158
 Bird v. Relp, 1129
 Birket v. Whitehaven Junction Rail. Co., 218, 506, 622
 Birket v. Willan, 595
 Birks v. Silverwood, 1143
 Birley v. Salford, 355
 Birmingham Canal Co. v. Lloyd, 1232
 Birmingham Curchwardens v. Shaw, 856, 871
 Birmingham Gas Co., *Ex parte*, 425, 635
 Birt v. Barlow, 1084
 Bishop v. Bryant, 663, 678
 Bishop v. Trustees of Bedford Charity, 197, 201, 205, 211, 245, 248, 253
 Bissil v. Williamson, 1156
 Black v. Baxendale, 593, 627
 Blackburn v. Greaves, 676
 Blackborne v. Blackborne, 1080
 Blackburn, *Ex parte*, 427
 Blackburn (Mayor, etc., of) v. Parkinson, 899
 Blackett v. Bradley, 124
 Blackham v. Pugh, 941
 Blackman v. Simmons, 230
 Blackmore, *Ex parte*, 1264
 Blades v. Arundel, 649, 789
 Blades v. Higgs, 9, 381, 413, 442
 Blagg v. Stuart, 945, 936
 Blaggrave v. Bristol Waterworks Co., 885, 910, 1151
 Blake v. Barnard, 691
 Blake v. Done, 1181, 1134
 Blake v. Gt. Western Rail. Co., 597
 Blake v. Layton, 1088
 Blake v. Midland Rail. Co., 520
 Blake v. Nicholson, 538, 543
 Blake v. Peters, 286
 Blake v. Thirst, 246, 510
 Blakemore v. Br. and Ex. Rail. Co., 18, 22, 524, 1035, 1102
 Blanchard v. Bridges, 115, 153
 Blanchard v. Hill, 1054
 Blanchenay v. Burton, 800
 Bland v. Bland, 1059
 Bland v. Lipscombe, 123
 Blank v. Newcomb, 1241
 Blaymire v. Haley, 1091
 Bleaden v. Hancock, 539
 Blenkiron v. Gt. Central Gas Co., 309
 Blewett v. Jenkins, 124
 Blewett v. Hill, 8, 35

- Blewitt v. Tregoning, 98, 124
 Bliss v. Hall, 194, 196
 Blisset's Case, 1075
 Blofield v. Payne, 10, 1039
 Blood v. Keller, 161
 Bloodworth v. Gray, 957
 Bloxam v. Elsee, 61, 65
 Bloxam v. Hubbard, 506
 Bloxam v. Metropolitan Rail. Co., 1230
 Bloxom v. Sanders, 419
 Blunden v. Catterall, 134
 Blunden v. Desert, 543
 Blunt Beaumont, 732
 Blyth v. Birm. Water Co., 515
 Blythe v. Topham, 203, 205
 Blything Union v. Warton, 234
 Boardman v. Boardman, 1063, 1081
 Boardman v. Sill, 540
 Bock v. Gorrisen, 542, 544
 Bode (Baron de), *In re*, 1266
 Bodley v. Reynolds, 463
 Bogg v. Midland Rail. Co., 899, 901
 Bogg v. Pearse, 1270
 Boggett v. Frier, 1109
 Bogue v. Houlston, 58
 Bohn v. Bogue, 52
 Bolch v. Smith, 203, 224
 Bolland, *Ex parte*, 428
 Bolton (Ld.) v. Tomlin, 686
 Bolton v. Lanc. and York. Rail., 537
 Bond v. Downton, 682
 Bonomi v. Backhouse, 12, 70, 75, 76, 91, 179, 735, 912, 1163
 Bonsey v. Wordsworth, 1139
 Boorman v. Brown, 1102
 Boosey v. Davidson, 1171
 Boosey v. Wood, 1156
 Booth v. Clive, 713, 714, 805
 Booth v. Taylor, 1235
 Boreham v. Boreham, 1067
 Borries v. Hutchinson, 629
 Borrodale v. Brunton, 1046
 Borrows v. Ellison, 340
 Bos v. Helsham, 1018
 Boss v. Litton, 476
 Bostock v. Bostock, 1063
 Bostock v. Floyer, 1027
 Bostock v. N. Staff. Rail. Co., 920, 1229
 Boulding v. Tyler, 1213
 Boulter v. Peplow, 686
 Boulton's Case, 267, 329
 Boulton, *Ex parte*, 433
 Boulton v. Bull, 62
 Boulton v. Crowther, 582, 886, 1120
 Boulton v. Reynolds, 661
 Boulton v. Watt, 62
 Bourke v. Warren, 984
 Bourne v. Alcock, 1219
 Bourne v. Fosbrooke, 456, 562
 Bourne v. Gatcliffe, 595
 Bourne v. Liverpool (Mayor of), 905
 Bovill v. Crate, 1233
 Bovill v. Finch, 60
 Bovill v. Goodier, 1230
 Bovill v. Hitchcock, 1233
 Bowditch v. Balchin, 698
 Bowditch v. Wakefield Local Board, 276
 Bowen v. Evans, 1252
 Bower v. Hill, 10, 172, 182, 185
 Bowes v. Foster, 420, 456
 Bowler v. Nicholson, 682
 Bowles's Case, 311
 Bowman v. Taylor, 66
 Bowyer v. Cook, 333, 1217
 Box v. Green, 1251
 Boyce, *In re*, 778
 Boyce v. Bayliffe, 1187
 Boycé v. Higgins, 809
 Boyd v. Croydon Rail. Co., 1009
 Boyd v. Shorrocks, 300
 Boydell v. M'Michael, 431
 Boyfield v. Porter, 888
 Boyle v. Brandon, 1095
 Boyle v. Tamlyn, 96, 136, 149, 167, 184, 328
 Boyle v. Wiseman, 1173
 Boys v. Pink, 584
 Boyson v. Coles, 422
 Bracegirdle v. Peacock, 1167
 Bracegirdle v. Orford, 1187
 Bracey v. Carter, 498
 Bradbee v. Christ's Hospital, 213
 Bradbury v. Grinsell, 158
 Bradby v. Southampton Local Board, 888
 Bradley v. Arthur, 1121
 Bradley v. Copley, 444, 454
 Bradley v. Gill, 192, 199
 Bradley v. Waterhouse, 24, 586, 1182
 Bradshaw v. Eyre, 169
 Bradshaw v. Vaughton, 725
 Bradworth v. Foshaw, 1181
 Brady v. Todd, 1137
 Braham v. Bustard, 1054
 Braithwaite v. Cooksey, 640
 Braithwaite v. Skinner, 49
 Bramley v. Chesterton, 385, 1189
 Bramwell v. Eglinton, 642
 Bramwell v. Halcomb, 1031
 Brancker v. Molyneux, 453
 Brand v. Hammersmith Rail. Co., 902, 906, 909
 Brandao v. Barnett, 545
 Bradling v. Barrington, 794
 Brandon v. Brandon, 642, 897
 Brandon v. Scott, 553, 555
 Brandt v. Craddock, 731
 Brandy v. S. Eastern Rail. Co., 604
 Brass v. Maitland, 22, 1033
 Brassington v. Llewellyn, 334, 542
 Bray v. Mayne, 526
 Bray v. Tracy, 310
 Brayne v. Cooper, 956
 Brazier v. The Polytechnic Institution, 249
 Brecon (Mayor, &c., of) v. Edwards, 16
 Bree v. Holbeck, 1219
 Breedon v. Capp, 1247

- Breedon v. Gill, 1241
 Breese v. Jerdein, 716
 Bremner, *Ex parte*, 545, 1061
 Bremner v. Hull, 1183
 Brent v. Haddon, 1160
 Brest v. Lever, 375
 Brewer v. Drew, 463, 1114
 Brewer v. Sparrow, 44
 Brewin v. Short, 426, 430
 Brewster v. Sewell, 1172
 Briddon v. Gt. Northern Rail. Co., 574
 Bridge v. Grand Junction Rail Co., 513
 Bridge v. Wain, 1122
 Bridges v. Blanchard, 113, 377
 Bridges v. Hawkesworth, 412
 Bridges v. North Lond. Rail., 471
 Bridgett v. Coyney, 834
 Bridgewater's (Duke of) Trustees v. Bootlecum-Linacre, 345
 Bridgland v. Shapter, 16
 Brisdon v. Benecke, 1233
 Brierly v. Kendall, 461
 Briggs, *Ex parte*, 1013, 1256, 1275
 Briggs v. Evelyn, 837
 Briggs v. Mercht. Trad., etc., 537
 Briggs v. Oliver, 23
 Briggs v. Sowry, 635
 Bright v. Walker, 142, 143, 156, 367
 Brind v. Dale, 535, 571
 Brind v. Hampshire, 421
 Brine v. Bazalgette, 945
 Brine v. Gt. West. Rail. Co., 364, 885, 919
 Brink v. Winguard, 1040
 Brinsmead v. Harrison, 442, 1158, 1161
 Briscoe v. Drought, 79
 Bristol and Exeter R. Co. v. Collins, 596
 Bristow v. Eastman, 1127
 British Columbia Sawmill Co. v. Nettle-ship, 628, 629
 British Empire Shipping Co. v. Somes, 539
 British Museum (Trustees of) v. Finnis, 267
 Britton v. S. Western Rail. Co., 1185, 1199
 Brittridge's Case, 957, 599
 Broad v. Ham, 744, 766
 Broadbent v. Imperial Gas Co., 92, 240, 885, 906
 Broadbent v. Ledward, 555, 556
 Broadbent v. Ramsbotham, 78
 Broadbent v. Wilks, 124
 Broadwater v. Blot, 531
 Broadwood v. Granara, 607, 616
 Brock v. Copeland, 229
 Brocklehurst v. Lawe, 651
 Bromage v. Prosser, 931
 Bromley v. Holden, 654
 Bromley v. Wallace, 1085
 Brook v. Montague, 967
 Brook v. Rawl, 970
 Brooke v. Clarke, 1185
 Brooke v. Ewers, 1259
 Brooke v. Pickwick, 578
 Brookes v. Brookes, 1059
 Brookes v. Titchborne, 980
 Brookman v. Wenham, 1251
 Brooks v. Blanshard, 983
 Brooks v. Hodgkinson, 800, 810
 Brooks v. Warwick, 745
 Broom v. Davis, 494
 Broome v. Gosden, 984
 Broomhead, *In re*, 537
 Brough v. Homfray, 490
 Broughton's Case, 1185
 Broughton v. Jackson, 728
 Brown's Case, 129
 Brown's (Lady) Case, 169
 Brown v. Accrington Cotton Co., 224
 Brown v. Allen, 1197
 Brown v. Annandale, 61, 65
 Brown v. Arundel, 648
 Brown v. Bateman, 415
 Brown v. Best, 78, 86
 Brown v. Brown, 1060, 1063
 Brown v. Bussell, 198, 293
 Brown v. Chapman, 719, 724, 755, 876
 Brown v. Cocking, 1140
 Brown v. Croome, 945
 Brown v. Edgington, 1021, 1022
 Brown v. Elkington, 1044
 Brown v. Gibbons, 1207
 Brown v. Giles, 329
 Brown v. Glenn, 643
 Brown v. Heathcote, 435
 Brown v. Holyhead Local Board, 45, 860
 Brown v. Jarvis, 780, 816
 Brown v. Lond. and N. W. Rail. Co., 1133
 Brown v. Mallett, 273, 1147
 Brown v. Met. Co., etc., 120, 652
 Brown v. Nichols, 103
 Brown v. Notley, 373
 Brown v. Robins, 75
 Brown v. Russell, 233
 Brown v. Shevill, 648
 Brown v. Smith, 957
 Brown v. Wilkinson, 518
 Brown v. Windsor, 148
 Brown v. Wootton, 1158
 Browne v. Dawson, 331, 695
 Browne v. Redmond, 1225
 Browning v. Newman, 1148
 Brownlow v. Met. Board of Works, 246, 882
 Bruce v. Helliwell, 101
 Brucker v. Fromont, 515
 Brunswick (Duke of) v. Hanover (King of), 40
 Brunswick (Duke of) v. Harmer, 982
 Brunswick (Duke of) v. Slowman, 821
 Brunt v. Mid. Rail. Co., 580, 583
 Brunton v. Hall, 182, 378
 Brunton v. Hawkes, 67
 Bryant v. Foot, 121
 Bryant v. Wardell, 445
 Brydges v. Kilburn, 320

- Brydges v. Stephens, 316
 Brydon v. Stewart, 226
 Bryson v. Wylie, 432
 Bubb v. Yelverton, 286
 Buccleuch (Duke of) v. Met. Board of Works, 896, 902, 905
 Buchannan v. Findlay, 340
 Buchannan v. Rucker, 1268
 Buckby v. Coles, 366
 Buckland v. Butterfield, 296
 Buckland v. Johnson, 442, 1158
 Buckland v. Papillon, 424
 Buckle v. Bewes, 821, 1199
 Buckley v. Gross, 412, 699
 Buckley v. Hann, 1244
 Buckley v. Wood, 935
 Buckman v. Levi, 624
 Buckmaster v. Buckmaster, 1066
 Budenberg v. Roberts, 1220
 Buggin v. Bennett, 1240, 1253
 Bullard v. Harrison, 366, 379
 Buller, *Ex parte*, 1258
 Buller v. Michel, 1175
 Bullock v. Bullock, 1071
 Bunbury v. Matthews, 814
 Bunch v. Kennington, 668
 Burbridge, *Ex parte*, 440
 Burder v. Velej, 1240, 1242
 Burges v. Lamb, 285, 286
 Burgess v. Clements, 612, 614
 Burgess v. Freelove, 730
 Burgess v. Gray, 176, 208
 Burgess v. Great Western Rail. Co., 218
 Burke v. Bryant, 446
 Burland v. Kingston-upon-Hull Local Board, 1277, 1292
 Burley v. Bethune, 869, 877
 Burling v. Harley, 806
 Burling v. Read, 361
 Burn v. Brown, 540
 Burn v. Morris, 404, 423
 Burnard v. Higgs, 1126
 Burnby v. Ballett, 1030
 Burne v. Richardson, 387, 635
 Burnes v. Pennell, 1038
 Burnett v. Lynch, 19
 Buron v. Denman, 39, 723
 Burrage v. Nicholetts, 362, 381
 Burroughes v. Bayne, 395
 Burrows v. March Gas Co., 24
 Burry v. Perry, 1207, 1208
 Burton, *In re*, 1261, 1273
 Burton v. Hughes, 436, 443
 Burton v. Legros, 716, 802, 806
 Bury v. Bedford, 1054
 Bush v. Beavan, 1290, 1292, 1293
 Bush v. Green, 491
 Bush v. Martin, 888, 890, 1277, 1291
 Bush v. Parker, 726
 Bush v. Steinman, 246
 Bushel v. Miller, 394
 Busst v. Gibbons, 743, 764
 Buszard v. Capel, 644
 Butcher v. Butcher, 375, 695
 Butcher v. Henderson, 1211
 Butcher v. L. and S. W. Rail. Co., 595, 599
 Butler v. Basing, 624
 Butler v. Hunter, 508, 510
 Butler v. Knight, 498
 Butler v. Woolcott, 602
 Butt v. G. W. Rail. Co., 586
 Butt v. Imperial Gas Co., 4, 921
 Butterfield v. Forrester, 494
 Butterworth v. Brownlow, 23, 578
 Button v. Heyward, 953, 968
 Buxton v. Baughan, 402, 541
 Buxton v. N. E. Rail. Co., 214, 597
 Bwlch-y-plwm Mining Co. v. Baynes, 1010
 Byerley v. Prevost, 410
 Byles, *In re*, 897, 904
 Byne v. Moore, 767
 Byrne v. Boadle, 202, 208, 212, 514
 Bywater v. Richardson, 201

C

- Cachar Co., *Re*, 1011
 Caddy v. Barlow, 759, 764
 Cahill v. L. and N. W. Rail. Co., 600
 Cailliff v. Danvers, 531
 Caillaud's Pat. Tan. Co. v. Caillaud, 1226
 Cairns v. Robins, 529, 593
 Calabar, *The*, 481
 Calcraft v. Harborough (Earl), 1086
 Calder and Hibble Navig. Co. v. Pilling, 45, 47, 48
 Calder v. Halkett, 774, 829
 Caldwell, *Ex parte*, 433
 Caledonian Rail. Co. v. Carmichael, 1225
 Caledonian Rail. Co. v. Sprot, 108, 112
 Caledonian Rail. Co. v. Ogilvy, 882, 907
 Calmady v. Rowe, 347
 Calne's (Borough of) Case, 1273
 Calvert v. Joliffe, 820
 Calye's Case, 610
 Camac v. Wariner, 1021
 Cambrin Railways Co.'s Scheme, 790
 Cameron v. Charing-cross Rail. Co., 903
 Cameron v. Wynch, 461
 Campbell v. Allgood, 287
 Campbell v. Mayor, etc., of Liverpool, 344
 Campbell v. Scott, 52, 1231
 Campbell v. Spottiswoode, 950
 Campion v. Benyon, 63
 Canadian Prisoners' Case, 863
 Cane v. Chapman, 1121
 Canham v. Barry, 1004, 1014, 1019, 1043
 Canham v. Fisk, 103, 114
 Canham v. Jones, 59
 Cann v. Clipperton, 714
 Cannee v. Spanton, 408
 Cannington v. Nuttall, 63
 Canot v. Hughes, 400, 404
 Canterbury (Lord) v. The Queen, 304

- Canterbury (Viscount) v. Att.-Gen., 304
 Capel v. Jones, 985
 Capel v. Powell, 1125
 Capella, The, 485, 519
 Card v. Card, 1149
 Card v. Case, 30, 251
 Cardigan (Earl of) v. Armitage, 101, 118, 120
 Cargill v. Cargill, 1059, 1065, 1068
 Carington v. Wycombe Rail. Co., 921
 Carlisle (Mayor of) v. Graham, 184, 348
 Carlyon v. Lovering, 86, 145, 251
 Carnavan (Earl of) v. Villebois, 1174
 Carne v. Brice, 1107
 Carnes v. Nisbitt, 317
 Carpenter v. Collins, 337
 Carpenter v. Mason, 847
 Carpenter v. Pearce, 792
 Carpenter v. Smith, 67
 Carpenter v. Wall, 1098
 Carque v. L. and B. Rail. Co., 472, 914
 Carr v. Benson, 120, 121
 Carr v. Foster, 155
 Carr v. Hood, 950
 Carr v. Lambert, 126
 Carr v. R. Exchange Ass. Co., 1149
 Carratt v. Morley, 876
 Carrill v. Pack, 131
 Carrington v. Roots, 1104
 Carrington v. Taylor, 13, 192
 Carruthers v. Payne, 437, 438
 Carslake v. Mapledoram, 957
 Carstairs v. Taylor, 83
 Carter v. Crick, 1024
 Carter v. James, 1159
 Carter v. Johnson, 455
 Carter v. Jones, 1168
 Cartier v. Carlisle, 1051
 Cartledge v. Cartledge, 1074
 Cartwright v. Amatt, 65
 Cartwright v. Eamer, 60
 Cartwright v. Wright, 983
 Cary v. Longman, 52, 55
 Casanovia v. The Queen, 447
 Casburn v. Reid, 761
 Cashill v. Wright, 615
 Cast Plate, Governor, etc., of v. Meredith, 887
 Castellan v. Thompson, 540
 Castle, *Ex parte*, 432
 Castleman v. Hicks, 659
 Castrique v. Behrens, 740
 Castrique v. Imrie, 1156
 Caswell v. Cook, 15
 Caswell v. Worth, 490
 Catchmade's Case, 1244
 Catchpole v. Ambergate, etc., Rail. Co., 19, 1119
 Cater v. Chignell, 808
 Caterham Rail. Co., *Re*, 631
 Catherwood v. Caslon, 1082
 Cator v. Lewisham Board of Works, 893, 920
 Catterall v. Kenyon, 448, 1124
 Catteris v. Cowper, 372
 Caudle v. Seymour, 836
 Caudwell, v. Hanson, 236
 Cave v. Coleman, 1015
 Cave v. Mountain, 826, 838
 Cavey v. Liddbitter, 194, 196
 Cawkwell v. Russell, 166, 193, 237
 Chabot, *In re*, 1238
 Chadwick v. Marsden, 101, 103
 Chadwick v. Trower, 213
 Chalk v. Wyatt, 388
 Chamberlain v. Goodwin, 972
 Chamberlain v. King, 713, 714
 Chamberlain v. West End, etc., Rail. Co., 901, 902, 903
 Chamberlaine v. Chester Birk. Rail. Co., 1169
 Chamberlayne v. Dummer, 286
 Chambers v. Bernasconi, 1176
 Chambers v. Caulfield, 1085
 Chambers v. Robinson, 764
 Champernown v. Scott, 547
 Champneys v. Arrowsmith, 344
 Chandeler v. Doulton, 656, 688
 Chandeler v. Thompson, 153
 Chandeler v. Lopus, 1015
 Chaney v. Payne, 848
 Channon v. Patch, 452
 Chanter v. Hopkins, 1021
 Chantler v. Lindsey, 1108
 Chapman v. Allen, 540
 Chapman v. Chapman, 499
 Chapman v. Cripps, 267
 Chapman v. Jones, 344
 Chapman v. Monm. Rail. Co., 796
 Chapman v. Pickersgill, 49
 Chapman v. Rothwell, 1148
 Chapman v. Speller, 418, 794, 1020
 Chapman v. Vantoll, 516
 Chappell v. Davidson, 1151
 Chapple v. Watt, 1225
 Charles v. Charles, 1071
 Charlwood v. Greig, 230
 Chase v. Westmore, 538
 Chasemore v. Richards, 72, 77, 82, 86
 Chauntler v. Robinson, 211, 213, 247
 Chauvin v. Alexandre, 796
 Cheasley v. Barnes, 730
 Cheese v. Scales, 229
 Cheesman v. Exall, 542, 554, 563, 623, 626
 Cheesman v. Hardham, 127
 Cheetham v. Hampton, 176, 539
 Chelsea Vestry v. King, 193
 Cheltenham, etc., Carriage and Wagon Co., *Re*, 776
 Cherry v. Colonial Bank of Australasia, 1026
 Chester v. Holyhead Rail. Co., 219
 Chetham v. Hoare, 341
 Chetham v. Williamson, 120, 135
 Chetwynd v. Chetwynd, 1072
 Cheveley v. Morris, 1203
 Chew v. Holroyd, 1141, 1245

- Chichester v. Lethbridge, 241, 271
 Child v. Affleck, 944
 Child v. Chamberlain, 664
 Child v. Hudson's Bay Co., 48
 Child v. Mann, 792
 Childers v. Wooler, 1005, 1018, 1041
 Chilton v. Carrington, 552, 564
 Chilton v. Lond. & Croy. Rail. Co., 48, 708
 Chinn v. Morris, 1175
 Chinnery Viall, 395, 1188
 Chinnock v. Sainsbury, 1228
 Chivers v. Savage, 731, 1243
 Chollet v. Hoffman, 63
 Christie v. Cowell, 957
 Christie v. Griggs, 474
 Christie v. Unwin, 850
 Christopherson v. Bare, 691, 723
 Church v. Barnet, 1147
 Church v. Inclos. Comm., 1238
 Churchill v. Siggers, 742, 754
 Churchward v. Coleman, 779, 1260
 Churchward v. Study, 413
 Churton v. Frewen, 344
 Cibber v. Sloper, 1085
 Clapham v. Shillito, 1016, 1042
 Clare v. Maynard, 1180
 Clark v. Armstrong, 230
 Clark v. Blything, 315, 1198
 Clark v. Calvert, 1114
 Clark v. Chamberlain, 400
 Clark v. Freeman, 929
 Clark v. Gaskarth, 646
 Clark v. Newsam, 735, 1197
 Clark v. Nicholson, 819
 Clark v. Webster, 231
 Clark v. Woods, 866
 Clark's Patent, 60
 Clarke v. Clark, 188
 Clarke v. Cogge, 106
 Clarke v. Dixon, 1010
 Clarke v. Earnshaw, 529, 531
 Clarke v. Hutchins, 583
 Clarke v. Leicester, etc., Canal Co., 286
 Clarke v. Postan, 450, 763
 Clarke v. Sarum (Bishop of), 1264, 1273
 Clarke v. Spence, 435
 Clarke v. Tinker, 127
 Clarke v. Watson, 500
 Clay v. Oxford, 1134
 Clay v. Roberts, 929
 Clay v. Willan, 24
 Clayards v. Dethick, 495
 Clayton v. Corby, 98, 135, 158, 364, 368
 Clayton v. Renton, 1143
 Cleeve v. Mahany, 196, 258
 Clegg v. Dearden, 1161
 Cleland, *Ex parte*, 545
 Clement v. Chivis, 924
 Clement v. Milner, 667
 Clements v. Flight, 262
 Clements v. Lambert, 166
 Clements v. Ohrlly, 765
 Clerk v. Gilbert, 551
 Cliff v. Mid. Rail., 473
 Clifton v. Hooper, 818
 Climie v. Wood, 300
 Clinton v. Clinton, 1066
 Clossman v. White, 557, 562
 Clothier v. Chapman, 1174
 Clothier v. Webster, 886, 889
 Clough v. L. and N. W. Rail., 420
 Clout v. Clout, 1073
 Clowes v. Beck, 1233
 Clowes v. Hughes, 434
 Coats v. Chaplin, 619
 Coats v. Clarence Rail. Co., 894
 Cobb v. Mid. Wales Rail. Co., 1222
 Cobban v. Downe, 531
 Cobbett v. Clutton, 398
 Cobbett v. Grey, 690
 Cobbett v. Wheeler, 1204
 Cock v. Gent, 913
 Cockayne v. Hodgkinson, 943
 Cockcroft v. Smith, 643, 696, 732
 Cocker v. Cowper, 99, 180
 Cocker v. Cardwell, 223
 Cocker v. Crompton, 359, 376
 Cocker v. Musgrove, 793
 Cockle v. L. and S. E. Rail., 471
 Cocks v. Chandler, 1053
 Codrington v. Lloyd, 810, 813
 Coe v. Wise, 888
 Coffin v. Coffin, 319
 Coggs v. Bernard, 522, 523, 524, 527, 533, 557, 574, 1112
 Cohen, *Ex parte*, 426, 440
 Cohen v. Huskisson, 704
 Cohen v. Morgan, 749, 876
 Colchester (Mayor of) v. Brooke, 28, 209, 237, 349
 Cole v. Forth, 280, 281
 Cole v. Foxman, 126
 Cole v. Goodwin, 579
 Cole v. Green, 10, 280
 Cole v. Maundy, 381, 382, 451
 Cole v. Turner, 691
 Colgrove v. Dios Santos, 396
 Coleman v. Coleman, 1067
 Coleman v. Foster, 120
 Coleman v. Riches, 1121
 Colemere, *Re*, 427
 Collard v. Allison, 64
 Collard v. S. E. Rail. Co., 1186
 Collen v. Wright, 1026, 1046, 1048, 1189
 Collett v. Curling, 638
 Collett v. Foster, 720, 810
 Collett v. Lond. and N. W. Rail. Co., 470, 620, 1103
 Collins v. Bristol and Exeter Rail Co., 596
 Collins v. Cave, 35, 1006
 Collins v. Evans, 1005, 1017
 Collins v. Forbes, 437
 Collins v. Martin, 545
 Collins v. Renison, 696
 Collins v. Ross, 872
 Collins' Co. v. Brown, 1051

- Collins' Co. v. Reeves, 1054
 Collis v. Selden, 19, 227, 249, 489
 Colnaghi v. Ward, 57
 Colwell v. Reeves, 1105
 Colyer v. Speer, 743
 Compton v. Richards, 114
 Concordis, The, and the Spring, 484
 Connell v. Watson, 1224
 Conradi v. Conradi, 1087
 Constable v. Nicholson, 122
 Conybeare v. Farries, 1220
 Cook, *Ex parte*, 1259
 Cook v. Batchellor, 971
 Cook v. Bath (Mayor of), 160, 162
 Cook v. Beal, 695
 Cook v. Cox, 973
 Cook v. Field, 979, 991
 Cook v. Ipswich Local Board, 276
 Cook v. Leonard, 715
 Cook v. Palmer, 782
 Cook v. Ward, 828
 Cooke v. Cooke, 1063
 Cooke v. Forbes, 259
 Cooke v. Hemming, 430
 Cooke v. Hughes, 987
 Cooke v. Jackson, 860
 Cooke v. Waring, 29
 Cooke v. Wilds, 936, 998
 Coomber v. Howard, 639
 Coombs v. Beaumont, 431
 Coombs v. Coombs, 1060
 Coombs v. Bristol and Exeter Rail. Co., 619
 Coombs v. Noad, 560
 Cooper v. Barber, 80
 Cooper v. Bill, 537
 Cooper v. Blandy, 685
 Cooper v. Booth, 751
 Cooper v. Gordon, 1270
 Cooper v. Harding, 720
 Cooper v. Hubbuck, 140, 152, 156, 188, 252, 259, 364
 Cooper v. Lond. & S. W. Rail. Co., 631
 Cooper v. Marshall, 131, 236, 329
 Cooper v. Shepherd, 1161
 Cooper v. Slade, 1221
 Cooper v. Stephenson, 499
 Cooper v. Wandsworth Board, etc., 364, 840, 1268
 Cooper v. Willomat, 554
 Cooper v. Woolley, 194
 Copeland v. N. East. Rail. Co., 1290
 Copeland v. Stephens, 424
 Copley v. Burton, 606
 Coppinger v. Gubbins, 316
 Corbet's (Sir Miles) Case, 127
 Corbett v. Brown, 783, 1008, 1039
 Corbett v. Gen. St. Nav. Co., 1138
 Corbett v. Ludham, 1237
 Corby v. Hill, 173, 178, 203
 Corner v. Champneys, 457
 Cornfoot v. Fowke, 1036
 Cornill v. Hudson, 1163
 Cornish v. Keene, 61, 66
 Cornish v. Stubbs, 100
 Cornman v. E. C. Rail. Co., 218
 Cornwall v. Metrop. Com. of Sewers, 206
 Cornwall v. Richardson, 767
 Cornwell v. Sanders, 842
 Corrance v. Corrance, 1072
 Corrigal v. Lond. & Bl. Rail. Co., 908
 Cosens v. Bognor Rail. Co., 922
 Coshay v. Tute, 583
 Cossey v. Lond. & Brighton Rail., 1154
 Costar v. Hetherington, 726
 Costard v. Wingfield, 128
 Costello v. Corlett, 1224
 Costworth v. Betison, 659
 Cotching v. Bassett, 187, 259, 1132
 Cotes v. Michill, 799, 813
 Cotesworth v. Spokes, 666
 Cotterell v. Griffiths, 163
 Cotterell v. Jones, 753
 Cotterill v. Hobby, 175
 Cotterill v. Starkey, 723
 Cotton v. Browne, 760
 Cotton v. Bull, 655
 Cotton v. James, 755
 Cotton v. Wood, 23, 476
 Counce v. Steel, 45, 50, 51
 Coulson v. White, 387
 Coulthart C. Coulthart, 1067
 Coupland v. Hardingham, 205
 Courtald v. Legh, 183
 Cousens v. Hall, 182
 Coutts v. Gorham, 115
 Coventry v. Gladstone, 422
 Coventry v. Lond., Brighton and S. C. Rail. Co., 910, 911
 Coward v. Baddeley, 691, 692
 Coward v. Gregory, 1130
 Cowell v. Amman Coll. Co., 1213, 1215
 Cowell v. Simpson, 540
 Cowing v. Cowing, 1086
 Cowlam v. Slack, 126
 Cowles v. Potts, 931
 Cowley v. Mayor, etc., of Sunderland, 223, 490, 524, 1118
 Cowling v. Higginson, 181
 Cowper (Earl) v. Baker, 316, 388
 Cox v. Bent, 637
 Cox v. Burbidge, 29, 30, 324
 Cox v. Cox, 1232
 Cox v. Feeney, 949
 Cox v. Glue, 75, 330, 370
 Cox v. Gt. East. Rail. Co., 569, 602
 Cox v. Land and Water Journal, 53
 Cox v. Lee, 929, 985
 Cox v. Leech, 499
 Cox v. London (Mayor of), 1239, 1246
 Cox v. Matthews, 115
 Cox v. Mitchell, 1155
 Cox v. Mousley, 330
 Cox v. Reid, 713
 Coxe v. Smith, 38
 Coxen v. Gt. West. Rail. Co., 596
 Coxhead v. Richards, 940, 988
 Crabb v. Crabb, 1065

- Cracknell v. Mayor of Thetford, 210, 1120
 Craft v. Boite, 1208
 Crafter v. Metrop. Rail. Co., 218
 Craig v. Hasell, 754
 Cramer v. Mott, 654, 655
 Cranch v. White, 403
 Cranden v. Walden, 959
 Crane v. London Dock Co., 416
 Crane v. Price, 62, 64
 Cranwell v. London (Mayor of), 922
 Craven, *Ex parte*, 427
 Craven v. Smith, 1212, 1214
 Craven v. Stubbins, 862
 Crawford's Case, 775
 Crawford v. Middleton, 956, 964
 Crawford v. Satchwell, 795
 Crawshay v. Homfrey, 540
 Crawshay v. Thompson, 1028, 1039, 1045
 Crease v. Barrett, 1175
 Crepps v. Durden, 836, 841
 Creuze v. Hunter, 1076
 Crewe v. Crewe, 1069
 Cristie v. Cowell, 956
 Crocker v. Molyneux, 415
 Croft v. Alison, 478, 515, 516
 Croft v. Day, 1053
 Croft v. Lond. and N. W. Rail. Co., 906, 909
 Croft v. Stevens, 931
 Crofts v. Brown, 953
 Crofts v. Haldane, 183
 Crofts v. Waterhouse, 468
 Crompton v. Ibbotson, 60
 Cronshaw v. Chapman, 806, 809, 1018
 Crook v. Dowling, 761
 Crosby v. Leng, 41
 Crosby v. Wadsworth, 372
 Cross, *Ex parte*, 863
 Cross v. Andrews, 607, 613
 Cross v. Androes, 607
 Cross v. Lewis, 137, 152
 Crosse v. Gardner, 1020
 Crossfield v. Such, 563, 565
 Crossley v. Beverley, 63
 Crossley v. Lightowler, 81, 84, 92, 115, 162, 166, 260, 348
 Crouch v. Great Northern Rail. Co., 604
 Crouch v. Great West. Rail. Co., 507
 Crouch v. Lond. and N. W. Rail. Co., 568, 583
 Crowder v. Long, 782
 Crowder v. Tinkler, 361
 Crowley v. Page, 1171
 Crozer v. Pilling, 756
 Crozier v. Cundey, 866, 868
 Crump v. Day, 792
 Crump v. Lambert, 258
 Cubitt v. Porter, 354, 1116
 Cubley v. Cubley, 1073
 Cudlipp v. Cudlipp, 1065
 Cullen v. Morris, 37
 Cullen v. Thompson, 1010
 Cullen v. Trimble, 5
 Culling v. Tuffney, 298
 Cullwick v. Swindell, 300
 Cumberland v. Copeland, 54
 Cumpston v. Haight, 539, 560
 Cunnington v. Cunnington, 1067, 1068
 Curlewis v. Broad, 19
 Curlewis v. Carter, 1234
 Curlewis v. Laurie, 363
 Curlewis v. Mordington, 1165
 Curry v. Walter, 946
 Curtis, *Re*, 1077
 Curtis v. Curtis, 1062
 Curtis v. Drinkwater, 512
 Curtis v. Mills, 229
 Curtis v. Platt, 1233
 Curtis v. Wheeler, 638
 Cuthbertson v. Parsons, 508
 Cutler v. Dixon, 934
 Czèch v. Gen. St. Nav. Co., 23, 589

D

- Da Costa v. The Russia Co., 1273
 Daines v. Hartley, 986
 Daintry v. Brocklehurst, 833
 Dale v. Birch, 806
 Dale v. Hall, 576, 622
 Dale v. Wood, 732
 Dalton v. Mid. Co. Rail. Co., 1107
 Dalton v. S. E. Rail. Co., 520
 Dalton v. Whitten, 644
 Dalyell v. Tyrer, 31, 507
 Damerell v. Protheroe, 1179
 Danby v. Lamb, 1209, 1211
 Dand v. Kingscote, 105
 Daniel v. Anderson, 104, 143, 168
 Daniel v. Gracie, 637
 Daniel v. Metrop. Rail. Co., 472
 Daniel v. North, 137, 184
 Daniel v. Wilson, 914
 Daniels v. Fielding, 625, 757
 Daniels v. Potter, 202, 206, 1177
 Dann v. Spurrier, 187
 Dansey v. Richardson, 528, 530, 618
 Danvers v. Morgan, 715
 Darby v. Harris, 644
 Darby v. Ouseley, 988, 1168, 1170
 Darby v. Waterlow, 789
 Darcy v. Allin, 60
 D'Arey (Lord) v. Askwith, 282
 Dare v. Heathcote, 182
 Dare v. Hopkins, 411
 Dare Valley Rail. Co., *Re*, 905
 Daaley v. The Queen, 1272
 Darling v. Clue, 155
 Daunt v. Crocker, 345
 Davenport v. Rylands, 1228, 1230
 Davey v. Chamberlain, 476
 Davey v. Mason, 584
 Davey v. Warne, 918
 Davidson v. Tulloch, 1120, 1185
 Davies v. England, 223
 Davies v. Jenkins, 6, 701, 794

- Davies v. Lond. and Blackw. Rail., 212
 Davies v. McHenry, 1248
 Davies v. Mann, 28, 237
 Davies v. Marshall, 152, 186, 260, 377, 1166
 Davies v. Nicholas, 399
 Davies v. Price, 1146
 Davies v. Sear, 106
 Davies v. Solomon, 961
 Davies v. Stacey, 680
 Davies v. Stear, 106
 Davies v. Stephens, 137, 181, 270, 378
 Davies v. Vernon, 398, 1123
 Davies v. Williams, 235, 1092, 1095
 Davis v. Bowsher, 545
 Davis v. Curling, 913, 916
 Davis v. Danks, 444
 Davis v. Gardiner, 960
 Davis v. Gyde, 642
 Davis v. James, 620
 Davis v. Jones, 296
 Davis v. Living, 433
 Davis v. Lond. and N. W. Rail. Co., 565
 Davis v. Nest, 560
 Davis v. Noake, 749
 Davis v. North West. Rail. Co., 626, 1186
 Davis v. Oswell, 463
 Davis v. Russell, 699, 700, 728
 Davis v. Swansea (Mayor of), 913
 Davis v. Symonds, 1043
 Davis v. Thomas, 1224
 Davison v. Duncan, 949
 Davison v. Gill, 349
 Davison v. Wilson, 331, 363
 Daw v. Eley, 775, 1231
 Dawes v. Hawkins, 266, 268, 271
 Dawes v. Peck, 619
 Dawkes v. Coveleigh, 41
 Dawkins v. Paulet (Lord), 730, 936
 Dawkins v. Rokeby (Lord), 730, 751
 Dawson v. Chamney, 613
 Dawson v. Cropp, 636, 658, 675
 Dawson v. Manch. etc., Rail. Co., 472
 Dawson v. Van Sandau, 765
 Dawson v. Willoughby-with-Sloothby, 274, 275
 Dawson v. Wood, 787
 Dawtry v. Higgins, 324, 327
 Day v. Buller, 959
 Day v. Carr, 791
 Day v. Day, 337
 Day v. King, 850
 Dayrell v. Hoare, 363
 Dean v. Branthwaite, 478
 Dean v. Hogg, 733
 Dean v. Peel, 1091
 Dean v. Taylor, 732
 Deane v. Clayton, 200
 Dean v. Keate, 525
 Dearden v. Townsend, 605
 Death, *Ex parte*, 1238
 Death v. Harrison, 809
 De Beauvoir v. Owen, 680
 De Crespigny v. Wellesley, 927
 Deeble v. Lineham, 137, 142
 Deere v. Guest, 389
 Deering v. Moor, 358
 Degg v. Midland Rail. Co., 493
 De Gondouin v. Lewis, 1195
 De Haber v. Portugal (Queen of), 1239
 Delacroix v. Thevenot, 981
 Delamere (Lord) v. The Queen, 1281
 De la Rue v. Fortescue, 1236
 Delegal v. Highley, 760, 766
 Delany v. Metrop. Board of Works, 909
 Delfe v. Delamotte, 52
 Delisser v. Towne, 751
 Dempster v. Dempster, 1070, 1072
 Dendy v. Simpson, 350, 351
 Dengate v. Gardiner, 1108
 De Nicholls v. Saunders, 638, 641
 Dennett v. Grover, 377
 Dennis v. Pawling, 1195
 Denston v. Ashton, 1225
 Dent v. Auction Mart Co., 92
 Dent v. Dent, 1087
 Dent v. Turpin, 1052
 Denton v. Gt. North. Rail. Co., 572, 1024, 1039
 Denton v. Macneil, 1011
 Denton v. Marshall, 1240, 1245
 Derby (Earl of) v. Bury Improvement Commissioners, 233
 Derecourt v. Corbishley, 703
 Dering v. Dering, 1067
 Derosne v. Fairie, 63
 De Rothschild v. R. M. St. P. Co., 530, 535
 De Rouffigny v. Peale, 498
 Devaux v. Steinkeller, 1009, 1039
 Devonshire (Duke of) v. Elgin, 99, 186, 1233
 Dewell v. Sanders, 329
 Dews v. Riley, 779
 Dexter v. Hayes, 1172
 D'Eyncourt v. Gregory, 292
 Dibble v. Bowater, 653
 Dibdin v. Swan, 950
 Dickenson v. Watson, 466
 Dickinson v. Coward, 1113
 Dickinson v. Follett, 1044
 Dickinson v. North-East Rail. Co., 503
 Digby v. Thompson, 928
 Dignam v. Bailly, 1224
 Dimes v. Grand Jun. Can. Co., 773, 858
 Dimes v. Petley, 208, 237
 Dimmock v. Hallett, 1018
 Dimmock v. North Staff. Rail. Co., 885
 Dinsdale v. Lond., Brighton and S. Coast Rail. Co., 1214, 1215
 Dingle v. Hare, 1191
 Dirks v. Richards, 408
 Ditchan v. Bond, 376
 Dixon v. Bell, 466, 512, 1103, 1191
 Dixon v. Enoch, 982
 Dixon v. Fawcus, 8, 1052
 Dixon v. Holden, 929
 Dixon v. Smith, 1194

- Dixon v. Stansfield, 544
 Dobell v. Stephens, 1019, 1043
 Dobree v. Napier, 40
 Dobson v. Blackman, 357
 Dobson v. Blackmore, 175
 Dockwray v. Dickenson, 446, 465
 Dod v. Monger, 659
 Dodd v. Burchall, 104, 168
 Dodd v. Holme, 213
 Dodd v. Norris, 1096, 1098
 Dodd v. Robinson, 959
 Dods v. Evans, 1224
 Dodwell v. Burford, 692
 Doe v. Arkwright, 1179
 Doe v. Beckett, 338
 Doe v. Benham, 338
 Doe v. Billett, 338
 Doe v. Bridges, 49
 Doe v. Challis, 386
 Doe v. Coombes, 342
 Doe v. Coulthred, 1179
 Doe v. Davidson, 100
 Doe v. Filliter, 1194, 1222
 Doe v. Gartham, 1268
 Doe v. Gower, 338
 Doe v. Hampson, 351
 Doe v. Harlow, 386, 387
 Doe v. Hinde, 338
 Doe v. Johnson, 333
 Doe v. Jones, 1270
 Doe v. Kemp, 351
 Doe v. Laming, 608
 Doe v. Leeds and Bradford Rail. Co.,
 895
 Doe v. Massey, 343
 Doe v. McKaeg, 1270
 Doe v. Moore, 337
 Doe v. Morris, 685
 Doe v. Murless, 813
 Doe v. Pearsey, 350
 Doe v. Penfold, 333
 Doe v. Phillips, 337
 Doe v. Pulman, 1179
 Doe v. Reed, 136
 Doe v. Rock, 337
 Doe v. Somerton, 1173
 Doe v. Stacey, 1175, 1180
 Doe v. Stanton, 335
 Doe v. Thorn, 800
 Doe v. Trye, 783
 Doe v. Turford, 1173
 Doe v. Wood, 120, 135
 Donald v. Suckling, 408, 526, 551
 Donaldson v. Beckett, 51
 Donaldson v. Gillott, 27
 Donford v. Ellys, 387
 Doorman v. Jenkins, 533, 533, 527, 557
 Dorchester (Mayor of) v. Ensor, 16
 Dorrington v. Carter, 451
 Doswell v. Impey, 771, 776
 Douglas v. Corbett, 765
 Douglas v. Yallop, 780
 Doulton v. Met. Board of Works, 1221
 Doust v. Slater, 915
 Dovaston v. Payne, 328, 329
 Dover, *Ex parte*, 434
 Dover v. Mills, 529
 Dover v. Rawlings, 678
 Dowding v. Gt. West Rail. Co., 1253
 Dowell v. Gen. Steam Nav. Co., 483
 Dowglass v. Kendall, 117
 Dowling v. Betjemann, 564, 1234
 Down v. Halling, 423
 Downes v. Price, 1011
 Downey's Case, 864
 Downing v. Butcher, 767
 Downing v. Capel, 715
 Downshire (Marquis of) v. Lady Sandys, 287
 Downton Overseers, *Ex parte*, 1263
 Dowes, The, 1144
 Doyle v. Falconer, 775
 Dracachi v. Anglo-Egyptian Nav. Co.,
 422
 Drake v. Beckham, 1113
 Drake v. Sykes, 782, 815
 Draper v. Fulkens, 1124
 Draper v. Sperring, 233
 Dresser v. Bosanquet, 549
 Drewell v. Towler, 96
 Drummond v. Sant, 337
 Drury v. Molins, 316
 Duberley v. Gunning, 1085, 1200, 1201
 Dubois v. Keats, 746, 748
 Dubost v. Beresford, 1196
 Du Boulay v. Du Boulay, 1050, 1054
 Duckworth v. Johnson, 503, 516
 Duddell v. Simpson, 1018
 Dudden v. Guardians of Clutton Union,
 78
 Dudley v. Smith, 467
 Dudley Can. Nav. Co. v. Grazebrook,
 109
 Dudley and West Bromw. Bank Co. v.
 Spittle, 41
 Duff v. Budd, 594, 619
 Dugdale v. Robertson, 76
 Duignan, *Ex parte*, 425, 427, 428
 Duke v. Barnett, 1019
 Dumas, *Ex parte*, 439
 Dumergue v. Rumsey, 298
 Dun. Nav. Co. v. North Mid. Rail. Co.,
 922
 Duncan v. Blundell, 496
 Duncan v. Findlater, 882, 887, 891, 1292
 Duncan v. Louch, 165, 181
 Duncomb v. Reeve, 659
 Dundalk Western Rail. Co. v. Tapster,
 49
 Dundonald (Earl of) v. Masterman, 497
 Dunlop v. Lambert, 620
 Dunn v. Large, 386
 Dunnicliff v. Mallet, 66
 Dunraven (Lord) v. Llewellyn, 1174
 Dunston v. Paterson, 701, 794, 801,
 1211
 Duppa v. Mayo, 643
 Durell v. Pritchard, 186, 1228, 1234

Durham and Sund. Rail. Co. v. Wawm, 318
 Du Terraux v. Du Terraux, 1067
 Dutton v. Powles, 1147
 Duvergier v. Fellows, 65
 Dwyer v. Collins, 1172
 Dyce v. Hay, 97, 122
 Dyer v. Hargrave, 1013
 Dyer's Co. v. King, 164
 Dyke v. Duke, 781
 Dynen v. Leach, 225, 489
 Dyson v. Collick, 372, 373
 Dyster v. Battye, 1034

E

Eager v. Dyott, 758, 762
 Eager v. Grimwood, 1093, 1095, 1097
 Eagle v. Charing Cross Rail. Co., 902
 Eagleton v. Gutteridge, 681
 Earle v. Holderness, 448
 Earle v. Picken, 686
 Earle's Case, 1269
 Easley v. Crockford, 405
 East India Co. v. Pullen, 624
 East India Co. v. Vincent, 186, 320
 East and West I. D. Co. v. Gattke, 901
 Eastern Co. Rail. Co. v. Broom, 722, 1118
 Eastern Co. Rail. Co. v. Dorling, 105, 238
 Easton v. London, 415
 Easton v. Richmond Highway Board, 273
 Eastwood v. Bain, 1011, 1042
 Eaton v. Johns, 929
 Eaton v. Swansea Water Co., 80, 154
 Eaves v. Dixon, 1044
 Eccleston v. Clipsham, 1115
 Eclipse, The, 484
 Edelsten v. Edelsten, 1051, 1053
 Edge v. Parker, 805
 Edgeberry v. Stephens, 66
 Edgell v. Francis, 733
 Edmonson v. Machell, 1094
 Edmonson v. Nutall, 442, 457, 459, 463, 688, 1196
 Edsall v. Russell, 955, 991
 Edwards v. Bridges, 787
 Edwards v. Crock, 1086
 Edwards v. Farebrother, 788
 Edwards v. Ferris, 834
 Edwards v. Gt. West. Rail. Co., 918
 Edwards v. Halinder, 211
 Edwards v. Hodges, 1181
 Edwards v. Hooper, 407, 426
 Edwards v. L. & N. W. Rwy., 721
 Edwards v. Martin, 432
 Edwards v. Sheratt, 624
 Eggington's Case, 795, 863
 Eggington v. Mayor of Litchfield, 1118
 Egremont (Lord) v. Pulman, 170, 193
 Egyptian (The), 480
 Eicholz v. Bannister, 1020
 Ekins v. Tresham, 1013, 1018
 Eliot v. Allen, 714, 1197, 1201
 Elliott's Case, 264
 Elliottson v. Feetham, 192, 196, 199
 Elliott v. Bishop, 295, 297, 298
 Elliott v. Nicklin, 1096
 Elliott v. North-East. Rail. Co., 110
 Ellis v. Abrahams, 751
 Ellis v. Bridgnorth (Mayor of), 17, 115, 116, 134
 Ellis v. Cowne, 1175
 Ellis v. Kelly, 862
 Ellis v. Lond. & S. W. Rail. Co., 221, 228
 Ellis v. Sheffield Gas Co., 208, 246
 Ellis v. Taylor, 661
 Ellison v. Isles, 1151, 1167
 Ellwood v. Christy, 58
 Elmhirst v. Spencer, 92
 Elmslie v. Boursier, 65
 Elsam v. Faucett, 1086
 Elsee v. Smith, 748, 828
 Elstob v. Wright, 716, 722
 Elston v. Rose, 1140
 Elwell v. Crowther, 93
 Elwes v. Maw, 291, 295, 298
 Elworthy v. Sandford, 416, 447
 Ely (Dean, etc., of) v. Warren, 127
 Emblem v. Myers, 517, 1193
 Embrey v. Owen, 10, 77, 78, 80
 Emerson v. Emerson, 1111
 Emery, *In re*, 1140, 1142
 Emery v. Barnett, 775
 Emmerton v. Matthews, 1030
 Enderby, *Ex parte*, 431
 Energy, The, 481
 England v. Bourke, 991
 England v. Purser, 730
 Ennor v. Barwell, 78, 79, 93
 Esdaile v. Oxenham, 547
 Esk, The, 484
 Europ. & Austr. R. M. Co. v. R. M. Steam. P. Co., 401, 623
 Evans, *Ex parte*, 1241, 1247
 Evans v. Botterill, 839
 Evans v. Edmonds, 1007
 Evans v. Evans, 1062
 Evans v. Hallam, 428
 Evans v. Harlow, 930, 959
 Evans v. Harries, 976, 1194
 Evans v. Matthias, 685
 Evans v. Nichol, 419
 Evans v. Rees, 1179, 1208
 Evans v. Roberts, 372
 Evans v. Walton, 1089, 1090
 Evans v. Wright, 396, 652
 Evelyn v. Raddish, 91, 311, 315
 Everard v. Kendall, 1144
 Everett v. Grapes, 46, 241
 Eversfield v. Newman, 842, 1141
 Everton (Overseers of), *Ex parte*, 1246
 Every v. Smith, 332, 372
 Ewart v. Cochrane, 103

Ewart v. Graham, 101
 Ewbank v. Nutting, 448, 457
 Excelsior (The), 484
 Exeter Carriers' Case, 601
 Exeter (Corporation of) v. Devon (Earl of), 210, 259
 Exley v. Inglis, 425
 Explorer, The, 483

F

Fabrigas v. Mostyn, 1184
 Fairman v. Ives, 936, 939
 Faithful, *Re*, 547
 Faldo v. Ridge, 363
 Falke v. Fletcher, 394
 Fallon, *Ex parte*, 716
 Farebrother v. Ansley, 1197
 Farina v. Silverlock, 1053
 Farley v. Danks, 755
 Farmer v. Darling, 743
 Farmer v. Hunt, 392
 Farmer v. Joseph, 1096
 Farnsworth v. Garrard, 496
 Farnworth v. Packwood, 612
 Farr v. Newman, 788
 Farrant v. —, 418
 Farrant v. Barnes, 22, 466, 489, 522, 553, 578, 1004, 1033, 1035
 Farrant v. Lovel, 317
 Farrant v. Thompson, 445, 453
 Farrow v. Hague, 1242
 Farshaw v. De Wette, 1213
 Farwell v. Boston, etc., Rail. Co., 227
 Fauconberg v. Piers, 190
 Fawcett v. Beavres, 1088
 Fawcett v. Fearne, 425, 430
 Fawcett v. York and N. Mid. Rail. Co., 220
 Fay v. Prentice, 192
 Fearon v. Mitchell, 17
 Feather v. The Queen, 60, 61
 Felkin v. Herbert (Lord), 1229
 Fell v. Knight, 607
 Fell v. Whittaker, 676
 Feltham v. England, 227
 Fenham (The), 483
 Fenn v. Bittleston, 445
 Fenn v. Dixe, 975
 Fenn v. Griffith, 1170
 Fenn v. Harrison, 1037
 Fennor v. Duplock, 685
 Fennings v. Grenville (Lord), 407
 Fentiman v. Smith, 99
 Fenton v. Logan, 651
 Fenwick v. Laycock, 788, 791
 Ferguson, *Ex parte*, 485
 Ferguson v. Carrington, 395
 Ferguson v. Kinnoul (Earl), 19, 21, 36
 Ferguson v. Wilson, 1012, 1228
 Fernandez, *Ex parte*, 776
 Fernie v. Young, 1231, 1234
 Fernley v. Worthington, 878

Ferrand v. Bradford (Corpon. of), 895
 Ferrers (Earl of) v. Staff. & Uttox. Rwy., 922
 Fetter v. Beale, 735, 1160, 1191
 Feversham v. Emerson, 361
 Field v. Adames, 668
 Field v. Brown, 285
 Field v. Carnarvon & Llanberris Rail. Co., 922
 Field v. Mitchell, 657
 Figlia Maggiore, The, 487
 Filliter v. Phippard, 12, 304, 305, 312
 Finch v. Blount, 457
 Findon v. M'Laren, 650
 Finlay v. Finlay, 1084
 Finnerty v. Tipper, 993, 996
 Finucane v. Small, 530
 Firth v. Purvis, 659
 Fisher v. Algar, 657, 676
 Fisher v. Bristow, 759
 Fisher v. Clement, 989
 Fisher v. Fisher, 1071
 Fisher v. Magnay, 795, 800
 Fisher v. Prowse, 205, 206
 Fitch v. Rawlings, 96, 122
 Fitzgerald v. Fitzgerald, 1066
 Fitzgerald v. Northcote, 727
 Fitzjohn v. Mackinder, 38, 747, 748
 Fleeming v. Orr, 231, 255
 Fletcher v. Bowsher, 1034
 Fletcher v. Braddick, 485
 Fletcher v. Calthorp, 848
 Fletcher v. Fletcher, 709, 1066
 Fletcher v. Greenwell, 913
 Fletcher v. Rylands, 83, 213
 Flewster v. Royle, 718
 Flight v. Leman, 753
 Flight v. Thomas, 151, 153, 252
 Flinn v. Perkins, 1135
 Flower v. Adam, 25
 Flower v. Gardner, 1223
 Flower v. London, Brighton & S. C. Rail. Co., 921
 Floyd v. Barker, 751
 Flyn v. Matthews, 435
 Foiston v. Crachroode, 123
 Foley v. Wilson, 284
 Ford v. Leche, 783
 Ford v. Tynte, 285
 Forde v. Skinner, 690, 692
 Fordham v. Akers, 674
 Fordham v. Brighton Rail. Co., 472
 Foreman v. Canterbury (Mayor of), 889
 Fores v. Wilson, 1096
 Forest Queen, The, 1144
 Forman v. Dawes, 452, 512
 Forsdyke v. Stone, 993, 1211
 Forster v. Forster, 1085
 Forsyth's Case, 62, 63
 Forth v. Simpson, 540
 Forward v. Pittard, 576, 593
 Foster v. Bates, 1112
 Foster v. Charles, 1008
 Foster v. Cookson, 793

Foster v. Crabb, 552, 561
 Foster v. Denny, 1078
 Foster v. Dod, 234, 344
 Foster v. Foster, 1238
 Foster v. Hilton, 793, 820
 Foster v. Pointer, 1208, 1216
 Foster v. Pritchard, 792, 808
 Foster v. Stewart, 1089
 Fotherby v. Metrop. Rail. Co., 904, 1288, 1289
 Fouldes v. Willoughby, 394
 Foulger v. Newcomb, 958
 Foulger v. Taylor, 804
 Fountain v. Boodle, 944
 Fowkes v. Joyce, 651
 Fowler v. Down, 453
 Fowles v. Great West. Rail. Co., 597
 Fox, *Ex parte*, 65
 Fox v. Fisher, 440
 Fox v. Gaunt, 701
 Foxall v. Barnett, 736, 768
 Foxcraft v. Wood, 543
 Foxham Tithing Case, 831
 Foxley, *Ex parte*, 427
 Foy v. London, Brighton, etc., Rail. Co., 471
 France v. Gaudet, 463
 Frances v. Ley, 9
 Francis v. Cockrell, 475
 Francis v. Wyatt, 650
 Frankland v. Cole, 498
 Franklin v. Hosier, 538
 Franklin v. Neate, 554
 Franklin v. S. E. Rail. Co., 520
 Franks v. Franks, 1066
 Franks v. Weaver, 1051
 Frankum v. Falmouth (Earl of), 86, 88
 Fraser v. Berkeley, 1195
 Fraser v. Swansea Navig. Co., 431
 Fray v. Fray, 928
 Fray v. Voules, 498
 Frean v. Sargent, 1207
 Freedom, The, 487
 Freeman v. Appleyard, 544
 Freeman v. Arkell, 763, 767
 Freeman v. Birch, 555, 620
 Freeman v. Cooke, 1178
 Freeman v. Edwards, 652
 Freeman v. Read, 274, 1146, 1249
 Freeman v. Rosher, 676
 Freemantle v. Gt. North. Rail. Co., 885
 Freer v. Marshall, 751
 Freestone v. Caswell, 237
 Fremantle v. Lond. & N. W. Rail. Co., 251, 307, 312
 French v. Phillips, 657, 683
 Freshney v. Carrick, 432
 Frewen v. Hastings Local Board, 1250
 Frewen v. Phillips, 152
 Friswell v. King, 546
 Frith v. Cartland, 441
 Frith v. Forbes, 548
 Fryer v. Kinnersley, 944
 Fulber, *Ex parte*, 779

Fuller v. Mackay, 1138
 Fuller v. Wilson, 1036
 Furber, *Ex parte*, 1260
 Furnis v. Leicester, 1020
 Furnis v. Midland Rail. Co., 911
 Fursdon v. Clogg, 339
 Futchet v. Hinder, 796
 Fynn, *In re*, 1074

G

Gabriel v. Dresser, 1151, 1155
 Gaby v. Wilts. Canal Co., 913
 Gage v. Collins, 1220
 Gage v. Smith, 284
 Gahan v. Laffitte, 771
 Gale v. Dalrymple, 726
 Gallagher v. Humphrey, 203
 Gallagher v. Piper, 226
 Galliard v. Laxton, 698, 866
 Galloway v. Bird, 672
 Galloway v. Bleaden, 67
 Galloway v. London (Corp. of), 921
 Gallwey v. Marshall, 975, 960
 Gambart v. Ball, 58
 Gambart v. Sumner, 58
 Gambrell v. Falmouth, 1223
 Gandy v. Jubber, 176, 196, 244
 Gann v. Whitstable Free Fishers, 347, 348
 Gardiner v. Gray, 1022
 Gardiner v. Williamson, 636
 Gardner v. Broadbent, 1230
 Gardner v. Slade, 944
 Garnett v. Backhouse, 239
 Garnett v. Ferrand, 770
 Garnett v. Willan, 596
 Garside v. Trent Navig. Co., 593
 Garrard v. Guibelei, 1134
 Garrard v. Tuck, 337
 Garret v. Taylor, 14
 Garrett v. Messenger, 263
 Garritt v. Sharp, 163
 Garth v. Howard, 1177
 Garton v. Bristol & Exeter Rail. Co., 574, 590, 603, 604
 Garton v. Gt. West. Rail. Co., 630, 914, 918, 1220, 1253
 Gaskell v. Marshall, 788
 Gatehouse v. Gatehouse, 1064
 Gateward's Case, 123
 Gathercole v. Miall, 951
 Gaudret v. Egerton, 203
 Gauntlett v. King, 676
 Gaved v. Martyn, 145, 146
 Gawler v. Chaplin, 780
 Gay v. Matthews, 865, 868
 Gayford v. Moffatt, 105, 168
 Gee v. Lanc. and York. Rail. Co., 627, 1220
 Gelley v. Clerk, 615
 General Exchange Bank, *Re*, 545
 General Exchange Bank v. Horner, 502

- Gen. St. Navig. Co. v. Br. and Col. St. Navig. Co., 481
 Gen. St. Navig. Co. v. Guillou, 1117
 Gen. St. Navig. Co. v. Hedley, 483
 Genges v. Genges, 546
 Gent v. Harrison, 285, 311
 George v. Beaumont, 66
 George v. Chambers, 868
 George and Richard, The, 483, 488
 George v. Skivington, 35, 496, 1036
 Gerard v. Lewis, 753
 Gerhard v. Bates, 6, 35, 1009, 1039
 Gerrard v. Cooke, 106
 Gibbins v. Phillips, 815
 Gibbon v. Paynton, 24, 1033
 Gibbons v. Alison, 757
 Gibbons v. Pepper, 8, 467, 510, 514, 723
 Gibbs v. Cole, 63
 Gibbs v. Ralph, 1207
 Gibbs v. Trus. of Liv. Dock, 203, 221, 222, 249, 887
 Giblin v. McMullen, 501, 527
 Gibson v. Bray, 435
 Gibson v. Hammersmith Rail. Co., 895, 922
 Gibson v. Humphrey, 448
 Gibson v. Ireson, 648
 Gibson v. Preston (Mayor of), 888
 Gibson v. Smith, 316, 1229
 Gibson v. Wells, 283
 Gilbert v. Burtenshaw, 993, 1199
 Gilbertson v. Richardson, 1186
 Gilding v. Eyre, 754
 Giles v. Lond. & Chat. Rail. Co., 895
 Giles v. Spencer, 638, 642, 647
 Giles v. Taff Vale Rail. Co., 1119
 Gill v. Cubitt, 423
 Gillard v. Brittan, 1196
 Gillett v. Wilby, 64
 Gillon v. Boddington, 913, 1109, 1163
 Gilman v. Elton, 648
 Gilpin v. Cohen, 796
 Gilpin v. Fowler, 938, 962
 Gimbert v. Coyney, 867
 Gimson v. Woodfall, 418
 Gipps v. Gipps, 1069, 1071
 Girlington v. Pitfield, 762
 Gisbourn v. Hurst, 647
 Gittins v. Symes, 1236
 Gladman v. Johnson, 255
 Gladstone v. Padwick, 788
 Gladwell v. Stéggall, 516, 1103, 1106
 Glaholm v. Barker, 482
 Glasgow (City of) Union Rwy. v. Hunter, 896, 902
 Glasgow Nat. Ex. Co. v. Drew, 1038
 Glasspoole v. Young, 460, 788
 Glave v. Harding, 103, 114
 Glennie v. Glennie, 1069
 Glover v. Dixon, 1166
 Glover v. Lond. & N. W. Rail. Co., 407
 Glover v. Lond. & S. W. Rail. Co., 734
 Glover v. North Staff. Rail. Co., 909
 Glyn v. Aberdare Rail Co., 904
 Glynn v. Houston, 731, 1186
 Glynn v. Thomas, 657, 661, 665, 670, 675, 683
 Goddard v. Harris, 795
 Goddard v. Haselfoot, 958
 Godefroy v. Dalton, 499
 Godefroy v. Jay, 498
 Godfrey v. Furzo, 439
 Godson v. Horne, 945
 Godts v. Rose, 422
 Godwin v. Francis, 1048
 Goff v. Gt. North. Rail. Co., 708, 720, 722, 1118, 1221
 Goggerly v. Cuthbert, 404
 Gold v. Strode, 814
 Golden v. Manning, 594
 Golding v. Stocking, 237
 Goldsmid v. Tunbridge Wells Commrs., 256, 258, 260
 Goldstein v. Foss, 998
 Gompertz v. Kensit, 1084
 Good v. Lond. Steam Shipowners' Association, 487
 Goodall v. Ensell, 1208
 Goode v. Job, 339
 Goodheim v. Goodheim, 1066
 Goodman v. Boycott, 529, 555, 558, 562, 563
 Goodman v. Harvey, 405
 Goodtitle v. Alker, 332
 Goodtitle v. Tombs, 387
 Goodwin v. Noble, 1130
 Goodwyn v. Cheveley, 322, 328, 667, 682
 Gordon v. East India Co., 432
 Gordon v. Harper, 444
 Gordon v. Woodford, 286
 Gore v. Grey, 709
 Gore v. English Fishery Commissioners, 239
 Gorton v. Falkner, 651
 Goslin v. Corry, 993, 1192
 Gosset v. Howard, 847
 Gott v. Gandy, 212
 Gough v. Everard, 441
 Gould v. Capper, 1240
 Governor, etc., of Cast Plate v. Meredith, 945
 Govett v. Radnidge, 1135
 Gowens v. Moore, 1212
 Grace v. Morgan, 1190
 Graham v. Furber, 429, 430
 Graham v. Graham, 1072
 Grainger v. Hill, 395, 755, 757
 Grand Junction Canal Co. v. Shugar, 83
 Granger v. George, 1164
 Grant v. Astle, 1185
 Grant v. Moser, 703, 729
 Grant v. Norway, 1036
 Grant v. Vaughan, 404, 422
 Grantham v. Hawley, 119
 Graves v. Ashford, 57
 Graves' Case, 59
 Gray v. Bond, 137
 Gray v. Carr, 537.

- Gray v. Pullen, 207, 246, 510
 Gray v. West, 1212
 Grayburn v. Clarkson, 1130
 Greasley v. Codling, 43.
 Greatrex v. Hayward, 147
 Gt. North. Co. v. Shepherd, 570, 600
 Gt. Ship Co., *Re*, 789
 Gt. West. Rl. Co. of Canada v. Braid, 890
 Gt. West. Rl. Co. of Canada v. Fawcett, 219, 473
 Great West. Rail. Co. v. Bennett, 109
 Great West. Rail. Co. v. Crouch, 600
 Great West. Rail. Co. v. Goodman, 500
 Great West. Rail. Co. v. Redmayne, 628
 Great West. Rail. Co. v. Rimell, 586
 Great West. Rail. Co. v. The Queen, 1257
 Great West. Rail. Co. v. Sutton, 604
 Great Yarmouth (Mayor of) v. Groom, 16
 Greathead v. Morley, 101
 Green v. Bartram, 729
 Green v. Button, 11, 36, 37, 1006, 1039
 Green v. Dunn, 400
 Green v. Elgie, 810
 Green v. Farmer, 543
 Green v. Goddard, 694
 Green v. Greenbank, 1127
 Green v. Ingham, 432
 Green v. Lon. Gen. Om. Co., 207, 241, 1118
 Green v. New River Co., 35
 Green v. Pope, 1287
 Green v. St. Cath. Dock Co., 655
 Greene v. Jones, 1167
 Greenhow v. Hsley, 173
 Greening v. Wilkinson, 460
 Greenland v. Chaplin, 27, 29, 480, 484, 1187
 Greenslade v. Darby, 344
 Greenslade v. Halliday, 237
 Greenway v. Fisher, 1130
 Greenway v. Hurd, 712, 914
 Greenwich Board of Works v. Maudslay, 268
 Gregg v. Wells, 456
 Gregory's Case, 1061
 Gregory v. Brunswick (Duke of), 740
 Gregory v. Cotterell, 781, 782, 821
 Gregory v. Hill, 696
 Gregory v. Piper, 247, 358
 Gregory v. West Mid. Rail. Co., 592
 Gregory v. Williams, 1192
 Gregson v. Theaker, 1085
 Gresham v. Postan, 1013
 Greville v. Chapman, 930, 985
 Griffin v. Coleman, 691, 698, 700, 719, 804, 867
 Griffin v. Dighton, 343
 Griffith v. Matthews, 135
 Griffiths v. Gidlow, 226, 489
 Griffiths v. Kynaston, 1223
 Griffiths v. Lewis, 943, 957, 975, 998
 Griffiths v. Longdon & Eilersfield Drainage Board, 73
 Griffiths v. Teetgen, 1091
 Grill v. Gen. Iron Screw Collier Co., 22, 483, 487
 Grimby v. Ackroyd, 1244
 Grimstead v. Marlow, 123
 Grimston v. Innkeeper, 616
 Grindley v. Booth, 1235
 Grinham v. Willey, 719, 731
 Grinnell v. Wells, 44, 1089, 1091, 1095
 Grocers' Co. v. Dunne, 884, 886
 Groenvelt v. Burwell, 777, 858
 Grose v. West, 351
 Grote v. Ches. & Holyh. Rail. Co., 473, 474
 Grove v. Nevill, 1031
 Groves v. Groves, 1067
 Grubb v. Burlington (Earl of), 291
 Grymes v. Boweren, 296
 Grymes v. Peacock, 166
 Guest v. Poole & Bournemouth Rail., 900
 Guest v. Warren, 787, 1159, 1244
 Guille v. Swan, 199
 Guldfaxe, The, 483, 503
 Gulliver v. Cosens, 669, 675
 Gunmakers' Co., v. Fell, 48
 Guntor v. Astor, 1099
 Gurr v. Cuthbert, 409
 Gustard's Case, 1295
 Gutsale v. Mathers, 932, 969, 1038
 Gwinnett v. Phillips, 684
 Gwynn v. Poole, 774

H

- Haddrich v. Heslop, 744, 760
 Hadesden v. Gryssel, 131, 413
 Hadley v. Baxendale, 627, 1047, 1187
 Hadley v. Taylor, 201, 229
 Hague v. Dandeson, 537
 Haigh v. Haigh, 1066
 Haigh v. Jaggat, 319
 Haigh v. Lond. & N. West. Rail. Co., 221, 227
 Hailes v. Marks, 728, 744
 Haines v. East India Co., 818, 1178
 Haines v. Roberts, 108
 Haines v. Taylor, 258
 Haines v. Welsh, 638
 Haire v. Wilson, 928, 989, 997
 Hakewill, *In re*, 1075
 Hale v. Oldroyd, 166
 Hall's Case, 260
 Hall's Estate, *Re*, 1084
 Hall v. Ball, 415
 Hall v. Barrows, 1050, 1054
 Hall v. Booth, 700
 Hall v. Bristol (Mayor of), 897
 Hall v. Fearnley, 514, 722
 Hall v. Harding, 172
 Hall v. Hollander, 1105
 Hall v. Johnson, 490
 Hall v. Lund, 103
 Hall v. Pickard, 445, 478

- Hall v. Smith, 1120
 Hall v. Swift, 77
 Hall v. Taylor, 1292
 Halley, The, 483
 Halliday, *In re*, 1079
 Halliday v. Holgate, 408
 Hallows v. Fernie, 1012
 Hamar v. Alexander, 1008
 Hambleton v. Veere, 1185, 1202
 Hambly v. Trott, 1128
 Hamer v. Knowles, 75
 Hamilton v. Bell, 434, 438
 Hamilton (Duke of) v. Graham, 330
 Hamilton v. Vere, 1088
 Hammack v. White, 23, 467
 Hammond v. Barclay, 543
 Hamond v. Howell, 770, 775
 Hams, *In re*, 432
 Hancke v. Hooper, 496
 Hancoke v. Caffyn, 1114
 Hancock v. Peaty, 1068
 Hancock v. Somes, 725
 Hancock v. Southall, 515
 Hand, *In re*, 1266
 Handcock v. Baker, 364
 Handford v. Palmer, 525
 Hando v. Lond., Chat. & Dover Rail. Co., 492
 Hankinson v. Bilby, 969
 Hanna (The), 481
 Hannaford v. Hunn, 730
 Hannam v. Mockett, 12, 13, 329
 Harbridge v. Warwick, 151, 152
 Harcourt v. Fox, 824, 1269
 Harcourt v. White, 320
 Harcourt v. Wyman, 1106
 Hardcastle v. S. York., etc., Rail. Co., 201, 203, 205, 229
 Harding v. Carter, 1178
 Harding v. Greening, 981
 Harding v. King, 725
 Harding v. Metrop. Rail. Co., 900
 Harding v. Pollock, 1269
 Hardwick v. Moss, 916
 Hardy v. Ryle, 872, 1164
 Hardy v. Veasey, 501
 Hardy v. Walker, 1239, 1245
 Hare v. Celey, 1115
 Hare v. Horton, 357
 Hargrave v. Le Breton, 970
 Harland v. Mayor of Newcastle-on-Tyne, 1212
 Harman v. Cornelius, 496
 Harman v. Delaney, 930, 953, 957
 Harmer v. Bell, 1156
 Harnett v. Maitland, 278, 283
 Harold v. Smith, 1223
 Harper v. Charlesworth, 270, 372
 Harper v. Godsell, 555
 Harper v. Luffkin, 1093
 Harper v. Pole, 1143
 Harries v. Thomas, 1207
 Harrington (Earl) v. Ramsay, 1142
 Harris v. Baker, 1120
 Harris v. Butler, 1091
 Harris v. Cockermonth Rail., 631
 Harris v. Costar, 468, 513
 Harris v. Dignum, 719, 731, 1177
 Harris v. Ryding, 108
 Harris v. Shipway, 643
 Harris v. Thompson, 945
 Harrison, *Ex parte*, 433
 Harrison v. Barnby, 642
 Harrison v. Blackburn, 373
 Harrison v. Bush, 935, 946
 Harrison v. Dixon, 451
 Harrison v. Good, 199
 Harrison v. Gt. North. Rail. Co., 23, 72, 885
 Harrison v. Parker, 373
 Harrison v. Pearce, 993
 Harrison v. Taylor, 57
 Harrison v. Thornborough, 953
 Harrison v. Wright, 1145
 Harrop v. Hirst, 80, 90
 Harrow School v. Alderton, 314, 320
 Hart's Case, 1294
 Hart v. Aldridge, 1089
 Hart v. Baxendale, 623
 Hart v. Crowley, 513
 Hart v. Frame, 497
 Hart v. Frontino and Bolivia Gold Mining Co., 1179
 Hart v. Leach, 677
 Hartley, *In re*, 864
 Hartley v. Halliwell, 254
 Hartley v. Harriman, 250
 Hartley v. Hindmarsh, 725, 732
 Hartley v. Moxham, 655
 Hartnall v. Ryde Improv. Commrs., 178, 888
 Hartop v. Hoare, 541
 Hartz v. Schrader, 319
 Harvey v. Brydges, 331, 376
 Harvey v. French, 985
 Harvey v. Mitchell, 1172
 Harvey v. Pocock, 645, 688
 Harwood v. Great North. Rail. Co., 67
 Haseler v. Lemoyne, 676
 Haselinton v. Gill, 439
 Hassall v. Wright, 65, 66
 Haswell v. Haswell, 1067
 Hatch v. Hale, 661
 Hatch v. Lewis, 517, 1214
 Hatton v. Kean, 54
 Haviland v. Haviland, 1064, 1068
 Hawkes v. Dunn, 400, 421
 Hawkes v. Smith, 577
 Hawkins v. Carbines, 182
 Hawkins v. Harwood, 498
 Hawkins v. Plomer, 797
 Haworth v. Hardcastle, 68
 Hawthorn v. Hammond, 606
 Hay v. Weakley, 755
 Haycraft v. Creasy, 1007, 1009, 1017
 Hayes v. S. W. Rail. Co., 596
 Hayley v. Racket, 802
 Hayling v. Okey, 363

- Haylock v. Sparke, 826, 872, 873, 877
 Hayward, *In re*, 847, 1263
 Hayward v. Met. Rail. Co., 1222
 Hayward v. Seaward, 399
 Hazeldine v. Grove, 872
 Head v. Briscoe, 1125
 Headlam v. Hedley, 351
 Heal v. Heal, 1087
 Heald v. Carey, 396
 Heap v. Barton, 299
 Hearn v. Lond. and S. W. Rail. Co., 585
 Hearne v. Stowell, 951, 998
 Heath v. Bucknall, 152
 Heath v. Milward, 455
 Heaton Steel and Iron Co., *Re*, 1294
 Hebbert v. Thomas, 371
 Hebblethwaite v. Hebblethwaite, 1080
 Heden v. Atlantic Mail etc., Co., 1211
 Hedges v. Tagg, 1092, 1095
 Heeley v. Thames Valley Rail. Co., 903
 Heeman v. Evans, 801
 Hegan v. Johnson, 637
 Hegingbotham v. East. and Cont. St. P. Co., 194, 264
 Heilbut v. Nevill, 426
 Heinrich v. Sutton, 547
 Hellawell v. Eastwood, 644
 Helliwell v. Hobson, 1147
 Helsham v. Blackwood, 979, 991
 Heming v. Power, 955
 Hemming v. Hale, 1185
 Hemmings v. Gasson, 974, 984, 988
 Henderson v. Broomhead, 934
 Henderson v. Lacon, 1010
 Henderson v. Lond. and N. W. Rail. 585
 Henderson v. Squire, 386
 Henkel v. Pape, 18
 Henley v. Mayor of Lyme, etc., 21, 132
 Henman v. Lester, 1171
 Henning v. Burnett, 379
 Hepburn v. Lordan, 261
 Heriot v. Stuart, 950
 Heriot's Hospital Feoffees v. Ross, 891
 Herlakenden's Case, 282
 Hermann v. Seneschall, 713
 Hern v. Nichols, 1036
 Hernaman v. Bowker, 713
 Herne v. Benbow, 283
 Herr v. Union Bank, 1229
 Herring v. Finch, 37
 Herring v. Metrop. Bd. of Works, 886, 899
 Hervey v. Smith, 187
 Herz v. Union Bank, 258
 Heslop v. Baker, 430, 451
 Heslop v. Chapman, 746
 Hesse v. Stevenson, 65
 Heugh v. Lond. and N. W. Rail., 594, 600
 Heurteloup's Case, 61
 Hewison v. Guthrie, 540
 Hewitt v. Cory, 1144
 Hewitt v. Isham, 362
 Hewitt v. Macquire, 813
 Hewlett v. Cruchley, 746, 1199
 Hewlins v. Shippam, 99, 178, 180
 Hewston v. Phillips, 1244
 Hey v. Moorhouse, 375
 Heydon and Smith's Case, 123, 461
 Heymann v. Eur. Central Rail. Co., 1011
 Heywood v. Collinge, 755
 Heywood v. Potter, 56
 Hibbs v. Ross, 515
 Hickinbotham v. Leech, 979
 Hide v. Thornborough, 148
 Hider v. Dorrell, 717
 Higgins v. Bretherton, 602
 Higgins v. Thomas, 450
 Higgon v. Mortimer, 282, 311, 449
 Higgons v. Burton, 420
 Higham v. Rabett, 366
 Highmore v. Harrington (Earl of), 993
 Hilbery v. Hatton, 398
 Hill, *In re*, 1244
 Hill v. Balls, 4, 1032
 Hill v. Goodchild, 1197
 Hill v. Gray, 1032
 Hill v. Lane, 1010
 Hill v. Reg., 1272
 Hill v. Sheriff of Middlesex, 816
 Hill v. Thompson, 62, 64, 68
 Hill v. Tupper, 84, 116, 121
 Hill v. Warren, 494
 Hills v. Evans, 1230
 Hilton v. Earl Granville, 124
 Hilton v. Woods, 383
 Hilton (Overseers of) v. Bowes (Overseers of), 116
 Hinchliffe v. Kinnoule (Earl), 103
 Hinde v. Sheppard, 1212, 1214
 Hindley v. Emery, 319
 Hindustan (Bank of), *Re*, 546
 Hinsley v. Wilkinson, 329
 Hinton v. Dibbin, 584
 Hinton v. Heather, 745
 Hipkins v. Birm., etc., Gas Co., 240
 Hirst v. Halifax Local Board, 274
 Hirst v. Molesbury, 705
 Hiscocks v. Jones, 798
 Hiscox v. Greenwood, 410, 541
 Hitchings v. Thompson, 685
 Hitchman v. Walton, 298
 Hoare v. Dickinson, 193, 248
 Hoare v. Silverlock, 929, 946, 977, 985
 Hobson v. Thelluson, 789, 818
 Hobson v. Todd, 173
 Hoddesdon v. Gresil, 181
 Hodges v. Paterson, 812
 Hodges v. Windham, 1085
 Hodgkinson v. Ennor, 192, 198, 248
 Hodgkinson v. Fernie, 39, 486
 Hodgman v. West Midl. Rail. Co., 203, 588
 Hodgson v. Duce, 388
 Hodgson v. Fullarton, 530
 Hodgson v. Gascoigne, 793
 Hodgson v. Scarlett, 967
 Hodgson v. Sidney, 1113, 1114

- Hodgson v. Towing, 786
 Hodsoll v. Stallebrass, 1105, 1191
 Hodson v. Walker, 1142
 Hoe's Case, 800
 Hoey v. Felton, 6
 Hoffman v. Postill, 1230
 Hogarth v. Jackson, 414
 Hogg v. Ward, 699
 Holborrow v. Jones, 1212
 Holcome v. Rawlins, 374
 Holden v. Holden, 1062
 Holden v. Liv. Gas Co., 250, 309, 513
 Holden v. Weeks, 288, 318
 Holden's Case, 1295
 Holder v. Coates, 352
 Holder v. Soulbey, 618
 Holderness v. Collinson, 543
 Holderness v. Rankin, 435
 Holdingshaw v. Rag, 376
 Hole v. Barlow, 194, 196
 Hole v. Sittingbourne, etc., Rail. Co., 207, 246, 892
 Hole v. Thomas, 318
 Holford v. George, 239
 Holford v. Hankinson, 178, 364
 Holland's Case, 824
 Holland (Lady) v. Kensington Vestry, 276
 Holliday v. Camsell, 406
 Hollier v. Laurie, 791, 809
 Hollis v. Claridge, 547
 Hollis v. Goldfinch, 352, 374
 Hollis v. Marshall, 809
 Hollis v. Smith, 1110
 Hollister v. Nowlen, 579
 Holloway v. Abel, 1095
 Holloway v. Holloway, 1051
 Holloway v. Turner, 1190
 Holmes v. Bellingham, 350
 Holmes v. Clarke, 226, 490
 Holmes v. Goring, 165
 Holmes v. Hodgson, 449
 Holmes v. London & N. W. Rail. Co., 65
 Holmes v. North-East Rail., 218, 227
 Holmes v. Onion, 506
 Holmes v. Pemberton, 1225
 Holmes v. Simmons, 1083
 Holmes v. Sixsmith, 1043
 Holmes v. Sparkes, 812
 Holmes v. Wilson, 332, 374, 1160
 Holme's Case, 263
 Holroyd v. Breare, 776
 Holroyd v. Marshall, 118
 Holt v. Daw, 366
 Holt v. Frost, 792
 Holt v. Rochdale (Corp. of), 210, 919
 Holyday v. Morgan, 1014, 1044
 Homan, *Ex parte*, 434
 Home v. Camden, 1240
 Home v. Grimble, 713
 Homer v. Taunton, 984
 Honess v. Stubbs, 1151
 Hood v. N. E. Rail., 920
 Hoole v. Gt. West. Rail. Co., 1230
 Hooman, *Ex parte*, 441
 Hooper, *In re*, 1234
 Hooper v. Bristol Port Rail. Co., 901, 908
 Hooper v. Hooper, 1066
 Hooper v. Lane, 786, 788, 796, 799
 Hopcroft v. Keys, 635
 Hope v. Hope, 1060, 1077, 1078
 Hopgood v. Parkin, 500
 Hopkins, *Ex parte*, 848
 Hopkins v. Crowe, 714, 719
 Hopkins v. Hitchcock, 1052
 Hopkins v. Tanqueray, 1015
 Hopkinson v. Burghley (Lord), 1231
 Hopper, *In re*, 771, 773, 1243, 1244
 Hopper v. Reeve, 691
 Hopwood v. Schofield, 175, 186
 Hopwood v. Thorn, 942, 954
 Horn v. Baker, 431, 436
 Horn v. Swinford, 706
 Horn v. Thornborough, 713
 Hornblower v. Boulton, 62
 Hornblower v. Proud, 430
 Horncastle v. Farran, 540
 Horne v. Horne, 1067, 1071
 Horn v. Widlake, 879
 Hornidge v. Cooper, 422
 Hornsby v. Miller, 429, 436
 Horrocks v. Metropolitan Railway Co., 904
 Horsefall v. Davy, 654
 Horsefall v. Mather, 301
 Horsfall v. Holland, 355
 Horsfall v. Thomas, 35
 Horsford v. Webster, 642, 647
 Horwood v. Smith, 418
 Hosking v. Phillips, 315, 357, 385
 Hoskins v. Knight, 817
 Hoskins v. Robins, 130, 667
 Hossack v. Gray, 481
 Hotten v. Arthur, 52
 Houghton v. Butler, 394
 Houghton v. Matthews, 544
 Houghton's Patent, 60
 Houlden v. Smith, 774
 Hounsell v. Smyth, 201, 205
 Housin v. Barrow, 781
 How v. Hall, 1173
 Howard v. Crowther, 1113
 Howard v. Jemmett, 440
 Howard v. Lovegrove, 1190
 Howard v. Newton, 1132
 Howard v. Shepherd, 18
 Howard v. Sheward, 1037
 Howard v. Smith, 686
 Howarth v. Brown, 1205
 Howarth v. Tollemache, 451
 Howden v. Standish, 781, 812
 Howe v. Hunt, 1228
 Howe v. Scarrott, 634
 Howell v. Jackson, 626, 694, 704
 Howell v. Rodbard, 1204
 Howell v. Young, 499, 913, 1164

Howes v. Ball, 652
 Howes v. Barber, 1223
 Howlett v. Haswell, 1127
 Howlett v. Tarte, 1157, 1159
 Howton v. Frearson, 105, 366
 Hoyer v. Bush, 867
 Hubbard v. Bagshaw, 431
 Hubbard v. Lees, 1084
 Huckle v. Money, 233, 1184, 1193
 Huddart v. Grimshaw, 62
 Huddart v. Rigby, 1166, 1167
 Hudson v. Baxendale, 600
 Hudson v. Granger, 543
 Hudson v. McRae, 132, 842
 Hudson v. Roberts, 232
 Hudston v. Midl. Rail. 570
 Huffer v. Allen, 754
 Hughes v. Buckland, 713, 913, 916
 Hughes v. Græme, 1047, 1188
 Hughes v. Hughes, 1067
 Hughes v. Quentin, 517
 Hull v. Pickersgill, 1122
 Humberstone v. Dubois, 679
 Hume v. Oldacre, 385, 735, 1196
 Hume v. Pocock, 1019
 Humfrey v. Gery, 649
 Humfrey v. Lond. and N. W. Rail. Co., 359
 Humfreys v. Mears, 887
 Humphrey v. Mitchell, 796
 Humphries v. Brogden, 73, 75, 112, 148
 Hunt v. Colson, 335
 Hunt v. Dowman, 301, 316
 Hunt v. Harris, 354
 Hunt v. Hooper, 782
 Hunt v. Maniere, 403, 1052
 Hunt v. North Staff., etc., Rail. Co., 1139, 1243
 Hunt v. Peake, 73, 75, 94, 148
 Hunter v. Caldwell, 500, 517
 Hunter v. French, 764
 Hunter v. Westbrook, 444
 Huntley v. Herring, 976
 Huntley v. Russell, 238
 Huntley v. Simson, 745, 750
 Hurst v. Gt. West. Rail. Co., 572
 Hussey v. Christie, 548
 Hutchins v. Scott, 683
 Hutchinson v. Copestake, 163
 Hutchinson v. Guion, 1033
 Hutchinson v. Lowndes, 834
 Hutchinson v. Morley, 1043
 Hutchinson v. York, Newc., etc., Rail. Co., 476, 479, 490
 Hutchison v. Birch, 785
 Hutton v. Cruttwell, 427
 Huxley v. Berg, 1187
 Huzzy Field, 31
 Hyams v. Webster, 209, 509
 Hyde v. Graham, 98, 362, 376, 1166
 Hyde v. Hyde, 1067
 Hyde v. Trent. Nav. Co., 576, 593, 621

I

Ibbett v. De La Salle, 666
 Ibbotson v. Peat, 13, 192
 Ile's Case, 1273
 Illidge v. Goodwin, 8, 511
 Ilott v. Wilkes, 200
 Imperial Gas Co. v. Broadbent, 258
 Imray v. Magnay, 782
 Inchbald v. Barrington, 257
 Inchbald v. Robinson, 257
 Incledon v. Berry, 762
 Indermaur v. Dames, 202, 203, 227
 Industrie (The), 484
 Ingate v. Christie, 571
 Ingle v. Bell, 704
 Inglis v. Spence, 1118
 Ingram v. Lawson, 929, 1192
 Ings v. Lond. and S. W. Rail. Co., 1211
 Inman v. Reck, 484
 Insole, *Re*, 1066
 Iona (The), 481
 Ipswich (Tailors of), 45
 Ireland (Bank of) v. Trustees of Evans's Charities, 27, 29
 Ireland v. Johnson, 684
 Ireland v. Livingston, 1027
 Ireson v. Pearman, 499
 Irons v. Smallpiece, 415
 Irving v. Wilson, 866, 915
 Irwin v. Brandwood, 958
 Irwin v. Dearman, 1094, 1096
 Irwin v. Grey, 21
 Isaac v. Belcher, 451
 Isaac v. Wyld, 1244
 Isack v. Clark, 393, 400
 Isle of Wight Ferry Co. v. Ryde Com., etc., 1206
 Israel v. Clark, 475
 Iveson v. Moore, 241
 Ivimey v. Stocker, 131, 146, 166

J

Jacklin v. Fytche, 874
 Jackson v. Beaumont, 1239, 1240, 1242, 1245, 1251, 1252
 Jackson v. Calesworth, 1204
 Jackson v. Cator, 186, 320
 Jackson v. Courtenay, 693
 Jackson v. Cummins, 539
 Jackson v. Everett, 1219
 Jackson v. Pesked, 84, 360
 Jackson v. Smithson, 230
 Jackson v. Tollett, 467
 Jackson v. Turquand, 502
 Jacobs v. Humphrey, 794, 816
 Jacobs v. Latour, 538, 550
 Jacobs v. Seward, 290, 1107, 1117, 1182
 Jacobssohn v. Blake, 895
 Jacomb v. Dodgson, 871
 Jacomb v. Knight, 115
 James (The), 433

- James v. Biddington, 1080
 James v. Boston, 933, 942
 James v. Brook, 973
 James v. Campbell, 690, 734
 James v. Great Western Railway Co., 474
 James v. Hayward, 183, 207, 271
 James v. James, 1056
 James v. Lond. & S. W. Rail., 1238
 James v. Phelps, 764
 James v. Plant, 168
 James v. Rutlech, 957
 James v. Swift, 717
 Janson v. Brown, 393, 457
 Janson v. Stuart, 926, 979
 Jardine v. Smith, 1260
 Jarmain v. Hooper, 727, 809, 810
 Jarman v. Woolloton, 439
 Jarrett v. Kennedy, 1007
 Jarrold v. Houlston, 52
 Jarvis v. Dean, 203, 205, 252, 269
 Jaxon v. Tanner, 1185
 Jayne v. Price, 333, 374
 Jeans v. Wheedon, 763
 Jeff Davis (The), 545, 547
 Jefferson v. Durham (Bishop of), 309
 Jefferson v. Jefferson, 558
 Jefferys v. Boosey, 51
 Jeffreys v. Jeffreys, 1068
 Jeffries v. Gt. West. Rail. Co., 456
 Jeffries v. Williams, 87, 182
 Jeffrye's Case, 1241
 Jegen v. Vivian, 383
 Jenings v. Florence, 754
 Jenkins v. Betham, 501
 Jenkins v. Gething, 296
 Jenkins v. Hutchinson, 1007, 1025
 Jenkins v. Turner, 30, 230, 250
 Jenner v. A'Beckett, 929
 Jenner v. Clegg, 635
 Jennings v. Great North. Railway Co., 605
 Jennings v. Rundall, 1126
 Jessel v. Chaplin, 1235
 Jesser v. Gifford, 85, 175, 185
 Jessop's Case, 63
 Jessop v. Crawley, 808
 Joel v. Morison, 477
 John v. Bacon, 237, 597
 Johns v. Jenkins, 653
 Johnson v. Emerson, 755
 Johnson v. Faulkner, 652
 Johnson v. Hill, 616
 Johnson v. Hudson, 984
 Johnson v. Johnson, 1010, 1071
 Johnson v. Leigh, 783
 Johnson v. Lord, 919
 Johnson Midland Rail. Co., 569
 Johnson v. Ossenton, 410
 Johnson v. Pye, 1031, 1153
 Johnson v. Renton, 1295
 Johnson v. Royal Mail. S. P. Co., 399, 410
 Johnson v. Stear, 395, 461, 553, 1188
 Johnson v. Upham, 661
 Johnson v. Windle, 423
 Johnston v. Renton, 27
 Johnstone v. Sutton, 39, 43, 751, 764
 Jolly v. Arbuthnot, 634
 Jolly v. Wimbledon, etc., Railway Co., 901
 Jombart v. Woollett, 437
 Jones v. Bewicke, 991
 Jones v. Bird, 213, 716, 874, 886
 Jones v. Bowden, 1032
 Jones v. Boyce, 578
 Jones v. Bright, 1013, 1021
 Jones v. Brown, 407, 1096
 Jones v. Carmarthen (Mayor of), 68
 Jones v. Carter, 386
 Jones v. Chapman, 360, 375
 Jones v. Davies, 450
 Jones v. Dowle, 557, 563
 Jones v. East. Co. Rail. Co., 631
 Jones v. Festiniog Rail. Co., 307
 Jones v. Gooday, 383, 918
 Jones v. Harber, 425, 426, 427
 Jones v. Hart, 447
 Jones v. Howell, 713
 Jones v. Johnson, 868
 Jones v. Jones, 234, 235, 831, 1051, 1245
 Jones v. Lewis, 1191
 Jones v. Mackie, 1209
 Jones v. Morris, 680
 Jones v. Nicholls, 716
 Jones v. Owen, 836, 1239
 Jones v. Pierce, 59
 Jones v. Pearle, 551, 617
 Jones v. Perry, 231
 Jones v. Pope, 811, 814
 Jones v. Powell, 192, 194
 Jones v. Price, 364, 366
 Jones v. Pritchard, 971
 Jones v. Sawkins, 667
 Jones v. Smith, 1154
 Jones v. Sparrow, 1201
 Jones v. Stevens, 995
 Jones v. Tapling, 153, 163, 188
 Jones v. Tarleton, 1173
 Jones v. Thurloe, 617
 Jones v. Tyler, 613, 622
 Jones v. Vaughan, 866
 Jones v. Williams, 235, 800, 813, 1211, 1212
 Jones v. Wood, 815
 Jordan v. Moore, 67
 Jordin v. Crump, 200
 Jory v. Orchard, 878
 Joseph v. Henry, 1239
 Joule v. Jackson, 648, 650
 Joule v. Taylor, 913
 Joyce v. Foukes, 647
 Jubb v. Hull Dock Co., 896, 903
 Judge v. Cox, 255
 Judson v. Etheridge, 539
 Jupe v. Pratt, 64
 Justice v. Gosling, 706

K

Kavanagh v. Gudge, 362, 376
Kay v. Grover, 867
Kay v. Marshall, 67
Kay v. Wheeler, 529
Keane, Re, 547
Kearney v. Lond. & Brighton Rail., 23, 514
Kearns v. Cordwainer's Co., 210
Keats v. Keats, 1070
Keeble v. Hickeringill, 13, 15, 192
Keech v. Kech, 1066
Keen v. Priest, 644, 688
Keene v. Dilk, 464
Keighley v. Bell, 730, 755, 934
Keightley v. Birch, 817
Kelcey v. Stupples, 1215
Kelk v. Pearson, 183, 188
Kelly v. Hutton, 53
Kelly v. Kelly, 1062
Kelly v. Lawrence, 794
Kelly v. Moray, 1113
Kelly v. Morris, 52, 53
Kelly v. Partington, 986
Kelly v. Sherlock, 993
Kelly v. Tinling, 951
Kelsack v. Nicholson, 561
Kemp v. Balne, 1248
Kemp v. Burt, 499
Kemp v. Neville, 698, 770, 776
Kemp v. Rose, 771, 773
Kempston v. Butler, 112, 149
Kendall v. King, 1292
Kendall v. Wilkinson, 856
Kendillon v. Maltby, 964, 968
Kennedy v. Panama Steam Co., 1012
Kent v. Astley, 490
Kent v. Freehold Land Co., 1011
Kent v. Gt. Western Rail. Co., 914
Kent v. Shuckard, 611
Kent Coast Rail. Co. v. Lond., Chatham and Dover Rail. Co., 922
Kenyon v. Hart, 9
Keppel v. Bailey, 118, 119
Kerbey v. Denby, 786
Kerby v. Harding, 663
Kerford v. Mondel, 401, 408
Kernaghan v. Williams, 1230
Kershaw v. Bailey, 965
Key, Ex parte, 428
Key v. Flint, 540, 543
Keynsham Blue Lias Co. v. Baker, 1138
Keyse v. Powell, 330
Keyworth v. Hill, 448, 1124
Kiddell v. Burnard, 1044
Kidgill v. Moore, 175, 178
Kimberly v. Dick, 771
Kimbray v. Draper, 1139
Kimpton v. Wiley, 1239, 1244
Kine v. Evershed, 713, 714
King (The) v. Watts, 273
King v. England, 660, 666
King v. Hoare, 1158

King v. Lake, 953, 959
King v. Milsom, 405
King v. Rose, 393
Kingsford v. Merry, 421, 422
Kingsley, In re, 1059
Kingston's (Dutches of) Case, 859
Kinloch v. Craig, 544
Kinloch v. Nevile, 368
Kinlyside v. Thornton, 280
Kinning v. Buchanan, 810
Kirby v. Simpson, 870, 873, 874, 877
Kirkin v. Jenkins, 839
Kirkley v. Hodgson, 432
Kirkman v. Shawcross, 548
Kitchen v. Campbell, 1156
Kite and Lane's case, 849
Knapman v. Pryer, 1211
Knapp v. Lond., Chatham and Dover Rail. Co., 895, 900
Knapp v. Salisbury, 723
Knight v. Bennett, 637
Knight v. Cox, 685
Knight v. Egerton, 688
Knight v. Fox, 246
Knight v. Gibbs, 963
Knight v. Mosely, 318
Knight v. Quarles, 499, 1112
Knight v. Waterford (Marquis), 1175
Knock v. Metropolitan Rail. Co., 901
Knott v. Morgan, 1053
Knowles v. Holden, 1245
Knowles v. Richardson, 4
Kramer v. Waymark, 26
Krehl v. Gt. Central Gas Co., 426
Kruger v. Wilcox, 543
Kynaston v. Crouch, 450

L

L— v. H—, 1087
Labalmondiere v. Addison, 236
Labalmondiere v. Frost, 236, 847
Laclough v. Towle, 626
Lacon v. Liffen, 426
Lacy v. Rhys, 56
Ladd v. Thomas, 661
Lade v. Shepherd, 332
Ladyman v. Grave, 137, 152
Lafone v. Smith, 979, 1208
Laing v. Whaley, 81, 87, 177
Laird v. Birkenhead Rail. Co., 186, 362
Lake v. King, 935
Lake v. Smith, 1124
Lamb's Case, 980
Lamb v. Burnett, 727
Lamb v. Palk, 477
Lambert v. Buckmaster, 546
Lambert v. Hepworth, 681
Lamb v. Hodgson, 1167
Lamb v. Robinson, 602
La Mert, Ex parte, 1271
Lampen v. Kedgewin, 1158
Launcester v. Eve, 282, 296

- Lanc. Canal Co., *Ex parte*, 432
 Lanc. Canal Co. v. Parnaby, 203, 221
 Lanc. Waggon Co. v. Fitzhugh, 396, 1167
 Lanc. and York Rail. Co. v. Evans, 909
 Land v. North, 561
 Land Credit Co. of Ireland v. Fermoy (Lord), 502
 Landens v. Shiel, 1254
 Lane v. Applegate, 1155
 Lane v. Cotton, 20
 Lane v. Dixon, 371
 Lane v. Tewson, 451, 559
 Lanfranchi v. Mackenzie, 153, 187, 189
 Lang v. Gisborne, 1230
 Langford v. Foot, 788
 Langford v. Selmes, 635
 Langley v. Hammond, 168
 Langley v. Headland, 546
 Langmead, *In re*, 433
 Langridge v. Levy, 35, 1004, 1006, 1035
 Langton v. Waite, 408
 Lanphier v. Phipos, 496
 Lansdowne v. Lansdowne, 286
 Lanyon v. Blanchard, 550
 Latch v. Rumner Rail. Co., 470, 472
 Latham v. Rutley, 625
 Lathropp v. Marsh, 317
 Laughier v. Breffitt, 462
 Laughier v. Pointer, 31, 478
 Laughton v. Taylor, 1155
 Laverack v. Bean, 1248
 Laveroni v. Drury, 529
 Law v. Dodd, 918
 Lawford v. Partridge, 1140, 1206, 1245
 Lawless v. Anglo-Egypt. Cotton Co., 933, 945
 Lawrence v. Gt. Northern Rail. Co., 883, 884, 906, 909, 1192
 Lawrence v. Hedger, 699
 Lawrence v. Hitch, 17
 Lawrence v. King, 237
 Lawrence v. Obee, 162
 Lawrenson v. Hill, 835, 838, 852, 868, 870, 872
 Lawson v. Carr, 488
 Lawson v. Dickenson, 547
 Lawson v. London (Bank of), 1030
 Lawson v. Weston, 404, 423
 Lawton v. Lawton, 297
 Layton v. Hurry, 670
 Lea v. Rossi, 791
 Leach v. Thomas, 295, 1185
 Leader, The, 547
 Leader v. Homewood, 299
 Leader v. Moxon, 39, 887, 899
 Leader v. Rhys, 1214
 Leake v. Loveday, 451
 Leame v. Bray, 2, 302, 393, 416, 512
 Leary v. Patrick, 834, 853, 869
 Leather v. Simpson, 1026, 1046
 Leather Cloth Co. v. American Cloth Co., 1051, 1054
 Leather Cloth Co. v. Hirschfield, 11
 Leatt v. Vine, 842
 Leck v. Maestaer, 526
 Leconfield (Lord) v. Dixon, 101
 Le Conteur v. Lond. and S. W. Rail. Co., 570, 582
 Lee, *Ex parte*, 1260
 Lee v. Bayes, 41, 401, 418, 554
 Lee v. Cooke, 658
 Lee v. Gansell, 785
 Lee v. Haley, 1051
 Lee v. Jones, 35
 Lee v. Lanc. and York. Rail., 1154
 Lee v. Lopes, 793
 Lee v. Milner, 905
 Lee v. Riley, 29, 324
 Lee v. Robinson, 401
 Lee v. Smith, 638
 Lee v. Stevenson, 99, 113, 116
 Lee v. Vessey, 867
 Leech v. North Staffordshire Rail. Co., 220
 Leeds (Duke of) v. Lord Amherst, 286
 Leete v. Harté, 713, 714, 715
 Lette v. Leete, 1061
 Le Fanu v. Malcolmson, 971, 984, 1115
 Legg v. Evans, 551
 Legg v. Pardoe, 842
 Legge v. Tucker, 1212
 Lehmann v. McArthur, 19
 Leicester (Earl of) v. Walter, 995
 Leigh v. Shepherd, 641
 Leigh v. Smith, 531
 Leigh v. Webb, 749
 Leith v. Pope, 768
 Lempriere v. Humphry, 376
 Lempriere v. Lempriere, 1067
 Lempriere v. Pasley, 435, 541
 Le Neve v. Mile End, etc., Vestry, 206, 271, 272
 Le Roy v. Campion, 1273
 Leslie v. Guthrie, 430
 Leslie v. Pound, 197, 211, 245
 Lester v. Garland, 716
 Lestranger v. Rowe, 347
 Lethbridge v. Phillips, 400
 Lethbridge v. Winter, 268
 Letton v. Goodden, 15
 Leuckhart v. Cooper, 543, 549, 560
 Levi v. Sanderson, 1211
 Levy v. Edwards, 703
 Levy v. Langridge, 35
 Levy v. Moylan, 776
 Levy v. Rice, 1147
 Levy v. Rutley, 53, 54
 Leward v. Baseley, 727
 Lewis, *Ex parte*, 441
 Lewis v. Alcock, 812
 Lewis v. Branthwaite, 330
 Lewis v. Clement, 947
 Lewis v. Davis, 65
 Lewis v. Great West. Co., 590
 Lewis v. Harris, 640
 Lewis v. Levy, 772, 829, 935, 947, 977
 Lewis v. Marling, 59, 67

- Lewis v. Peake, 1190
 Lewis v. Read, 676
 Lewis v. Rochester (Mayor of), 891
 Lewis v. Walter, 946, 964
 Lexden Un. v. Southgate, 1242
 Ley v. Peter, 339
 Liddard v. Kain, 1013, 1015
 Lidster v. Borrow, 714
 Liford's Case, 104, 118, 374
 Liggins v. Inge, 89, 100, 161
 Lightfoot v. Keane, 547
 Lilley v. Harvey, 1141
 Lillie v. Price, 977
 Limpus v. Lond. Gen. Omn. Co. (Limited), 34, 477
 Lindon v. Hooper, 666
 Lindsay v. Leigh, 847
 Linford v. Gudgeon, 806
 Linford v. Lake, 734, 737, 1195
 Lingard v. Messiter, 432
 Lingham v. Biggs, 431, 432
 Lingwood v. Gyde, 124
 Lingwood v. Stowmarket Paper Co., 92
 Lion, The, 481
 Litchfield v. Ready, 375
 Littledale, *Ex parte*, 433
 Littledale v. Scaith, 414
 Liverpool (Mayor of), *Ex parte*, 233
 Liverpool Adelphi, etc. v. Fairhurst, 44, 1031, 1125, 1153
 Liverpool New Cattle Market v. Hudson, 194
 Liverpool (Rector of), *Ex parte*, 344
 Livesay v. Hood, 438
 Livett v. Wilson, 136, 347
 Llandaff, etc., Market Co. v. Lyndon, 17
 Lloyd, *Ex parte*, 431
 Lloyd v. Burrapp, 49
 Lloyd v. Peell, 1130
 Lloyd v. Sandilands, 785
 Lloyd v. Screw Collier Co., 487
 Load v. Green, 439, 541
 Lock v. Askton, 734
 Locke v. Matthews, 343
 Lockley v. Pye, 461
 Loeschman v. Machin, 445, 511
 Lomax v. Buxton, 427
 London's (Bishop of) Case, 413
 London (Bishop of) v. Web, 286, 316
 London (City of) v. Pugh, 317
 London (City of) v. Wood, 773
 London, Chatham & Dover Railway, *Re*, 923
 London (Mayor of) v. Cox, 1237, 1239
 London (Mayor of) v. Hedger, 316
 London & N. W. R. Co. v. Ackroyd, 109
 London & N. W. R. Co. v. Bartlett, 594
 London & N. W. R. Co. v. Bradley, 882, 902, 909
 London & N. W. R. Co. v. Lancashire, etc., Rail. Co., 187, 389
 London & N. W. R. Co. v. Skerton, 220
 London & N. W. R. Co. v. Smith, 903
 London & S. W. Rwy. v. Blackmore, 910
 London & West. Loan, etc., Co., 300
 London Cotton Co., *Re*, 789
 London & Devon Biscuit Co., *Re*, 789
 London & Provincial Tel. Co., *Re*, 1179
 Long v. Orsi, 499
 Longbottom v. Berry, 300, 644
 Longbottom v. Longbottom, 1244
 Longford v. Ellis, 1130
 Longman v. Tripp, 431
 Longmeid v. Holliday, 1036, 1103, 1108
 Longmore v. Great West. Rail. Co., 219
 Lonsdale (Earl) v. Curwen, 388
 Lonsdale v. Nelson, 235
 Lonsdale v. Rigg, 413
 Looker v. Halcomb, 702
 Loosemore v. Radford, 1191
 Lopes v. De Tastet, 512
 Lot v. Mid. Rail. Co., 593
 Lord v. Sidney (Commrs. of), 350
 Loring v. Warburton, 661
 Losh v. Hague, 61, 67
 Lotan v. Cross, 446
 Loton v. Devereux, 821
 Louis v. Louis, 1066
 Lousley v. Hayward, 135
 Lovegrove v. Lond. & Brighton Rail. Co., 492
 Lovegrove v. White, 500
 Lovell v. Martin, 428
 Lovell v. Smith, 164
 Lover v. Davidson, 55
 Lovering v. Lovering, 1069
 Lovett v. Hobbs, 571, 624
 Low v. Rutledge, 52
 Low v. Ward, 52, 53
 Lowe v. Carpenter, 154
 Lowe v. Govett, 349
 Lowe's Case, 1294
 Loweth v. Smith, 726
 Lowry v. Guildford, 498
 Lowther v. Radnor (Earl), 830
 Lucan (Earl) v. Smith, 977
 Lucas v. Dorrien, 544, 545
 Lucas v. Lond. Dock Co., 448
 Lucas v. Tarleton, 665, 677, 683, 684, 688
 Ludlow v. Browning, 440
 Lukin v. Godsall, 257, 315
 Lumby v. Allday, 960, 990
 Lumley v. Gye, 11, 37, 1088, 1098
 Lumsden's Case, 1294
 Lunde Granite Co., *Re*, 635, 650
 Lunn v. Thornton, 118
 Lunt v. Lond. & North Rail. Co., 474
 Lutterell v. Reynell, 41
 Luttrell's Case, 128
 Lycett v. Staff. & Uttox. Rail., 922
 Lyde v. Barnard, 1008
 Lygo v. Newbold, 494
 Lyme Regis (Mayor, etc., of) v. Henley, 68, 1117
 Lynch v. Knight, 5, 44, 954, 961
 Lynch v. Nurdin, 8, 26, 494, 511, 517
 Lyne, *Ex parte*, 706

Lyne v. Leonard, 239
 Lyne v. Siesfeld, 1151
 Lynvi Co., *Ex parte*, 424
 Lynvi v. Brogden, 383
 Lyon v. Knowles, 56
 Lyon v. Mells, 590
 Lyon v. Tomkies, 664
 Lyons v. Blenkin, 1074
 Lyons v. Martin, 676
 Lysney v. Silby, 1014, 1018, 1039, 1042
 Lythgoe v. Vernon, 44

M

Maauss v. Henderson, 550
 M'Cance v. Lond. & N. W. Rail. Co.,
 592, 627, 1178
 MacCarthy v. Young, 22, 524
 McClellan, *Ex parte*, 1074
 M'Combie v. Davies, 397
 Macrae v. Clark, 820
 M'Crea v. Holdsworth, 56, 57
 M'Curday v. Driscoll, 726
 M'Dermott v. Justices of British Guiana,
 859
 M'Donald v. Rooke, 745
 M'Donald v. Thompson, 424
 M'Donnell v. Evans, 1170
 M'Donnell v. M'Kinty, 335
 Macdougall v. Patterson, 1209, 1214
 M'Dougall v. Claridge, 941
 M'Eniry v. Waterford, 492
 M'Fadzen v. Mayor, etc., of Liverpool,
 761
 M'Gregor v. Deal & Dover Rail. Co.,
 1027
 M'Gregor v. Galsworthy, 716
 M'Gregor v. Gregory, 979
 M'Gregor v. Thwaites, 772, 927, 948
 Mackay v. Ford, 966
 McKean v. M'Ivor, 594
 McKenzie v. M'Leod, 308
 M'Kewen v. Cotching, 455
 M'Kinnon v. Penson, 888
 M'Kone v. Wood, 230
 M'Laughlin v. Pryor, 478
 M'Leish v. Tate, 637
 M'Leod v. M'Ghie, 462
 M'Manus v. Crickett, 33, 476
 M'Manus v. Lanc., etc., Rail. Co., 589,
 590, 592
 M'Murray v. Wright, 1156
 McNiel's Case, 1011
 M'Pherson v. Daniels, 964, 972, 976, 979,
 991
 M'Swiney v. Haynes, 94, 106, 170
 Mace v. Cammel, 433
 Mace v. Philcox, 47, 133, 347
 Machell v. Ellis, 675
 Machu v. L. & S. W. Rail. Co., 586
 Macklin v. Richardson, 1231
 Macrow v. Gt. West. Rwy., 570
 Madrid Bank, *Re*, 1011
 Magdalena Steam Navig. Co. v. Martin,
 1149
 Magnay v. Burt, 752, 757, 796
 Magnay v. Monger, 796
 Magor v. Chadwick, 146
 Mahoney v. Widows' Life Ass., 1154
 Maitland v. Goldney, 972, 983
 Major v. Park Lane Co., 286
 Malachy v. Soper, 969
 Mali Ivo, The, 483, 1155
 Mallam v. Arden, 639
 Mallinson v. Mallinson, 1065, 1073
 Manby v. Scott, 1126
 Manby v. Witt, 942
 Manceaux, *Ex parte*, 63
 Manchester & Altr. Rail. Co. v. Fullar-
 ton, 882, 885
 Manchester & Sheff., etc., Rail. Co. v.
 Workshop Board of Health, 892
 Man., Sheff. & Lin. Rail. Co. v. Wallis,
 215, 668
 Man., Sheff. & Lin. Rail. Co. v. Wood,
 241
 Manders v. Williams, 446, 553
 Mangan v. Atterton, 26
 Manley v. Field, 1091
 Manley v. St. Helen's Can. & Rail Co.,
 222, 884
 Mann v. Forrester, 544, 549
 Mann v. Shniffner, 544
 Manning v. Clement, 991
 Manning v. Farquharson, 1239, 1246
 Manning v. Wasdale, 96
 Mansergh v. *In re*, 776
 Manton v. Moare, 435
 Manton v. Parker, 62
 March v. March, 1071, 1074
 Marchmont v. Marchmont, 1081
 Marfell v. South Wales Rail. Co., 214,
 217, 221
 Margate Pier Company (The) v. Han-
 nam, 834
 Margetson v. Wright, 1013
 Maria, The, 481
 Marker v. Kenrick, 280
 Markham v. Cobb, 41
 Marks v. Lahee, 1175
 Marks v. Feldman, 426
 Marlborough (Duke of) v. Saint John,
 288, 318
 Marrable, *Ex parte*, 434
 Marriott v. Lond. & S. W. Rail. Co., 630
 Marris v. Marris, 1070
 Marsh v. Conquest, 56
 Marsh v. Dewes, 1140
 Marsh v. Loader, 698
 Marsh v. Marsh, 1071
 Marshall v. Martin, 1208
 Marshall v. Moran, 481
 Marshall v. Ross, 1055
 Marshall v. Ulleswater, 349
 Marshall v. Watson, 319
 Marshall v. York, Newcastle, etc., Rail.
 Co., 578, 620, 1103

- Marshalsea (The) Case, 803
 Marson v. Lond., Chat. & Dover Rail. Co., 911
 Martin, *Ex parte*, 439
 Martin v. Bell, 815
 Martin v. Gilham, 283, 311
 Martin v. Great Ind. Peninsul. Rail. Co., 569
 Martin v. Great North Rail Co., 218, 494
 Martin v. Headon, 187, 188
 Martin v. Kennedy, 1156
 Martin v. Porter, 383
 Martin v. Pridgeon, 839
 Martin v. Roe, 289, 292
 Martin v. Shopper, 690
 Martin v. Strong, 943
 Martin v. Temperley, 507
 Martindale v. Smith, 395
 Martini v. Coles, 1105
 Martins v. Upcher, 716, 874
 Martyn v. Knowles, 290, 1104, 1116
 Martyn v. Williams, 119, 1181
 Martyr v. Bradley, 298, 311
 Mary's (Robert) Case, 718
 Mary Caroline, The, 518
 Marzetti v. Williams, 11, 18
 Mason v. Barker, 879
 Mason v. Birkenhead Com., etc., 913
 Mason v. Cæsar, 235
 Mason v. Farnell, 559, 560
 Mason v. Hill, 77
 Mason v. Keeling, 230, 324, 329
 Mason v. Mitchell, 1058
 Mason v. Newland, 675
 Mason v. Paynter, 780, 819
 Mason v. Sainsbury, 1198
 Mason v. Shrewsbury & Hereford Rail., 77, 139, 147
 Mason v. Tucker, 1214
 Massam v. Hunter, 166
 Massey, *Re*, 547
 Massey v. Goyder, 213
 Massey v. Johnson, 847, 864, 872
 Massey v. Sladen, 410
 Masterman, *Ex parte*, 433
 Masters v. Farris, 687, 1199
 Mather v. Lay, 429
 Mathers v. Green, 66
 Mathew v. Sherwell, 462
 Mathieson v. Harrod, 58
 Matson v. Cooke, 872
 Matthews v. Hopping, 534
 Matthias v. Mesnard, 648
 Matts v. Hawkins, 354
 Maughan v. Sharpe, 526
 Maund v. Monm. Rail. Co., 1117
 Maunder v. Venn, 1096
 Mawby, *Ex parte*, 1271
 Maxwell v. Hogg, 53, 1051, 1232
 May, *Ex parte*, 845, 857
 May v. Brown, 986
 May v. Burdett, 229, 250
 May v. Footner, 1182
 May v. Great West. Rail., 911
 May v. Harvey, 555
 Mayall v. Higby, 13, 1239
 Mayer v. Burgess, 1252
 Mayhew v. Eames, 24
 Mayhew v. Herrick, 406
 Mayhew v. Locke, 834
 Mayhew v. Maxwell, 52
 Mayhew v. Nelson, 584
 Mayhew v. Suttle, 335, 446
 Maynard v. Moseley, 1019
 Mears v. Lond. & S. W. Rail., Co., 445, 505, 553
 Mechelen v. Wallace, 638
 Med. Nav. Co. v. Romney (Earl of), 84
 Medina v. Stoughton, 1020
 Melling v. Leak, 337
 Mellor v. Baddeley, 751
 Mellor v. Leather, 678, 711, 808
 Mellor v. Spateman, 129
 Mellors v. Shaw, 223, 226, 489
 Melville v. Doidge, 533
 Melvina, The, 504
 Mennie v. Blake, 672, 673
 Mercer v. Jones, 462
 Mercer v. Peterson, 410
 Mercer v. Stanbury, 1148
 Mercer v. Whall, 1168
 Mercer v. Woodgate, 206
 Merest v. Harvey, 7, 322, 382, 1192
 Meriton v. Coombes, 323, 331, 361
 Merivale v. Exeter Turnp. Rd. (Trustees of), 193, 276
 Merryweather v. Nixon, 1197
 Mersey Dock Trustees v. Gibbs, 888
 Mersey Dock v. Penhallow, 222
 Meryweather v. Turner, 984
 Mesnard v. Aldridge, 1043
 Messiter v. Roe, 1150
 Metcalf v. Hetherington, 178, 249
 Metcalf v. Lond. & Bri., etc., Rail. Co., 556, 586, 625
 Metcalf v. Lumsden, 418
 Metcalf v. Westaway, 401
 Metropolitan Associat. v. Petch, 175, 180, 183, 249
 Metropolitan Bd. of Works v. Metro. Rail. Co., 107
 Metropolitan Co. Ins. Soc. v. Brown, 298
 Metropolitan Rail. Co. v. Turnham, 1222
 Metropolitan Saloon Om. Co. v. Hawkins, 929, 976, 992
 Meyer v. Everth, 1043
 Meyerstein v. Barber, 422
 Meynell v. Angell, 557
 Michael v. Alestree, 480
 Michell v. Brown, 239
 Michell v. Hughes, 1113
 Michell v. Williams, 746, 755
 Micklethwaite v. Micklethwaite, 286
 Middlesex, Sheriff of, *Ex parte*, 425
 Middleton v. Fowler, 624
 Midl. Rail. Co. v. Checkley, 109
 Midl. Rail. Co. v. Daykin, 216

- Midl. Rail. Co. v. Pye, 1059
 Midl. Rail. Co. v. Taylor, 1273
 Midelton v. Gale, 869
 Milan, The, 405, 480, 484, 487, 504, 519
 Milburn v. L. & S. W. Rail., 486
 Mildred v. Weaver, 267
 Miles v. Cattle, 628
 Milford v. Milford, 1062, 1072, 1073
 Milgate v. Kebble, 409
 Mill v. New Forest Comm., 142
 Millar v. Taylor, 51
 Miller v. Miller, 1097
 Miller v. Race, 404, 405, 422
 Milligan v. Picken, 56
 Milligan v. Wedge, 508
 Millington v. Fox, 1051
 Mills v. Colchester (Mayor of), 100, 121
 Mills v. Collett, 836
 Mills v. Graham, 1127
 Milman v. Dolwell, 450
 Milne v. Leisler, 1176
 Milne v. Marwood, 1006, 1007
 Milne v. Milne, 1071, 1087
 Milner, *Ex parte*, 1259
 Milner v. Milner, 1067
 Milner v. Milnes, 1107
 Milton v. Green, 866
 Miner v. Gilmour, 78, 116
 Minet v. Morgan, 190
 Minna, The, 481, 504
 Minor v. Lond. & N. W. Rail. Co. 1138
 Minshull v. Lloyd, 815
 Minter v. Wells, 61, 62
 Minter v. Williams, 65
 Mires v. Solebay, 401
 Mitchell v. Crassweller, 477, 1149, 1181
 Mitchell v. Foster, 839
 Mitchell v. Jenkins, 764
 Mitchell v. Tarbutt, 359, 1131
 Mitten v. Faudrye, 393
 Mobbs v. Vandenbrande, 1204
 Mody v. Gregson, 1024
 Moffat v. Bateman, 23, 476
 Mold v. Wheatcroft, 186, 1228
 Molesworth v. Robbins, 547
 Money v. Leach, 867
 Money Penny v. Hartland, 495
 Monk v. Sharp, 425
 Monkton v. Ashley, 730
 Monmouth Canal Co. v. Harford, 367
 Monm. Can. & Rail. Co. v. Hill, 352
 Monprivatt v. Smith, 1167
 Moody v. Spencer, 546
 Moody v. Steward, 1226
 Moon v. Raphael, 462
 Moone v. Rose, 805
 Moore v. Gt. South & West. Rail. Co., 902
 Moore v. Meagher, 975
 Moore v. Plymouth (Earl), 363
 Moore v. Rawson, 160, 162
 Moore v. Robinson, 1105
 Moore v. Watson, 1213, 1215
 Moore v. Wilson, 620
 Morant v. Chamberlain, 206, 272
 Mordaunt v. Mordaunt, 1068
 Morden v. Porter, 842
 Moreland v. Richardson, 1230
 Moreton v. Harden, 511
 Moreton v. Holt, 1248
 Morgan v. Cubitt, 1107
 Morgan v. Hughes, 719, 836
 Morgan v. Knight, 1113
 Morgan v. Lingen, 929
 Morgan v. Marquis, 407, 559
 Morgan v. Met. Rail. Co. 900, 904, 1278, 1290
 Morgan v. Palmer, 873
 Morgan v. Powell, 383
 Morgan v. Ravey, 607, 613
 Morgan v. Seaward, 55, 62, 68
 Morgan v. Sim, 23
 Morgan v. Steble, 1114
 Morgan v. Vale of Neath R. Co., 491, 493
 Moriarty v. L. C. & D. Rail., 516
 Morison v. Salmon, 1039, 1045, 1210
 Morland v. Cook, 132
 Morley v. Attenborough, 418, 422, 1020
 Morley v. Pincombe, 645
 Morley v. Pragnall, 192
 Morphet v. Morphet, 1063
 Morrell v. Martin, 868
 Morris v. Ashbee, 53
 Morris v. Branson, 65
 Morris v. Cannan, 433
 Morris v. Edgington, 103, 105
 Morris v. Miller, 1082
 Morris v. Morris, 286, 316
 Morris v. Nugent, 231
 Morris v. Ogden, 849
 Morris v. Reynolds, 771
 Morris v. Robinson, 1161
 Morris v. Wright, 53
 Morrish v. Murray, 783
 Morrison, *Ex parte*, 546
 Morrison v. Gen. St. Nav. Co., 484
 Morse v. James, 813
 Mortimer v. Cottrell, 387
 Mortimer v. Cradock, 459, 1186
 Mortimer v. S. W. Rail. Co., 908
 Mortimer v. Wright, 1080
 Morton v. Woods, 935, 637
 Mosley v. Fosset, 532
 Moss, *Re*, 547
 Moss v. Townsend, 617
 Mossop v. Gt. North. Rail. Co., 1245
 Mostyn v. Fabrigas, 38, 40, 1149
 Motley v. Downman, 1054
 Motteram v. E. Co. Rail. Co., 846
 Moule v. Garrett, 19
 Mounsey v. Ismay, 122, 141, 379
 Mount v. Taylor, 1211
 Mountjoy's Case, 120
 Mountjoy v. Wood, 778
 Mountney v. Watton, 979
 Mountnoy v. Collier, 1141, 1143
 Mourilyan v. Labalmondieri, 236
 Mouse's Case, 606
 Muir v. Fleming, 540

Mulkern v. Ward, 929
 Muller v. Moss, 433
 Mullet v. Challis, 781
 Mullett v. Mason, 1032, 1047
 Mumford v. Oxford, Worc. & Wolv. Rail. Co., 244
 Mummery v. Paul, 1040
 Mungean v. Wheatley, 674, 1245, 1253
 Munns v. Isle of Wight Rail., 922
 Munro v. Butt, 496
 Munster v. S. E. Rail. Co., 588, 599
 Murchie v. Black, 73, 76
 Mure v. Kaye, 728
 Murgatroyd v. Robinson, 81, 198, 251
 Murish v. Murray, 1145
 Murly v. M'Dermott, 354
 Murphy v. Caralli, 509
 Murray, *Ex parte*, 438
 Murray v. Currie, 509
 Murray v. Hall, 354, 357
 Muschamp v. Lan. & Pres. Rail. Co., 596
 Musgrave's Case, 1294
 Musgrave v. Bovey, 959
 Musgrave v. Forster, 101
 Mushett v. Hill, 120
 Muspratt v. Gregory, 647, 650
 Mutton v. Young, 792
 Myers v. L. & S. W. Rail., 568, 572
 Mytton v. Mid. Rail. Co., 596, 599, 622

N

Napier, *Ex parte*, 1265
 Nargett v. Nias, 645, 675, 677
 Nash, *Ex parte*, 1273
 Nash v. Dickenson, 788
 Nash v. Lucas, 643
 Nathan v. Buckland, 555
 National Guar. Manure Co. v. Donald, 161
 Naylor v. Collinge, 298
 Naylor v. Mangles, 543
 Neale v. Cripps, 819
 Neale v. Mackenzie, 636
 Neat v. Harding, 442
 Needham v. Rawbone, 395
 Neilau v. Hanny, 395
 Neilson v. Betts, 1230
 Nelson's Case, 167
 Nelson v. Couch, 482, 504, 1162
 Nelson v. Mackintosh, 534
 Nepoter, The, 487
 Neville, *Ex parte*, 496
 Newbold v. Coltman, 844, 845
 Newbould v. Met. Rail. Co., 897
 New Bruns., etc., Rail. Co. v. Conybeare, 1010, 1027
 New Bruns., etc., Rail. Co. v. Muggeridge, 1010
 Newby v. Colt's Firearms Co., 1117
 Newby v. Harrison, 120, 121
 Newcastle (Duke of) v. Clark, 373

Newcastle (Duke of) v. Hundred of Broxtowe, 383
 Newcastle (Duke of) v. Morris, 796
 Newcombe v. De Ross, 1244
 Newman v. Bendyshe, 841
 New River Co. v. Johnson, 897
 Newsan v. Carr, 767
 Newsome v. Newsome, 1070
 Newton v. Beck, 415
 Newton v. Boodle, 1223
 Newton v. Cubitt, 16
 Newton v. Ellis, 890, 915
 Newton v. Harland, 331, 694, 786
 Newton v. Holford, 1153
 Newton v. Newton, 415, 545
 Newton v. Rowe, 1208
 Newton v. Scott, 635
 Nicholl v. Allen, 63
 Nicholl v. Darley, 798
 Nicholls v. Chamberlain, 103
 Nicholls v. Parker, 1174
 Nicholson v. Great West. Rail. Co., 631
 Nicholson v. Lanc. & York. Rail. Co., 218
 Nicholson v. Mouncey, 485
 Nicholson v. Williams, 345
 Nicklin v. Williams, 172
 Nicoll v. Glennie, 448, 1122, 1131
 Nicolls v. Bastard, 446, 555, 620
 Nightingale v. Adams, 672
 Nixon v. Freeman, 643
 Nixon v. Roberts, 482
 Noden v. Johnson, 695, 726
 Norbury (Lord) v. Kitchen, 78
 Norman v. Westcombe, 682
 Normand's Patent, 60
 Normandy, The, 486
 Norris v. Baker, 233
 Norris v. Irish Land Co., 1273, 1275, 1290
 Norris v. Seed, 709
 Norris v. Staps, 46
 Norris v. Williams, 537
 North v. Cox, 129
 North v. Gt. Northern Rail. Co., 1132
 North v. Holroyd, 1244, 1252
 North v. Miles, 816
 North v. Smith, 33, 467
 North-East Rail. Co. v. Crossland, 101, 110
 North-East Rail. Co. v. Elliott, 108, 111, 189
 Northam v. Bowden, 372, 453
 Northam v. Hurley, 177
 Northampton's (Lord) Case, 979
 Northampton (Mayor of) v. Ward, 332
 Northumberland (Duke of) v. Houghton, 348
 Northumbria, The, 482
 Norton v. Nicholls, 57
 Norton v. Scholefield, 192, 250, 977
 Norway v. Rowe, 319
 Norwood v. Pitt, 713, 1218
 Notara v. Henderson, 487

Nott v. Nott, 1066
 Nottingham's Town Clerk's Case, 1267
 Novello v. Sudlow, 52
 Nugent v. Vetzera, 1078
 Nuova Raffaelina, The, 1144
 Nuttall v. Bracewell, 82
 Nuttall v. Staunton, 640
 Nutting, *Ex parte*, 433
 Nylander v. Barnes, 1225

O

Oakes v. Turquand, 1011
 Oakes v. Wood, 693, 696, 732
 Oakley v. Davis, 1163
 Oakley v. Kensington Can. Co., 913
 Oakley v. Ports. and Ryde St. Packet Co., 575, 605
 O'Brien v. Bryant, 991
 O'Brien v. Clement, 978, 979
 O'Brien v. Lewis, 546
 Ogle v. Atkinson, 554
 O'Hanlan v. Great West. Railway Co., 629
 Ohrby v. Ryde Comm., 888
 Ohrloff v. Briscall, 482
 Oldacre v. Hunt, 257
 Oldham v. Langmead, 66
 Oldham Bridge Co. v. Heald, 1133
 Olivant v. Berino, 448
 Olive v. Smith, 549
 Oliver v. Bartlett, 431
 Oliver v. Oliver, 416, 561, 1062
 Olliet v. Bessey, 774, 804
 Onley v. Gardiner, 154, 159
 Onslow v. —, 317
 Oppenheim v. Russell, 602
 Oppenheim v. White Lion Hotel Co., 612
 Opperman v. Smith, 653
 Orchard v. Rackstraw, 539
 Ord, *Ex parte*, 440
 Orme v. Orme, 1060
 Ormond v. Holland, 227
 Ormrod v. Huth, 1005, 1023, 1024
 Orpheus (The), 482
 Orpwood v. Barkes, 983
 Osbond v. Meadows, 9
 Osborn v. Gough, 717
 Ostell v. Lepage, 1155
 Overend & Co. v. Gurney, 502, 1128
 Overton v. Freeman, 246, 510
 Owen v. Burnett, 584
 Owen v. Knight, 451
 Owen v. Legh, 661
 Owen v. Lond. and N. W. Rail. Co., 1222
 Owens v. Jones, 1139
 Owens v. Woosnam, 1139
 Oxlade, *In re*, 572
 Oxlade v. North-Eastern Railway Co., 572
 Oxley v. Watts, 393, 655

P

Packer v. Wellstead, 167
 Packington's Case, 316
 Padmore v. Lawrence, 966
 Page v. Cowasjee Edulgee, 395
 Page v. Hatchett, 89
 Page v. Pearce, 1211
 Paget's Case, 310
 Painter v. Liv. Gas Co., 810, 854, 876
 Painter v. Lond. and Br. Rail. Co., 631
 Palk v. Skinner, 159
 Palmer's Case, 118
 Palmer v. Fletcher, 114
 Palmer v. Grand Junc. Rail. Co., 914
 Palmer v. Jarmain, 404
 Palmer v. Lond. and Br. Rail., 603, 631
 Palmer v. Lond. and S. W. Rail. Co., 632
 Pantou v. Isham, 302, 312, 315
 Pantou v. Jones, 685
 Pantou v. Williams, 764, 766
 Pape v. Lister, 1154
 Papendick v. Bridgewater, 184
 Pappa v. Rose, 771
 Pardington v. South Wales Rail. Co., 590
 Pardo v. Bingham, 1163
 Pariente v. Pennell, 430
 Paris v. Levy, 951
 Parke v. Eliason, 437
 Parker v. Bristol and Ex. Rail. Co., 1251, 1253
 Parker v. Crole, 1130
 Parker v. Flint, 607, 616
 Parker v. Godin, 447
 Parker v. Gt. West. Rail. Co., 604
 Parker v. Leach, 135
 Parker v. Mitchell, 156
 Parker v. Norton, 1130
 Parker v. Patrick, 541
 Parker v. Smith, 183
 Parker v. Staniland, 372
 Parker v. Tootal, 1204
 Parkes v. Stevens, 62, 66
 Park Gate Iron Co. v. Coates, 1252
 Parkins v. Scott, 7, 964, 972
 Parkinson v. Gt. West. Rail., 631
 Parkinson v. Lee, 1023
 Parkinson v. Parkinson, 1066
 Parmenter v. Webber, 634
 Parmiter v. Coupland, 952, 997
 Parr v. Lillicrap, 1213
 Parrett v. Navigation Co. v. Robins, 210
 Parrington v. Moore, 702
 Parrot v. Carpenter, 953
 Parrott v. Anderson, 643, 658
 Parrott v. Palmer, 320, 1232
 Parry v. Roberts, 533
 Parry v. Thomas, 366
 Parsons v. Brown, 762
 Parsons v. Gingell, 650, 651
 Parsons v. Lloyd, 720, 800

- Parsons v. St. Matthews, Beth. Green, 888
 Parteriche v. Powlett, 286
 Parton v. Williams, 875, 878
 Partridge v. Elkington, 806
 Partridge v. Gardner, 1204
 Partridge v. Scott, 73, 148
 Paslay v. Freeman, 35, 1006, 1008, 1020, 1046
 Patch v. Ward, 859
 Pater, *Re*, 858, 859
 Pater v. Baker, 971, 1180
 Paterson v. Harris, 1166
 Paterson v. Paterson, 1062
 Paterson v. Wallace, 488
 Patrick v. Colerick, 362, 381
 Patrickson v. Patrickson, 1084
 Patten v. Rea, 515, 517
 Patterson v. Patterson, 546, 1087
 Pattison v. Jones, 944
 Paul v. Paul, 1071
 Pauli, *Ex parte*, 438
 Pawly v. Holly, 566
 Pawsey v. Gooday, 1253
 Pawson v. Watson, 1007, 1015
 Payne v. Beaumorris, 961
 Payne v. Brander, 419
 Payne v. Rogers, 211, 253
 Payne v. Shedden, 143, 164
 Peaceable v. Watson, 1179
 Peachey v. Rowland, 245, 246
 Peacock v. Bell, 1145
 Peacock v. Peacock, 1070, 1071
 Peacock v. Reynal, 981
 Peake v. Oldham, 956
 Pearce v. Ormsby, 981
 Pearce v. Pearce, 1071
 Pearcy v. Walter, 723
 Peardon v. Underhill, 378
 Pearman v. Pearman, 1063
 Pears v. Wilson, 1244, 1245
 Pearse v. Coker, 387
 Pearse v. Dobinson, 859
 Pearson v. Glazebrook, 1141
 Pearson v. Le Maitre, 988
 Pearson v. Spencer, 103, 167, 168
 Pease v. Chaytor, 828, 829, 843, 845, 858, 863
 Pease v. Gloahec, 422
 Peatfield v. Barlow, 546
 Pechell v. Watson, 753
 Pedgrift v. Chevallier, 862
 Pedley v. Davis, 772, 844, 855, 866, 871
 Peek v. Gurney, 1010
 Peek v. Larsen, 537
 Peek v. North Staff. Rail. Co., 532, 587, 589, 590, 592
 Peek v. Spencer, 190
 Peek v. Waterloo, etc., Loc. Bd., 234, 236
 Peel's Case, 1011
 Peer v. Humphrey, 417, 541
 Peerless, *The*, 481
 Peerless, *Re*, 849
 Pegler v. Monm. Rail. Co., 603
 Pell v. Northampton and Banbury Rail. Co., 922
 Pellas v. Bresslauer, 1212
 Pemberton v. Colls, 957
 Pembroke's (Earl of) Case, 128
 Penfold v. Westcote, 956
 Penn v. Bibby, 1230
 Penn v. Jack, 64, 1228
 Penn v. Ward, 727, 732
 Pennell v. Woodburn, 1190
 Penny, *In re*, 778, 862, 907, 1203
 Penruddock's Case, 192, 242, 1109
 Pension v. Gooday, 1185
 Penton v. Browne, 785
 Penton v. Robart, 297
 Peppercorn v. Hoffman, 867
 Peppin v. Shakspear, 98, 365
 Percival v. Nanson, 1176
 Percival v. Stamp, 371, 788, 795
 Perham, *In re*, 838
 Perkins v. Smith, 1123
 Perkins v. Vaughn, 1194
 Perkinson v. Gifford, 1128
 Perren v. Monm. Rail. Co., 1170
 Perrot v. Perrot, 316
 Perry v. Bennett, 1220
 Perry v. Fitzhowe, 234
 Perry v. Truefitt, 1052
 Perryman v. Lister, 729, 743
 Peskett v. Somers, 636
 Petch v. Tutin, 119
 Peter v. Daniel, 367
 Peter v. Kendal, 16
 Peterson v. Ayre, 1187
 Peto v. Blade, 1032
 Petrie v. Lamont, 677, 757, 761, 1132
 Pettimangin, *Ex parte*, 831
 Pewtriss v. Austen, 1027, 1039
 Peyton v. London (Mayor of), 112, 149
 Phelps v. Lond. & N. Western Rail. Co., 570, 598
 Phene v. Popplewell, 653
 Pheysey v. Vicary, 104, 168
 Philippine, *The*, 546
 Phillips v. Biron, 720
 Phillips v. Bacon, 1204
 Phillips v. Barlow, 285
 Phillips v. Berryman, 682, 1158
 Phillips v. Clark, 589
 Phillips v. Eyre, 38, 40
 Phillips v. Homfray, 383
 Phillips v. Hudson, 190
 Phillips v. Jansen, 981
 Phillips v. Jones, 564
 Phillips v. Phillips, 1060, 1069
 Phillips v. Naylor, 746, 751, 763
 Phillips v. Shervill, 635
 Phillips v. Smith, 282
 Phillipson v. Gibbon, 353
 Philp v. Squire, 1088
 Philpott v. Dobbinson, 680
 Philpott v. Kelley, 397
 Phosphate of Lime Co. v. Green, 921

- Phythian v. White, 376
 Pianciani v. Lond. and S. W. Rail. Co., 582, 623
 Pickard v. Sears, 1178
 Pickard v. Smith, 201, 205
 Pickering v. Dowson, 1034
 Pickering v. Rudd, 247
 Pickford v. Grand Junc. Rail. Co., 568, 622
 Pierce v. Bartrum, 47
 Pierpoint v. Shapland, 1169
 Piggot v. East. Co. Rail. Co., 305, 312
 Piggott v. Birtles, 656, 685, 688
 Piggott v. Cubley, 395, 408
 Piggott v. Stratton, 1178
 Pike v. Carter, 830
 Pike v. Nicholas, 53
 Pilgrim v. Southamp., etc., Rail. Co., 374
 Pilkington v. Cooke, 802, 812
 Pilkington v. Riley, 716
 Pillot v. Wilkinson, 402
 Pilmore v. Hood, 1035
 Pim v. Curell, 1174
 Pindar v. Wadsworth, 173, 814
 Pinhorn v. Souster, 337, 681
 Pinkett v. Wright, 440
 Pinnington v. Galland, 105
 Pipe v. Fulcher, 1175
 Pippet v. Hearn, 767
 Pitcher v. King, 780
 Pitt v. Donovan, 970
 Pitt v. Shew, 644
 Pitt v. Yalden, 498
 Pitts v. Gaince, 1105
 Plant v. James, 168
 Plasterers' Co. v. Parish Clerks' Co., 151
 Plas-yn-Mhowys Mining Co., *Re*, 789
 Playfair v. Musgrove, 787
 Playford v. United Kingdom Telegraph Co., 18, 535
 Pluckwell v. Wilson, 475
 Plumer v. Plumer, 1085
 Plunket v. Gilmore, 38
 Poe, *In re*, 1245
 Polden v. Bastard, 167
 Polhill v. Walter, 1006, 1025, 1039
 Polkinhorn v. Wright, 694, 730
 Pollard, *Ex parte*, 859
 Pollen v. Brewer, 331
 Pollitt v. Forrest, 637, 679
 Pollock v. Lester, 195
 Pomfret v. Ricroft, 104, 115, 170
 Ponsford v. Walton, 427
 Pontifex v. Bignold, 1039
 Poole's Case, 297
 Poole v. Huskisson, 267
 Popham v. Pickburn, 936, 949
 Portland (Duke of) v. Hill, 124
 Portman v. Middleton, 1047, 1187
 Postlethwaite v. Gibson, 866
 Potter v. Faulkner, 493
 Potter v. North, 135
 Potteries, Shrewsbury & North Wales Rail., *Re*, 790
 Potteries v. Minor, 790
 Potts v. Port Carlisle Co., 224, 489
 Potts v. Plunkett, 224, 489
 Potts v. Smith, 182
 Poulson v. Thirst, 915
 Poulton v. Lond. and S. West. Rail. Co., 708, 721
 Pow v. Davis, 1026, 1190
 Powell v. Hodgetts, 1177
 Powell v. Rees, 1128
 Powell v. Salisbury, 185
 Powell v. Thomas, 186
 Powes v. Marshall, 676
 Powle v. Gandy, 1214
 Powlett v. Bolton (Duchess of), 411
 Powys v. Blaggrave, 286, 287, 319
 Poynton v. Gill, 192
 Pozzi v. Shipton, 1131
 Pratt v. Brett, 316
 Pratt v. Jenner, 1071
 Pratt v. Pratt, 363
 Preece v. Corrie, 634
 Prentice v. Harrison, 814
 Prestige v. Woodman, 873
 Preston, *In re*, 1074
 Price v. Harewood, 195
 Price v. Hewitt, 1030
 Price v. Messenger, 867
 Price v. Seeley, 703, 729
 Price v. Severn, 1201
 Price v. Woodhouse, 1172
 Priestly v. Fowler, 489
 Prickett v. Gratrix, 834, 858, 874
 Prickett v. Platt, 434
 Prince v. Molt, 1202
 Prince Albert v. Strange, 13, 1231
 Princess Royal, The, 438
 Pringle v. Taylor, 461, 1186
 Pringle v. Wernham, 183
 Pristwick v. Poley, 498
 Pritchard v. Long, 452, 512
 Pritchett v. Boevey, 464, 736, 1191
 Proctor v. Harris, 202, 206
 Proctor v. Hodgson, 106, 366
 Progress Assurance Co., *Re*, 649
 Prohibitions del Roy, 1237
 Protheroe v. Mathews, 457
 Protheroe v. May, 66
 Proud v. Holis, 379
 Proudfoot v. Montefiore, 1036
 Proudlove v. Twemlow, 688
 Provost, etc., Queen's College v. Tallett, 280
 Pudding Norton (Overseers of) *Re*, 860
 Pugh v. Acton, 299
 Pugh v. Griffith, 785
 Pugh v. Vaughan, 287
 Pullen v. Palmer, 641
 Pulsford v. Richards, 1007, 1045
 Pultney v. Keymer, 544
 Purcell v. Macnamara, 765
 Purcell v. Nash, 317

Pursell v. Horne, 690, 692
 Purves v. Landell, 499
 Pye v. Mumford, 370
 Pyer v. Carter, 104
 Pym v. Gt. North. Rail. Co., 504, 520,
 1199
 Pyne v. Dor, 286

Q

Quarman v. Burnett, 478
 Queensberry (Duke of) v. Shebbeare,
 13, 1231
 Queen, The, 485
 Queen's Case, The, 1170
 Queen's College (Provost, etc., of,) v.
 Hallett, 280
 Quick v. Staines, 788

R

Race, *In re*, 1075
 Race v. Ward, 96, 122
 Rackham v. Jesup, 453
 Radcliff v. D'Oyly, 1129
 Raitt v. Mitchell, 540
 Ralston v. Smith, 64
 Ram v. Lamley, 934
 Ramsay, *Re*, 775
 Ramsbottom v. Buckhurst, 814
 Ramshire v. Bolton, 1046
 Rance's Case, 502
 Rand v. Vaughan, 653
 Randal v. Cockran, 310, 1198
 Randall v. Raper, 1190, 1191, 1192
 Randall v. Stevens, 342
 Randall v. Trimen, 1007, 1025, 1039,
 1046, 1188
 Randell v. Wheble, 816
 Randleson v. Murray, 509
 Rangeley v. Midland Rail. Co., 919
 Rankin v. De Medina, 813
 Ransome v. East. Co. Rail. Co., 603,
 629, 631
 Raphael v. Bank of England, 404, 405,
 423
 Raphael v. Goodman, 782
 Raphael v. Pickford, 593
 Raphael v. Thames Valley Rail. Co., 920
 Rapson v. Cubitt, 510
 Rashdall v. Ford, 1012, 1017
 Ratcliff v. Davies, 551
 Ratcliffe v. Barnard, 500
 Ratcliffe v. Burton, 783
 Ratcliffe v. Ratcliffe, 1081, 1084
 Rawlings v. Bell, 661, 1028, 1039, 1125
 Rawlings v. Till, 692
 Rawlins v. Wickham, 1166
 Rawnsley v. Hutchinson, 865
 Rawstorne v. Backhouse, 239
 Rawstron v. Taylor, 147
 Raymond v. Fitch, 1110

Rea v. Sheward, 381, 392, 451
 Read v. Burley, 646
 Read v. Coker, 690, 713, 867
 Read v. Edwards, 30, 231, 327, 329, 457
 Read v. Gt. East. Rail. Co., 503
 Read v. Vict. and Pimlico Rail. Co., 904,
 908
 Reade v. Conquest, 51, 54, 55
 Reade v. Lacy, 55
 Readhead v. Midl. Rail. Co., 468, 475
 Reddie v. Scoolt, 1094, 1095
 Redfern v. Smith, 278
 Redway v. Webber, 1205
 Reece v. Rigby, 498
 Reece v. Taylor, 729
 Reed v. Harrison, 323
 Reed v. Taylor, 751
 Reed v. Thoitys, 816
 Reddie v. Lond. & N. Western Rail. Co.,
 507, 509
 Rees v. Bowen, 761
 Rees v. Davies, 843
 Rees v. Williams, 1250, 1253
 Reeve v. Holgate, 957
 Reeve v. Palmer, 529, 557, 562
 Reeve v. Taylor, 732
 Reeve v. Whitmore, 652
 Reeves v. Capper, 550
 Reg. v. Aberdare Canal Co., 859, 1238
 Reg. v. Aberdeen Canal Co., 773
 Reg. v. Abrahams, 1261, 1265
 Reg. v. Aire & Calder Nav. Co., 111,
 906, 1278
 Reg. v. Allen, 831, 1249
 Reg. v. Ambergate, 1257, 1266, 1283,
 1284
 Reg. v. Ardley, 1049
 Reg. v. Arkwright, 1238
 Reg. v. Ashby Folville, 275
 Reg. v. Aston, 856
 Reg. v. Badger, 859, 1250
 Reg. v. Baines, 1269
 Reg. v. Baker, 276
 Reg. v. Balby, etc., Turnpike Trust,
 1265
 Reg. v. Bateman, 233
 Reg. v. Bedfordshire, 1174
 Reg. v. Bessel, 56
 Reg. v. Birm., etc., Rail. Co., 265, 1278,
 1282
 Reg. v. Blackburn, 843
 Reg. v. Blanshard, 1258
 Reg. v. Bolton, 862
 Reg. v. Boteler, 843, 1258
 Reg. v. Bradford Nav. Co., 883
 Reg. v. Brickhall, 839, 859
 Reg. v. Brancaster Churchwardens,
 1276
 Reg. v. Bristol Dock Co., 1264
 Reg. v. Bristol & Exeter Rail. Co., 1264,
 1280
 Reg. v. Brown, 905
 Reg. v. Browne, 864
 Reg. v. Bryan, 1049

- Reg. v. Bucks (Justices of), 837, 862
 Reg. v. Burslem Local Board, 1278, 1279
 Reg. v. Caledonian Rail. Co., 1281
 Reg. v. Cambrian Rail. Co., 16, 901, 902
 Reg. v. Casterton, 850
 Reg. v. Cheadle Highway Trustees, 1280
 Reg. v. Cheek, 1260, 1286
 Reg. v. Cheltenham Commers., 858, 859
 Reg. v. Chester (Dean and Chapter of), 1270
 Reg. v. Chickhester (Bishop of), 1266
 Reg. v. Chorley, 165
 Reg. v. Churchwardens, etc., 1277
 Reg. v. Coles, 1238
 Reg. v. Collins, 864
 Reg. v. Colvill, 1261
 Reg. v. Commissioners of Woods and Forests, 1278
 Reg. v. Cooper, 981
 Reg. v. Cotesworth, 692
 Reg. v. Cridland, 842, 851
 Reg. v. Crowan, 849
 Reg. v. Cumberland (Clerk, etc., of), 1269
 Reg. v. Darlington Local Board, 882
 Reg. v. Darlington School Governors, 1270, 1287
 Reg. v. Davis, 867
 Reg. v. Deny, 840
 Reg. v. Derby, 1272
 Reg. v. Derbys., etc., Rail. Co., 1275
 Reg. v. Dickenson, 846, 857, 860, 862
 Reg. v. Dodson, 842
 Reg. v. Dolgelly Guard, etc., 1272
 Reg. v. Driscoll, 693
 Reg. v. Dundas, 1048
 Reg. v. Eagleton, 1049
 Reg. v. East. Co. Rail. Co., 1256, 1280
 Reg. v. East Mark, 268
 Reg. v. East Riding Justices, 1258
 Reg. v. Evans, 1049
 Reg. v. Fail, 1284, 1287
 Reg. v. Farrer, 275
 Reg. v. Fox, 1261, 1267
 Reg. v. Frere, 605
 Reg. v. Garland, 1256, 1273
 Reg. v. Gen. Cemet. Co., 1275, 1290
 Reg. v. Gen. Council Med., etc., 1268
 Reg. v. Gillyard, 859
 Reg. v. Goodrich, 1258
 Reg. v. Gt. North of Engl. Rail. Co., 265
 Reg. v. Grey, 860
 Reg. v. Halifax Road Trustees, 1279
 Reg. v. Hampshire (Justices of), 1206
 Reg. v. Harden, 234, 1142
 Reg. v. Hardey, 42
 Reg. v. Harris, 264
 Reg. v. Harwood, 1260
 Reg. v. Hawkhurst, 271
 Reg. v. Hawkins, 725, 841
 Reg. v. Hellingley, 863
 Reg. v. Henson, 262
 Reg. v. Herefordshire Justices, 833
 Reg. v. Hereford (Mayor of), 1282
 Reg. v. Herford, 1238
 Reg. v. Hertfordshire Justices, 833, 858
 Reg. v. Higginson, 845
 Reg. v. High Wycombe Rail. Co., 1278
 Reg. v. Higham, 863
 Reg. v. Hopkins, 1266
 Reg. v. Hornsea, 274
 Reg. v. Hornsey (Inhab. of), 271
 Reg. v. Howes, 1075
 Reg. v. Hull and Selby Rail. Co., 1264, 1282
 Reg. v. Huntingtower (Lord), 858
 Reg. v. Huntley, 865
 Reg. v. Huntsworth, 843
 Reg. v. Hurstbourne Tarrant, etc., 1277, 1279
 Reg. v. Jenkins, 233
 Reg. v. Johnson, 691, 841, 851
 Reg. v. Kendal, 1273
 Reg. v. Kent Justices, 1258
 Reg. v. Kilham, 1049
 Reg. v. Lambarge, 857
 Reg. v. Langley, 1000
 Reg. v. Ledgard, 1281, 1288
 Reg. v. Lee, 1049
 Reg. v. Leech, 262
 Reg. v. Leeds (Mayor of), 1272
 Reg. v. Leicester Deputies, 1258
 Reg. v. Levi, 454
 Reg. v. Light, 702
 Reg. v. Liver., Manch., etc., Rail. Co., 1275
 Reg. v. Liverpool Recorder, 1258
 Reg. v. Lond. and Coleraine Rail. Co., 1275
 Reg. v. Lond. and N. W. Rail. Co., 897, 904, 907, 908, 1257, 1260, 1283
 Reg. v. Lond. and S. W. Rail. Co., 1281
 Reg. v. London (Lord Mayor of), 900
 Reg. v. Long, 1249
 Reg. v. Longton Gas Co., 263, 886, 917
 Reg. v. Lundie, 48
 Reg. v. McCleverty, 416
 Reg. v. Mainwaring, 864, 1084, 1283
 Reg. v. Manch. & Sheffield Rail. Co., 773, 778, 832, 900
 Reg. v. Manktelow, 1099
 Reg. v. Mann, 48
 Reg. v. Martin, 691
 Reg. v. Master, 1130
 Reg. v. Mathias, 267
 Reg. v. Metrop. Board, etc., 74, 82, 897, 903
 Reg. v. Metrop. Com. of Sewers, 897
 Reg. v. Metrop. Police (Receiver of), 1266
 Reg. v. Mid. Rail. Co., 1275
 Reg. v. Middlesex Justices, 865
 Reg. v. Monmouth (Mayor of), 1257, 1262
 Reg. v. Munster, 709
 Reg. v. Musson, 345
 Reg. v. Mutters, 205
 Reg. v. Newborough, 1250

- Reg. v. Newton Ferrers, 851
 Reg. v. New Windsor (Mayor of), 1283
 Reg. v. Newport Guardians, 1258
 Reg. v. Norfolk Comm. of Sewers, 1277
 Reg. v. North Mid. Rail. Co., 1257
 Reg. v. Norwich and Brandon, Rail. Co., 1280
 Reg. v. Nunneley, 843
 Reg. v. Orchard, 264
 Reg. v. Orton Trustees, 1265, 1273
 Reg. v. Oxford (Mayor of), 1272
 Reg. v. Oxford, etc., Roads, 1261
 Reg. v. Payn, 825
 Reg. v. Paynter, 864, 1286
 Reg. v. Petrie, 268
 Reg. v. Pinder, 709
 Reg. v. Ponsford, 1265
 Reg. v. Powell, 1282, 1286
 Reg. v. Pratt, 854
 Reg. v. Purdey, 863, 865
 Reg. v. Ragg, 1049
 Reg. v. Ramsden, 274
 Reg. v. Rand, 773, 832
 Reg. v. Riall, 1252
 Reg. v. Richards, 863, 1257, 1259
 Reg. v. Richmond Recorder, 1258, 1279
 Reg. v. Rochester (Dean, etc., of), 1270
 Reg. v. Roebuck, 1049
 Reg. v. Rogier, 263
 Reg. v. Rose, 46
 Reg. v. Rotherham, 1277
 Reg. v. Rynd, 1278
 Reg. v. Sadlers' Co., 1268, 1273
 Reg. v. St. Albans, 859
 Reg. v. St. George's Bloomsbury, 847, 850
 Reg. v. Saintiff, 264
 Reg. v. St. Luke's, 902
 Reg. v. St. Luke's, Chelsea, 1281
 Reg. v. St. Martin's 1272
 Reg. v. St. Stephen's, 1272
 Reg. v. Salford, 1238
 Reg. v. Salop, 843
 Reg. v. Scaife, 1253
 Reg. v. Scott, 841
 Reg. v. Scotton, 838
 Reg. v. Sheffield (Mayor of), 891, 922, 1249
 Reg. v. Sherwood, 1049
 Reg. v. Skinner, 968
 Reg. v. Smith, 1049, 1074, 1268
 Reg. v. Southampton Port Commrs., 1281
 Reg. v. S. E. Rail. Co., 1281
 Reg. v. South Wales Rail. Co., 779, 907
 Reg. v. Spencer, 860
 Reg. v. Stamford (Mayor of), 1286
 Reg. v. Stannard, 263
 Reg. v. Stephens, 109
 Reg. v. Stewart, 1263
 Reg. v. Stimpson, 132, 842
 Reg. v. Stock, 855
 Reg. v. Stockton, 849
 Reg. v. Stone, 900
 Reg. v. Strand Board of Works, 349
 Reg. v. Suffolk Justices, 833
 Reg. v. Suffolk, 1250, 1252
 Reg. v. Surrey Justices, 274, 432, 1250
 Reg. v. Thallman, 264
 Reg. v. Timmins, 1075, 1099
 Reg. v. Tithe Commissioners, 1281
 Reg. v. Totness, 849, 854
 Reg. v. Train, 264, 272
 Reg. v. Treasury (Comms. of), 1265
 Reg. v. Treasury (Lords of), 1266
 Reg. v. Trustees of Cheadle Highw., 1280
 Reg. v. Twiss, 1239
 Reg. v. United Kingd. Teleg. Co., 272
 Reg. v. Vaughan, 897
 Reg. v. Victoria Park Co., 1264, 1276
 Reg. v. Wallasey Local Board, 898
 Reg. v. Warwick Justices, 859
 Reg. v. Watson, 262, 264
 Reg. v. Watts, 212
 Reg. v. West Riding Justices, 858, 1259
 Reg. v. Whitecross Street Prison (Governors of), 1261
 Reg. v. Williams, 263
 Reg. v. Wing, 1275
 Reg. v. Wood, 46, 48, 846, 860
 Reg. v. Wood Ditton Surveyors, 1263
 Regnart v. Porter, 638
 Reid v. Ashby, 1215
 Reid v. Fairbanks, 460
 Reid v. Margison, 814
 Reynolds v. Edwards, 379
 Rennison v. Walker, 1135
 Renshaw v. Bean, 163
 Revett v. Brown, 374
 Revis v. Smith, 934, 967
 Rex v. Abingdon (Lord), 949
 Rex v. Abingdon (Mayor, etc., of), 1282, 1288
 Rex v. Allen, 860
 Rex v. Amphlit, 982
 Rex v. Arkwright, 61, 63, 65
 Rex v. Atkins, 860
 Rex v. Austin, 850
 Rex v. Avering Atte Bower, 1257
 Rex v. Axbridge (Mayor, etc., of), 1273
 Rex v. Backhouse, 786
 Rex v. Bagley, 274
 Rex v. Bank of England, 1275
 Rex v. Barker, 1273
 Rex v. Barr, 265
 Rex v. Beare, 980
 Rex v. Bedford Level, 1272
 Rex v. Benn, 1260
 Rex v. Berkley, 860
 Rex v. Betterton, 260
 Rex v. Birmingham Canal Co., 1257
 Rex v. Birmingham Rector, 1271
 Rex v. Birnie, 833
 Rex v. Bradshaw, 659
 Rex v. Brangan, 764
 Rex v. Brecknock, etc., Canal Co., 1280
 Rex v. Bristow, 1263

- Rex v. Buckingham (Marquis of), 222
 Rex v. Burdett, 980, 982, 1000
 Rex v. Burnaby, 842
 Rex v. Butterson, 320
 Rex v. Cambridge, 1272
 Rex v. Cambridge Justices, 1260
 Rex v. Cambridge University, 1272
 Rex v. Carlile, 947
 Rex v. Cashiobury, Justices, 855
 Rex v. Chalke, 1270
 Rex v. Chandler, 849
 Rex v. Churchill, 130
 Rex v. Clapham, 1267
 Rex v. Clear, 1265, 1281
 Rex v. Colchester (Mayor of), 1272
 Rex v. Colebrook, 1260
 Rex v. Coleridge, 1264
 Rex v. Commissioners of Customs, 1261
 Rex v. Commissioners of Sewers of Essex, 132
 Rex v. Commissioners of Tower Hamlets, 890
 Rex v. Cotton, 636
 Rex v. Creevey, 949
 Rex v. Cross, 262
 Rex v. Croydon Churchwardens, 1267
 Rex v. Crunden, 47, 133, 263
 Rex v. Cumberland Justices, 1256, 1259
 Rex v. Curghey, 1282
 Rex v. Dant, 229
 Rex v. Davies, 860
 Rex v. Davis, 850
 Rex v. De Manneville, 1076
 Rex v. Derbyshire Justices, 859
 Rex v. Dewsnap, 262
 Rex v. Dixon, 263
 Rex v. Dobbyn, 850
 Rex v. Doherty, 741
 Rex v. Dorset Justices, 260
 Rex v. Ecclesfield, 274
 Rex v. Edwards, 849
 Rex v. Ely (Bishop of), 1260
 Rex v. England (Bank of), 1275
 Rex v. Essex, 865, 890
 Rex v. Exeter (Bishop of), 1283
 Rex v. Faversham Fish. Co., 1283
 Rex v. Gaskin, 1268
 Rex v. Grantham, 1260
 Rex v. Great Chart, 831
 Rex v. Great Yarmouth, 831
 Rex v. Greenhill, 1076
 Rex v. Griffiths, 1283
 Rex v. Gudridge, 831
 Rex v. Hardwick, 1177
 Rex v. Harrison, 849
 Rex v. Hastings (Mayor of), 1257
 Rex v. Hatfield, 350
 Rex v. Hazell, 849
 Rex v. Hendon, 1273
 Rex v. Hermitage, 167
 Rex v. Higginson, 263
 Rex v. Holt, 1000, 1001
 Rex v. Hoseason, 831
 Rex v. Hostmen of Newcastle, 1274
 Rex v. Huggins, 230
 Rex v. Hull, 685
 Rex v. Humphery, 549
 Rex v. Ilchester Bailiffs, etc., 1260
 Rex v. Ingram, 1267
 Rex v. Ivens, 606
 Rex v. James, 775
 Rex v. Jefferies, 852
 Rex v. Jeyes, 1263
 Rex v. Johnson, 849
 Rex v. Jones, 262, 263
 Rex v. Jotham, 1269, 1273
 Rex v. Jukes, 848
 Rex v. Kent Justices, etc., 1256
 Rex v. King, 860
 Rex v. Langley, 1000
 Rex v. Leake, 270
 Rex v. Leeds and Selby Rail. Co., 906, 1278
 Rex v. Leicester Justices, 1261
 Rex v. Liverpool, (Mayor of), 1269, 1283
 Rex v. Lloyd, 265
 Rex v. London Dock Co., 902
 Rex v. London (Mayor, etc., of), 372, 1271, 1283
 Rex v. Londonthorpe, 296
 Rex v. Lyme Regis (Mayor of), 1283
 Rex v. March, 1273
 Rex v. Margate Pier Co., 1282, 1286
 Rex v. Merchant Taylors' Co., 1274
 Rex v. Middlesex Justices, 1260
 Rex v. Midhurst, 1260
 Rex v. Milverton (Lord of), 1260
 Rex v. Mitton, 442
 Rex v. Monmouth Justices, 858
 Rex v. Montacute (Lord) 1260
 Rex v. Moor Critchell, 850
 Rex v. Moore, 199, 263
 Rex v. Moreley, 853
 Rex v. Morley, 849
 Rex v. Morpeth Ballivos, 1267
 Rex v. Neil, 262
 Rex v. Newcastle Coopers, etc., 48
 Rex v. North, 849
 Rex v. North Riding, etc., Justices, 1256
 Rex v. Norwich (Dean, etc., of), 1272
 Rex v. Norwich (Mayor of), 1282
 Rex v. Nottingham Old Water Works, 1278
 Rex v. Osborne, 999
 Rex v. Otley, 296
 Rex v. Oxfordshire Justices, 855
 Rex v. Pagham (Commissioners of), 23, 210
 Rex v. Pappineau, 262
 Rex v. Payn, 1263, 1266
 Rex v. Pease, 882, 885
 Rex v. Pedley, 196, 197, 211
 Rex v. Pilkington, 1288
 Rex v. Pocock, 1000
 Rex v. Price, 849
 Rex v. Priest, 852
 Rex v. Reed, 763

- Rex v. Revel, 832
 Rex v. Richardson, 1269
 Rex v. Ripon (Mayor of), 1282, 1287
 Rex v. Rislip, 991
 Rex v. Robinson, 726
 Rex v. Rosewell, 234
 Rex v. Russell, 262, 264, 273
 Rex v. St. Cath. Dock Co., 1276
 Rex v. St. George, 690
 Rex v. St. Nicholas, 1270
 Rex v. Sankey, 547
 Rex v. Severn and Wye Rail. Co., 1264
 Rex v. Sillifant, 1260
 Rex v. Smallpiece, 1281
 Rex v. Smith, 199, 263
 Rex v. Southerby, 794
 Rex v. Sparrow, 759
 Rex v. Speed, 847
 Rex v. Stafford (Marquis of), 1265
 Rex v. Staffordshire Justices, 1261
 Rex v. Stoke Damerel, 1272
 Rex v. Stratford (Mayor of), 1270
 Rex v. Symonds, 832
 Rex v. Taylor, 262
 Rex v. Tindall, 264, 272
 Rex v. Topham, 999
 Rex v. Tower, 1273
 Rex v. Treasury (Lords of), 1265, 1266
 Rex v. Vantandillo, 262
 Rex v. Ward, 264, 272
 Rex v. Watson, 984, 997, 999
 Rex v. Watts, 273
 Rex v. Wells (Mayor of), 1257
 Rex v. Weltye, 1000
 Rex v. West Torrington, 825
 Rex v. Westwood, 46
 Rex v. Wheeler, 62, 63
 Rex v. White, 262, 999
 Rex v. Wildman, 1267
 Rex v. Williams, 999
 Rex v. Wilson, 1075
 Rex v. Wilton (Mayor of), 1270
 Rex v. Winchester (Mayor of), 1272
 Rex v. Windham, 1272, 1273
 Rex v. Wix, 1271
 Rex v. Worcestershire Canal Co., 1275
 Rex v. Worcestershire Justices, 1260
 Rex v. Wright, 272, 380
 Rex v. Wrightson, 1000
 Rex v. Yarmouth (Great), 831
 Rex v. York (Archbishop of), 1283
 Reynolds v. Barford, 801
 Reynolds v. Bowley, 433
 Reynolds v. Clark, 192
 Reynolds v. Clarke, 324
 Reynolds v. Harris, 1223, 1224
 Reynolds v. Reynolds, 333
 Rhodes v. Hull, 781
 Rice v. Dub. and Wick. Rail. Co., 1225
 Rich v. Aldred, 555, 556
 Rich v. Basterfield, 198
 Rich v. Wooley, 660, 682
 Richards v. Dyke, 1240
 Richards v. Frankum, 559
 Richards v. Gellatly, 1154
 Richards v. Harper, 76
 Richards v. Johnston, 792
 Richards v. Lond., B., etc., Rail. Co., 595, 599, 625
 Richards v. Morgan, 1172
 Richards v. Richards, 996
 Richards v. Rose, 112
 Richards v. Symons, 451
 Richards v. Turner, 992
 Richardson, *Ex parte*, 431, 433
 Richardson v. Ardley, 793
 Richardson v. Atkinson, 397
 Richardson v. Dunn, 1025, 1188, 1190
 Richardson v. Goss, 549
 Richardson v. Locklin, 241
 Richardson v. Mellish, 1191
 Richardson v. Metrop. Rail. Co., 472
 Richardson v. North-East. Rail., 577
 Richardson v. Williamson, 1026, 1182
 Richbell v. Alexander, 1114
 Richmond v. Nicholson, 1129
 Richmond v. N. Lond. Rail. Co., 900
 Richardson v. Smith, 611
 Ricket v. Metrop. Rail. Co., 884, 896, 903
 Ricketts, *Ex parte*, 1266
 Ricketts v. East and West India Docks Rail. Co., 215
 Riddle v. Pakeman, 800
 Rideal v. Fort, 789, 796
 Rideal v. Gt. West. Rail. Co., 1154
 Rideout's Trusts, *Re*, 1080
 Rider v. Smith, 176, 249
 Ridgway v. Lord Stafford, 663
 Riga, The, 1143
 Rigby v. Hewitt, 480, 1186
 Rigg v. Lonsdale, 130, 142
 Rigg v. Parsons, 314
 Riley v. Baxendale, 489
 Ringland v. Lowndes, 898, 1146, 1277, 1279, 1283
 Rinquist v. Ditchell, 1037
 Ripon (Earl) v. Hobart, 92, 1233
 Rippin v. Bastin, 843
 Risely v. Ryle, 811, 817
 Ritchings v. Cordingley, 345
 Riviere v. Bower, 115
 Roads v. Overseers of Trumpington, 372
 Robbins v. Jones, 206, 211, 212, 252
 Robert Mary's Case, 718
 Roberts v. Camden, 969, 985
 Roberts v. Carr, 265
 Roberts v. E. C. Rail. Co., 1154
 Roberts v. Gt. West. Rail. Co., 217
 Roberts v. Haines, 75
 Roberts v. Humby, 1240
 Roberts v. Hunt, 273
 Roberts v. McCord, 182
 Roberts v. Orchard, 715
 Roberts v. Read, 912, 1163
 Roberts v. Roberts, 961
 Roberts v. Rose, 94, 238, 251
 Roberts v. Smith, 226

- Roberts v. Taylor, 361, 693
 Roberts v. Thomas, 787
 Roberts v. Williams, 717
 Roberts v. Wyatt, 444
 Robertson v. Adamson, 224
 Robertson v. Fleming, 18
 Robertson v. Gantlett, 1167
 Robertson v. Sterne, 1215
 Robertson v. Womack, 1252
 Robins v. Barnes, 116
 Robinson v. Briggs, 410
 Robinson v. Byron (Lord), 93
 Robinson v. Chartered Bank, 1229
 Robinson v. Dunmore, 535, 599
 Robinson v. Gell, 780
 Robinson v. Gt. West. Rail. Co., 572, 589
 Robinson v. Hoffman, 641
 Robinson v. Lenaghan, 1242, 1245
 Robinson v. Litton, 317, 318
 Robinson v. Marchant, 957, 977
 Robinson v. S. West. Rail. Co., 583
 Robinson v. Vaughton, 835
 Robinson v. Waddington, 663
 Robinson v. Ward, 530
 Robinson v. Wray, 101, 130
 Robotham v. Robotham, 1071
 Rochdale Canal Co. v. King, 10, 90
 Rochester (Mayor of) v. Reg., 1262
 Roche, *Ex parte*, 428
 Roden v. Eytton, 657
 Rodger v. Comptoir d'Escompte de Paris, 422, 537
 Rodgers v. Maw, 442
 Rodgers v. Nowill, 10, 1029, 1039, 1045
 Rodgers v. Parker, 665, 684, 688
 Rodrigues v. Melhuish, 481
 Rodriguez v. Tadmire, 767
 Roe v. Birkenhead, Lanc., etc., Rail. Co., 1121, 1123
 Roebuck v. Stirling, 61
 Rogers, *Ex parte*, 440
 Rogers v. Brenton, 121, 124, 130
 Rogers v. Challis, 1228
 Rogers v. Clifton, 944
 Rogers v. Davenant, 1241
 Rogers v. Driver, 56
 Rogers v. Head, 534
 Rogers v. Jones, 839
 Rogers v. McNamara, 9, 1139
 Rogers v. Ragendro Dutt, 15, 21, 36
 Rogers v. Spence, 382, 1114, 1151, 1168
 Rogers v. Taylor, 75, 87, 148, 179
 Roles v. Davis, 1181
 Rolfe v. Gregory, 407
 Rolfe v. Peterson, 317
 Rolin v. Steward, 11
 Rolle v. Whyte, 132, 239
 Rollins v. Hinks, 979
 Romney Marsh (Bailiffs of) v. Trinity House, 488
 Ronneberg v. Falkland Islands Co., 1190
 Rooke v. Mid. Rail. Co., 403
 Rooth v. N. East. Rail. Co., 217, 588
 Rooth v. Wilson, 176, 185, 214
 Roper v. Harper, 377, 1132
 Roret v. Lewis, 752
 Roscorla v. Thomas, 1014, 1039
 Rose v. Groves, 208, 242
 Rose v. Hart, 543
 Rose v. Miles, 43, 242
 Rose v. Wilson, 729
 Rosewell v. Pryor, 116, 176, 197, 1161
 Roskell v. Whitworth, 1234
 Roskrug v. Caddy, 679
 Ross v. Adcock, 289
 Ross v. Estates Invest. Co., 1011, 1012
 Ross v. Hill, 534, 571
 Ross v. Norman, 757
 Ross v. Ross, 1070
 Rosse v. Bransteed, 617
 Roswell v. Prior, 197
 Roswell v. Vaughan, 1019
 Rothery v. Wood, 793
 Routledge v. Hislop, 1158
 Rowbotham v. Wilson, 75, 76, 118, 120, 124, 1163
 Rowe v. Brenton, 453, 1175
 Rowlands v. Samuel, 768
 Rowley v. Rowley, 1064
 Rowning v. Goodchild, 21, 45, 50
 Royal British Bank, *In re*, 1012
 Ruck v. Williams, 890, 917
 Rudd v. Scott, 713
 Ruffey v. Henderson, 299
 Rugby Charity, *Ex parte*, 1261
 Rugg v. Kingsmill, 344
 Rugg v. Winchester (Bishop of), 343
 Rumsey v. N. East. Rail. Co., 598
 Runcorn v. Cooper, 137
 Rundle v. Little, 459
 Rushforth v. Hadfield, 543, 602
 Rushton v. Crawley, 63
 Rushworth v. Taylor, 399
 Russell v. Briant, 56
 Russell v. Cowley, 62
 Russell v. Harford, 104
 Russell v. Palmer, 497
 Russell v. Shenton, 247
 Rutherford v. Evans, 990
 Rutland's (Countess of) Case, 799
 Ruttinger v. Temple, 1079
 Ryall v. Rowles, 432
 Ryan v. Clark, 361
 Ryan v. Shilcock, 643, 785
 Ryan v. Thompson, 680
 Ryde Com. v. Isle of Wight Ferry Co., 1229
 Ryder v. Bentham, 188
 Ryder v. Ryder, 1073, 1075

S

- Sabin v. Long, 1197
 Sablich v. Russell, 402
 Sacheverell v. Porter, 125
 Sadler v. Belcher, 437

- Sadler v. Henlock, 506
 Saffron Hill (Overseers of), *Ex parte*, 239
 Sagrill v. Milward, 324
 Sahlgreen's Case, 1294
 Saint Devereux v. Much Dew Church, 1084
 St. Albans (Duke of) v. Skipwith, 288
 St. Germans (Earl of) v. Crystal Palace Rail., 922
 Saint Helen's Smelting Co. v. Tipping, 195
 Saint John's Coll. v. Murcott, 649
 Saint Panacras Vestry v. Batterbury, 49
 St. Luke v. Middlesex Justices, 1260
 St. Margaret's Rochester (Burial Board of) v. Thompson, 345
 St. Martin's Birmingham (Rector of), *Ex parte*, 344
 St. Mary Newington v. Jacobs, 332
 St. Paul v. St. Paul, 1069
 Salisbury (Marquis of) v. Gt. North. Rail. Co., 349
 Salisbury (Marquis of) v. Gladstone, 290
 Salisbury v. Metrop. Rail. Co., 1230
 Salmon v. Bensley, 242
 Salmon v. Ward, 1015
 Salter v. Metrop. Distr. Rail., 911
 Salters' Co. v. Jay, 140
 Sammell v. Wright, 478
 Sampson v. Hoddinott, 78, 80, 144
 Sampson v. Mackay, 1212
 Sampson v. Smith, 258, 261
 Samuel v. Buller, 798
 Samuel v. Payne, 699
 Sandeman v. Scurr, 485
 Sanders v. Spencer, 614
 Sanderson v. Bell, 538
 Sandford v. Clarke, 1199
 Sandon v. Jervis, 731, 785
 Sandys, *Ex parte*, 1270
 Sankey Brook Coal Co. (*Re*), 537
 Sarazin v. Hamel, 57
 Sarch v. Blackburn, 229, 231
 Saterwaite v. Durest, 1090
 Saunders v. Bate, 1181
 Saunders v. Edwards, 1164
 Saunders v. Mills, 946
 Saunders v. Musgrave, 817
 Saunders v. Newman, 144
 Saunders v. Oliffe, 167
 Saunders v. Plummer, 607
 Saunders v. Saunders, 1061
 Saunders v. Smith, 1229, 1231
 Sanderson v. Baker, 787
 Savage v. Brook, 48
 Savile v. Jardine, 5, 926, 954
 Savile v. Roberts, 752, 758, 767
 Savill v. Barchard, 543
 Saville v. Sweeney, 1107
 Savin v. Hoylake Rail. Co., 1258
 Savory v. Price, 60, 63
 Sawin v. Guild, 65
 Saxby's Patent, 60
 Saxby v. Manchester Rail., 176 196
 Saxby v. Easterbrook, 1230
 Saxon v. Castle, 754
 Scarfe v. Morgan, 408, 538, 541
 Scattergood v. Silvester, 417
 Schneider v. Heath, 1015, 1034
 Scholefield v. Robb, 1045
 Scholefield v. Templer, 1028
 Schotsmans v. Lanc. and Yorksh. Rail Co., 1228, 1232
 Schroder v. Ward, 1220
 Schuringe v. Dowell, 267
 Schuster v. M'Kellar, 447
 Schwalbe, The, 481
 Scothorn v. South Staff. Rail. Co., 597
 Scott v. Craig, 227
 Scott v. Dixon, 1006, 1010, 1041
 Scott v. Dub. and Wickl. Rail. Co., 28, 493
 Scott v. Hanson, 1016
 Scott v. Jones, 1173
 Scott v. London Dock Co., 23, 202, 472, 514
 Scott v. Manch. (Mayor, etc., of), 884, 1118
 Scott v. Marshall, 816
 Scott v. Newington, 445
 Scott v. Pilkington, 1155
 Scott v. Porcher, 421
 Scott v. Rayment, 1228
 Scott v. Scott, 485, 1063
 Scott v. Seymour (Lord), 40, 1154
 Scott v. Shepherd, 3, 7, 510
 Scott v. Stanford, 52
 Scott v. Stansfield, 772
 Scott v. Surman, 439
 Scott and Young, *Ex parte*, 63
 Scratton v. Brown, 348
 Seagram v. Knight, 285
 Seare v. Prentice, 496
 Searle v. Law, 561
 Searle v. Lindsay, 227, 490
 Sears v. Lyons, 9, 382
 Seddon v. Seddon, 1072, 1081, 1085
 Seddon v. Tutop, 1159
 Sedgworth v. Overend, 506
 Sedley v. Sutherland, 1132
 Seixo v. Provezende, 1046, 1052
 Selby v. Cryst. Pal. Distr. Gas Co., 269
 Selby v. Greaves, 634
 Selby v. Robinson, 127
 Seller v. Seller, 1071
 Sellers v. Till, 985
 Selmes v. Judge, 916
 Sells v. Hoare, 684
 Selway v. Fogg, 1005, 1016
 Selway v. Holloway, 624
 Semayne's Case, 784
 Semple v. Lond. and Birm. Rail. Co., 92, 258
 Senhouse v. Christian, 106
 Senior v. Medland, 965
 Senior v. Metrop. Rail. Co., 903

- Senior v. Pawson, 188
 Senior v. Ward, 226, 490, 493, 495
 Serres v. Dod, 676
 Sewell, *Ex parte*, 1059
 Seymour v. Greenwood, 33, 478
 Seymour v. Maddox, 224, 249, 1147
 Shackell v. West, 526
 Shadwell v. Hutchinson, 174, 175, 185, 243, 256, 1161
 Sharp, *Ex parte*, 1058
 Sharp v. Grey, 468, 474
 Sharp v. Powell, 7
 Sharpe v. Brice, 1184
 Sharpe v. Hancock, 72
 Sharrod v. Lond. and N. W. Rail. Co., 1121
 Shattock v. Carden, 801
 Shatwell v. Hall, 714
 Shaw, *In re*, 433
 Shaw v. Harvey, 434, 438
 Shea v. United Assur. Co., 1139
 Sheers v. Brooks, 784
 Sheffield Waterworks v. Yeomans, 189
 Shelbury v. Scotsford, 562
 Shelley v. Westbrook, 1076
 Shepherd v. Bristol and Exeter Rail. Co., 595
 Shepherd v. Harrison, 422
 Shepherd v. Hills, 49, 899, 901
 Sheppard v. Schoolbred, 420
 Sheppard v. Wakeman, 11
 Sherborn v. Wells, 839
 Sheridan's Case, 980, 983
 Sheridan v. New Quay Co., 401, 623
 Sherwin v. Swindall, 1216
 Shiels v. Gt. North. Rail. Co., 1138
 Shilcock v. Passman, 499
 Ship v. Crosskill, 501, 1225
 Shipley v. Todhunter, 986
 Shipman's Case, 1295
 Shirley v. Wright, 814
 Short v. Kalloway, 1190
 Shower v. Pilck, 415
 Shrewsbury's (Earl of) Case, 1269
 Shrewsbury v. Blount, 1042
 Shrewsbury (Countess of) v. Crompton, 301
 Shury v. Piggot, 72
 Shuttleworth v. Cocker, 1210, 1216
 Shuttleworth v. Hernaman, 432
 Shuttleworth v. Le Fleming, 141
 Sichel v. Lambert, 1084
 Sichel's Case, 1294
 Sidley's Case, 263
 Simmond's v. Gt. East. Rail. Co., 547
 Simmond's v. South East. Rail. Co., 628
 Simmons v. Edwards, 433, 439
 Simmons v. Lillystone, 359, 397, 1147
 Simmons v. Millingen, 702, 703, 707
 Simons v. Gt. West. Rail. Co., 590, 592, 625
 Simons v. Patchett, 1046
 Simpson v. Blues, 1144
 Simpson v. Dendy, 350
 Simpson v. Hartopp, 645
 Simpson v. Holliday, 63, 1233
 Simpson v. Lethwaite, 366
 Simpson v. Robinson, 989
 Simpson v. Sadd, 1156
 Simpson v. Savage, 244
 Sinden v. Bankes, 50
 Siner v. Gt. West. Rail. Co., 470
 Singleton v. East. Co. Rail. Co., 494
 Singleton v. Williamson, 668, 669
 Six Carpenters' Case, 323, 655
 Skelton v. Lond. and N. W. Rail. Co., 473
 Skelton v. Springett, 1080
 Skinner, *Ex parte*, 1076
 Skinner v. Chapman, 414
 Skinner v. Lond. Br., etc., Rail. Co., 470
 Skinner v. Shoppee, 1207
 Skipp v. East. Co. Rail. Co., 488
 Skipton Indus. Co-operative Society v. Prince, 1140, 1242
 Skipwith v. —, 616
 Skull v. Glennister, 379
 Skuse v. Davis, 725
 Slackford v. Austen, 798
 Sladden v. Serjeant, 1171
 Slade's Case, 1158
 Slater v. Baker, 496
 Slater v. Pinder, 428
 Slater v. Sunderland (Mayor of), 546
 Slater v. Swann, 392
 Slatterie v. Pooley, 686
 Sleat v. Fagg, 628
 Sleath v. Wilson, 476
 Sleddon v. Cruikshank, 296
 Slim v. Gt. North. Rail. Co., 624
 Slocombe v. Lyall, 361
 Small v. Moates, 537
 Smallcombe's Case, 1012
 Smallman v. Pollard, 793, 811, 817
 Smart v. Hutton, 782
 Smart v. Morton, 75, 113
 Smeed v. Ford, 1186
 Smith's Case, 1010
 Smith, *Ex parte*, 847, 863, 864
 Smith, *In re*, 1266
 Smith v. Ashforth, 657, 684
 Smith v. Birm. Gas Co., 1117
 Smith v. Bonsall, 126
 Smith v. Brown, 483, 488, 504
 Smith v. Brownlow (Earl of), 190
 Smith v. Carey, 985
 Smith v. Dearlove, 615, 617
 Smith v. Edge, 1215
 Smith v. Feverell, 173
 Smith v. Goodwin, 658
 Smith v. Gt. East. Rail. Co., 230
 Smith v. Harnor, 1213
 Smith v. Hopper, 713, 916
 Smith v. Hudson, 439
 Smith v. Kenrick, 83
 Smith v. Knowelden, 1180
 Smith v. Lawrence, 478
 Smith v. Lloyd, 325

- Smith v. Lond. and Br. Rail. Co., 584
 Smith v. Lond. & N. W. Rail. Co., 1104
 Smith v. Lond. & S. W. Rail., 306
 Smith v. Lond. Dock Co., 223
 Smith v. Mayor of London, 1242
 Smith v. Mapleback, 634
 Smith v. Milles, 453
 Smith v. Moffat, 1112
 Smith v. Powdich, 21
 Smith v. Pritchard, 782, 802
 Smith v. Reese River Mining Co., 1011
 Smith v. Render, 296
 Smith v. Richardson, 978
 Smith v. Royston, 375
 Smith v. Russell, 649
 Smith v. Shaw, 913
 Smith v. Shirley, 364
 Smith v. Smith, 911, 1072, 1125
 Smith v. Spooner, 970
 Smith v. Stokes, 204
 Smith v. Sydney, 720
 Smith v. Taylor, 990
 Smith v. Tett, 386
 Smith v. Thackerah, 12, 912, 1163
 Smith v. Thomas, 977
 Smith v. Topping, 431
 Smith v. Wiltshire, 875, 913
 Smith v. Wood, 980
 Smith v. Wright, 656, 660
 Smith v. Young, 400
 Smout v. Ilbery, 1007, 1025
 Smyth v. Carter, 279, 318
 Smythe v. Smythe, 286,
 Snag v. Gray, 959
 Snead v. Watkins, 616
 Snelgrove v. Hart, 1115
 Snelgrove v. Stevens, 1172
 Snell v. Finch, 641
 Snook v. Davidson, 550
 Snow v. Latham, 405
 Snow v. Peacock, 405
 Snowball v. Goddricke, 816
 Soady v. Turnbull, 1130
 Soames v. Edge, 1228
 Soane v. Knight, 951
 Solomon v. Lawson, 984, 998
 Solomon v. Vinters' Co., 73, 112, 149
 Solomons v. Dawes, 402, 554
 Soltau v. De Held, 199, 241, 261
 Some v. Barwisch, 1109, 1115
 Somers, *In re*, 900
 Somerville v. Hawkins, 765, 931
 Southampton, etc., Bridge Co. v. Local Board, Southampton, 890, 891, 917, 1292
 South Australian Co. v. Randell, 522
 Southcote's Case, 798
 Southcote v. Stanley, 227, 249
 Southee v. Deny, 953, 1180
 Southerne v. Howe, 1032
 Southernwood v. Ramsden, 1096
 South East. Rail. Co. v. Richardson, 1222
 South Essex Reclamation Co., *Re*, 545
 South Yorkshire Rail. Co., *In re*, 1278
 Sowell v. Champion, 687, 810, 819, 1196
 Sowerby v. Coleman, 122
 Sowerby v. Prior, 288
 Spackman v. Miller, 432
 Spark v. Heslop, 1191
 Sparry's Case, 1155
 Speaker of Victoria Assembly v. Glass, 775
 Spears v. Hartly 537, 543
 Speck v. Philips, 734, 737, 1194
 Spedding v. Nevell, 1048, 1188
 Speight v. Olivera, 1093
 Spencer v. Lond. & Birm. Rail. Co., 261
 Spering v. Spering, 1060
 Spill v. Maule, 998
 Spilsbury v. Micklethwaite, 732, 812
 Spokes v. Banbury Board of Health, 259
 Spooner v. Brewster, 9
 Spring, *The*, 484
 Springhead Spinning Co. v. Riley, 14, 929
 Squire, *Ex parte*, 427
 Stace v. Griffith, 932, 998
 Stacey v. Stacey, 1074
 Stafford (Marquis of) v. Coyney, 270, 380
 Staffordshire, etc., Canal Co. v. Birm. Canal Navigations, 147
 Staight v. Burn, 164
 Staight v. Gee, 715, 722
 Stainback v. Fernley, 1010
 Stainton v. Metrop. Board, etc., 919
 Stainton v. Woolrych, 894
 Stallard v. Gt. West. Rail Co., 532
 Stammers v. Yearlsy, 726
 Stanford v. Robinson, 415
 Stanhope v. Thorsby, 857
 Stannard Uliothorne, 497
 Stannerd v. Lee, 58, 1232
 Stansfeld v. Cubitt, 429
 Stansfeld v. Mayor of Portsmouth, 299
 Stante v. Prickett, 730
 Staple v. Heydon, 105
 Staples v. Accid. Death Ins. Co., 1252
 Stapley v. Lond., Br. and S. Coast Rail. Co., 474
 Starling v. Turner, 36
 Staveley v. Allcock, 641
 Stead v. Williams, 61
 Steadman v. Hockley, 547
 Stebbing v. Met. Bd. of Works, 344, 905
 Stedman v. Bates, 680
 Stedman v. Smith, 354
 Steel v. Prickett, 266, 351
 Steel v. South-East. Rail. Co., 510
 Steele v. Midland Rail. Co., 911
 Steele v. North. Metrop. Rail. Co., 923
 Stephens v. Elwall, 447, 1123
 Stephens v. Myers, 690
 Stephenson, *Re*, 1059
 Stephenson, v. Hart, 594, 619
 Stevens v. Adamson, 1032
 Stevens v. Benning, 1232

- Stevens v. Chapman, 1213, 1215
 Stevens v. Evans, 49
 Stevens v. Jeacocke, 49, 51, 414
 Stevens v. Mid. Rail. Co., 743, 759, 1119
 Stevenson v. Blakelocke, 546
 Stevenson v. Newnham, 425, 658
 Steward v. Gromett, 742
 Steward v. Young, 970
 Stewart's Case, 1011
 Stewart, *Ex parte*, 436, 440
 Stewart v. Austin, 501, 1025
 Stewart v. Gt. West. Rail., 1154
 Stewart v. Lond. and N. W. Rail. Co., 578, 579, 588, 598
 Stewart v. Smith, 760
 Stiles v. Cardiff Steam Navigation Co., 230
 Stiles v. Nokes, 947
 Stimson v. Farnham, 801
 Stinson v. Browning, 204
 Stockdale v. Hansard, 948
 Stockley v. Hornidge, 758
 Stockport Dis. Waterworks Co. v. Manchester (Mayor of), 1229
 Stockport Dis. Waterworks Co. v. Potter, 81, 195, 198
 Stockport, etc., Rail. Co., *Re*, 896
 Stodhard v. Johnson, 1207
 Stoessiger v. South-East. Rail. Co. 584
 Stokoe v. Singers, 162
 Stonard v. Dunkin, 421
 Stone v. Cartwright, 245, 507
 Stone v. Dean, 1252
 Stone v. Jackson, 203, 229
 Stone v. March, 41
 Stoneham v. Lond. & Bright. Rail., 125
 Stonehouse v. Elliott, 719
 Storer v. Hunter, 299, 436
 Storey v. Ashton, 477
 Storr v. Crowley, 594
 Story, *Ex parte*, 1240
 Story v. Richardson, 1115
 Stott v. Stott, 90
 Stourbridge Canal Co. v. Dudley, 109
 Strachy v. Francis, 288
 Strader v. Graham, 1206
 Strafford's Case, 1202
 Stretton v. Gt. West. Rail., 922
 Strick v. Swansea Canal Co., 631
 Strickland v. Ward, 853
 Strother v. Barr, 1170
 Stroud v. Watts, 1209
 Stuart v. Crawley, 577
 Stuart v. Lovell, 950
 Stuart v. Whittaker, 817
 Stubley v. Lond. & N. W. Rail. Co., 473
 Stubbs v. Stubbs, 415, 1138
 Studdy v. Studdy, 1067
 Stukeley v. Butler, 118
 Sturgis v. Smith, 1134
 Sturt v. Blagg, 935, 997
 Submarine Telegraph Co. v. Dickson, 209
 Suffield v. Brown, 102, 103, 168
 Suggate v. Suggate, 1074
 Sumner v. Bromilow, 295, 298, 299
 Sunbolf v. Alford, 617
 Surgeons' Company's Case, 1288
 Surrey Canal Co. v. Hall, 267
 Sury v. Pigot, 170
 Sutcliffe v. Booth, 146
 Sutcliffe v. Surveyors of Sowerby, 237
 Suter v. Burrell, 815
 Sutherland v. Murray, 38
 Sutton v. Buck, 443
 Sutton v. Clarke, 885, 886, 1120, 1131
 Sutton v. Gt. West. Rail. Co., 572
 Sutton v. Johnstone, 43, 751
 Sutton v. Ld. Montfort, 188
 Sutton v. Moody, 413
 Sutton v. South-East. Rail. Co., 1236
 Sutton v. Wilders, 1027
 Swan, The, 1144
 Swan, *Ex parte*, 1079, 1294
 Swan v. Brit. Austr. Co., 1291
 Swan v. Dakins, 863
 Swan v. North Brit. Austr. Co., 22, 27, 1178, 1273
 Swann v. Falmouth (Earl), 654
 Swann v. Phillips, 1008, 1039
 Swannell v. Ellis, 498
 Swansborough v. Coventry, 114
 Swayne's Case, 129
 Sweet v. Pym, 550
 Sweetman v. Guest, 837, 838, 857
 Swinfen v. Ld. Chelmsford, 500, 1169
 Swire v. Leach, 648
 Swithin v. Vincent, 972
 Sybray v. White, 201, 253
 Syeds v. Hay, 395, 462, 595
 Sykes v. Sykes, 1039, 1072, 1225
 Sylph, The, 488
 Syme v. Harvey, 296
 Symonds v. Dimsdale, 1252
 Sym's Case, 128
 Sym's v. Chaplin, 625

T

- Taafe v. Downes, 744
 Tabart v. Tipper, 950
 Taff Vale Rail. Co. v. Giles, 621
 Tailors of Ipswich's Case, 45
 Tait's Case, 1011
 Tait v. Harris, 1132
 Talbot (Earl) v. Scott, 319, 388
 Talley v. Gt. West. Rwy., 599
 Tancred v. Allgood, 445, 452, 788, 794, 810
 Tancred v. Leyland, 657, 662, 683
 Tanistry's Case, 121
 Tanner v. European Bank, 557
 Taplin v. Atty, 815
 Tapling v. Jones, 150, 163
 Tarleton v. M'Gawley, 14
 Tarpley v. Blabey, 980, 996
 Tarrant v. Webb, 490

- Tate v. Glead, 651
 Tattan v. Gt. West. Rail. Co., 1213
 Tatton v. Wade, 1008, 1039
 Taunton v. Costar, 695
 Taverner v. Little, 513
 Tayler v. Fish, 376
 Taylerson v. Peters, 640
 Taylor v. Ashton, 1005, 1010, 1041
 Taylor v. Blacklow, 497
 Taylor v. Buller, 1034
 Taylor v. Cass, 1212
 Taylor v. Chester, 537
 Taylor v. Chichester & Midhurst Rail. Co., 921
 Taylor v. Cole, 363, 367, 695, 726, 1067
 Taylor v. Gt. Ind. Penins., 27
 Taylor v. Gt. North. Rail. Co., 574, 1220
 Taylor v. Green, 1036
 Taylor v. Hawkins, 932
 Taylor v. Humphreys,
 Taylor v. Lanyon, 606
 Taylor v. Nesfield, 716, 874, 876
 Taylor v. Pillow, 56
 Taylor v. Plumer, 437
 Taylor v. Robinson, 544
 Taylor v. Smith, 730
 Taylor v. Stendall, 212
 Taylor v. Whitehead, 106, 379
 Taylor v. Willans, 766
 Tealby v. Gascoigne, 816
 Tear v. Freebody, 395
 Tebb v. Hodge, 300
 Tebbutt v. Brist. & Ex. Rail., 33
 Tebbutt v. Selby, 177
 Telford v. Met. Board, 923
 Tenant v. Golding, 193, 248
 Tenant v. Goldwin, 112, 328
 Tenham v. Herbert, 190
 Tennant's Case, 61
 Tennant v. Field, 660
 Terry v. Huntington, 861
 Terry v. Hutchinson, 1091
 Thackthwaite v. Cock, 434
 Thames Conservators v. Hall, 481
 Thames Conservators v. Victoria Station Co., 900
 Thames Iron Works Co. v. Patent Derrick Co., 539
 Tharp v. Stallwood, 1112
 Thaxbie v. Smith, 1185
 Theobald v. Crichmore, 712
 Theobald v. Rail. Pass. Assur. Co., 1187
 Thistlewood's Case, 980
 Thom v. Bigland, 1041
 Thomas, *Ex parte*, 440
 Thomas v. Chirton, 968
 Thomas v. Daw, 921
 Thomas v. Harries, 654, 659, 669
 Thomas v. Harris, 1193
 Thomas v. Jones, 317
 Thomas v. Morgan, 255, 1040
 Thomas v. Oakley, 316, 388
 Thomas v. Philips, 419
 Thomas v. Powel, 736
 Thomas v. Rhymney Rail., 597
 Thomas v. Roberts, 1076
 Thomas v. Russell, 766, 767
 Thomas v. Saunders, 722
 Thomas v. Sorrell, 100
 Thomas v. Thomas, 168, 1072
 Thomas v. Welch, 63
 Thomas v. Williams, 914
 Thomlinson v. Brown, 162
 Thompson, *In re*, 840
 Thompson v. Bernard, 956
 Thompson v. Dallas, 1212
 Thompson v. Gibson, 197, 243, 1210
 Thompson v. Giles, 437
 Thompson v. Hill, 213
 Thompson v. Ingham, 862, 1141, 1245
 Thompson v. Lacy, 608
 Thompson v. Mashiter, 648
 Thompson v. North-East. Rail. Co., 222
 Thompson v. Nye, 996
 Thompson v. Pettit, 314
 Thompson v. Ross, 1090, 1091
 Thompson v. Stanhope, 1231
 Thompson v. Thompson, 1060, 1064, 1072
 Thompson v. Trevanion, 1176
 Thompson v. Wood, 678
 Thomson v. Simpson, 1045
 Thorburn v. Barnes, 771
 Thorley v. Kerry (Lord), 927
 Thorn v. Bigland, 1027
 Thorne v. Tilbury, 451, 562
 Thornevell v. Wigner, 1189
 Thornton v. Adams, 653
 Thornton v. Pickering, 991
 Thorogood v. Bryan, 479, 511
 Thorogood v. Robinson, 398
 Thorp v. Facey, 337, 343
 Thorpe v. Adams, 1258
 Thresher v. East Lond. Water Co., 298
 Throgmorton v. Allen, 698
 Thurgood v. Richardson, 811
 Tickle v. Brown, 156, 367, 370
 Tidman v. Ainslie, 964, 972, 979
 Tighe v. Cooper, 978
 Tilk v. Parsons, 990
 Tilson v. Warwick Gas Light Co., 49
 Timothy v. Simpson, 694, 695, 703
 Tindall v. Bell, 518, 1189
 Tinkler v. Wandsworth District Board, 919, 921, 1229
 Tinsley v. Lacey, 52, 54
 Tipping v. St. Helen's Smelting Co., 196
 260
 Titchmarsh v. Chapman, 1240
 Tobacco Pipe, etc., Co., v. Loder, 46
 Tobin v. The Queen, 447
 Todd v. Flight, 211
 Todd v. Hawkins, 939
 Todd v. Todd, 1067
 Todhunter, *Ex parte*, 428
 Toft v. Rayner, 1242
 Tollemache v. Lond. & S. W. Rail. Co., 708
 Tollit v. Sherstone, 1102

- Tomlinson, *In re*, 1079
 Tonson v. Walker, 1281
 Toogood v. Spyryng, 931, 943
 Tooke v. Hollingworth, 437, 439
 Toomey v. Lond. & Br. Rail. Co., 218
 Topham v. Dent, 1114
 Torrence v. Gibbins, 1095, 1096
 • Torriano v. Young, 280
 Tottenham v. Byrne, 350
 Towne v. Lewis, 400
 Townley v. Gibson, 100
 Townley v. Jones, 499
 Townsend v. Wathen, 200
 Tozer v. Child, 36, 37, 771
 Tozer v. Mashford, 956
 Tracy v. Open Stock Exchange, 778
 Tracy v. Veal, 42
 Traherne v. Gardner, 1224
 Treadwin v. Gt. East. Rail. Co., 580, 585
 Trelawney v. Coleman, 1086
 Trent v. Hunt, 641, 663, 680.
 Trent Nav. Co. v. Ward, 577
 Tripp v. Thomas, 992
 Trismall v. Lovegrove, 431
 Trower v. Chadwick, 212
 Truscott v. Merchant Taylor's Co., 140
 Trust. Brit. Museum v. Finnis, 267
 Tubb v. Good, 236
 Tubervil v. Stamp, 12, 303, 305
 Tuberville v. Savage, 691
 Tucker v. Newman, 244, 256
 Tucker v. Turpin, 1052
 Tucker v. Wright, 448
 Tuff v. Warman, 28, 485, 493, 516
 Tufton v. Harding, 792
 Tulk v. Metrop. Board of Works, 122
 Tullay v. Reed, 694
 Tullidge v. Wade, 733, 1097, 1193
 Tullit v. Tullit, 411
 Tunney v. Midland Rail. Co., 492
 Tunnicliffe v. Moss, 990
 Tunnicliffe v. Tedd, 725
 Tunno v. Morris, 777
 Turberville v. Stampe, 515
 Turner v. Ambler, 744, 766
 Turner v. Baynes, 345, 640
 Turner v. Cameron, 644
 Turner v. Deane, 547
 Turner v. Doe, 336
 Turner v. Felgate, 800, 813
 Turner v. Ford, 445, 446, 460
 Turner v. Horton, 1208
 Turner v. Postmaster-General, 840
 Turner v. Ringwood Highway Board,
 272, 380
 Turner v. Spooner, 152, 163, 188
 Turner v. Winter, 63
 Turner v. Wright, 286
 Turnley v. Macgregor, 1041
 Turquand v. Marshall, 502
 Turrill v. Crawley, 616
 Tuson v. Evans, 946
 Tutton v. Darke, 644
 Tutty v. Alewin, 958
 Two Ellens, The, 538
 Twort v. Twort, 318
 Twyman v. Knowles, 384
 Twynam v. Porter, 547
 Tyler v. Bennett, 1209
 Tyler v. Leeds (Duke of), 819
 Tyne Improvement Commissioners v.
 Gen. Steam Nav. Co., 481
 Tyringham's Case, 167
 Tyson v. Smith, 121, 122
 Tyson v. London (Mayor of), 900
- U
- Udell v. Atherton, 1027, 1121
 Uhla, The, 488
 Umphelby v. McLean, 915
 Underhill v. Ellicombe, 49
 Underwood v. Hewson, 466
 Underwood v. Parks, 993
 Union Bank of Manchester, *Ex parte*,
 431, 432
 Union Cement and Brick Co., *Re*, 545
 United Service Co., *In re*, 27, 501, 518
 Unity Joint-Stock Bank Min. Associa-
 tion v. King, 362
 Upmann v. Elkan, 64, 1052
- V
- Valentine v. Cleugh, 1220
 Valentine v. Penny, 127
 Vallance, *Ex parte*, 432
 Vallance v. Savage, 85, 1105
 Valpy v. Manley, 819
 Valpy v. Sanders, 426
 Vanderburg v. Truax, 8
 Vanderzee v. Willis, 645
 Vane v. Lord Barnard, 286
 Van Sandau v. Turner, 775
 Van Toll v. South-East. Rail. Co., 532,
 593
 Vaughan, *Ex parte*, 861
 Vaughan v. Cork and Yough. Rail. Co.,
 493
 Vaughan v. Lewis, 1287
 Vaughan v. Menlove, 304, 307, 308, 312
 Vaughan v. Taff Vale Rail. Co., 307, 312
 Vaughton v. Bradshaw, 725
 Velasquez, The, 481
 Veley v. Burder, 1238; 1241
 Venafra v. Johnson, 741, 835
 Veness, *Ex parte*, 428
 Venezuela Rail. Co. v. Kisch, 1011
 Vere v. Cawdor (Lord), 457
 Vernon v. Keyes, 1022
 Verrall v. Robinson, 399, 450
 Verry v. Watkins, 1097
 Vicars v. Wilcocks, 6, 962, 963, 989
 Victor, The, 482
 Villiers v. Mousley, 926, 928
 Vine v. Saunders, 1125

Viner v. Cadell, 432
 Viner v. Vaughan, 316
 Violet v. Sympson, 872
 Virtue v. Bird, 25
 Vivian v. Champion, 1109
 Vivid, The, 485
 Vizard, *Re*, 424
 Vose v. Lanc. and York. Rail. Co., 218,
 224, 490
 Vowles v. Miller, 354
 Voyce v. Voyce, 354

W

Waddell v. Waddell, 1061
 Wade v. Tatton, 1008
 Wadhurst v. Damme, 393, 457
 Wadsworth v. Bentley, 1157
 Wain v. Bailey, 416
 Wait v. Wait, 1087
 Waite v. Garston Local Board, 47
 Waite v. North-East. Rail. Co., 493
 Wakefield v. Buccleugh (Duke of), 75,
 124, 189
 Wakeman v. Linsey, 662
 Wakeman v. Robinson, 466, 514
 Wakley v. Cooke, 930
 Wakley v. Froggatt, 362, 1166
 Wakley v. Healey, 985
 Walker v. Birch, 542
 Walker v. Brewster, 199
 Walker v. Brit. Guarantee Ass., 523, 528
 Walker v. Evans, 241
 Walker v. Gann, 1248
 Walker v. Goe, 222, 887
 Walker v. Jackson, 628
 Walker v. Milner, 1022
 Walker v. Olding, 1187
 Walker v. S. E. Rail., 721, 759, 1118
 Walker v. Willoughby, 795
 Wall v. Hinds, 297
 Wall v. London and S. W. Railway Co.,
 1223
 Wall v. McNamara, 39
 Wallace, *Re*, 775
 Wallace v. Carroll, 965
 Wallace v. Jarman, 1013, 1014
 Wallace v. Woodgate, 550, 603
 Waller v. Drakeford, 456
 Waller v. Holmes, 546
 Walker v. South-East. Rail. Co., 492
 Walley v. McConnell, 809
 Wallington v. Wood, 1185
 Wallis v. Harrison, 120, 378, 1106
 Wallis v. L. and S. W. Rail., 602
 Walmsley, *Ex parte*, 1265
 Walmsley v. Milne, 291, 294
 Walsham v. Stainton, 741
 Walshe v. Provan, 556
 Walter v. Selfe, 192, 195, 258
 Walters v. Mace, 983
 Walters v. Pfel, 212
 Walters v. Webb, 338

Walton v. Brown, 1206
 Walton v. Lavater, 66
 Walton v. Walton, 1067
 Wandsworth Beard v. Lond. and S. W.
 Rail. Co., 92, 258, 262, 387, 1229
 Wanless v. N. E. Rail., 474
 Wansbrough v. Maton, 296
 Wanstead Local Board, etc., v. Hill, 46,
 59, 195
 Warburton v. Gt. West. Rail. Co., 493
 Warburton v. Parke, 142, 144, 168
 Warde, *Ex parte*, 1295
 Warde v. Lee, 890, 892
 Warde v. Lowndes, 1277, 1291, 1294
 Warde v. Robins, 154, 156
 Warde v. Shew, 641
 Warde v. South-East. Rail. Co., 1291
 Warde v. Ward, 156, 160, 164, 1067
 Warde v. Weeks, 7, 964, 972
 Warde v. Eyre, 411
 Warde v. Warde, 1076, 1077
 Wardell v. Mourillyan, 595
 Warden v. Bailey, 1121
 Wardle v. Brocklehurst, 103, 104, 169
 Ware, *In re*, 909
 Ware v. Regent's Canal Co., 1232
 Waring v. Waring, 1061
 Warne v. Chadwell, 989
 Warner v. Riddiford, 647, 719, 731
 Warr v. Jolly, 942
 Warren v. Warren, 981
 Warren v. Webb, 359
 Warrick v. Queen's Coll., 122, 154, 190,
 1174
 Warwick v. Foulkes, 729, 993
 Wason v. Walter, 948, 949, 950
 Watbroke v. Griffith, 616
 Waterer v. Freeman, 242, 753
 Waterhouse v. Jamieson, 1011
 Waterhouse v. Keen, 914
 Waterlow v. Bacon, 180, 189
 Waterman v. Soper, 352, 1116
 Waters v. Monarch, 461
 Waters v. Towers, 463
 Watkin v. Hall, 973, 975
 Watkins, *Ex parte*, 436, 1249
 Watkins v. Gt. North. Rail. Co., 364,
 901, 919
 Watkins v. Lee, 760
 Watkins v. Reddin, 204, 263
 Watling v. Oastler, 225
 Watson v. Ambergate Rail. Co., 596
 Watson v. Bodell, 803
 Watson v. Charlemont (Earl), 1009
 Watson v. Christie, 734, 995, 1195
 Watson v. Denton, 1044
 Watson v. Maclean, 416
 Watson v. Peache, 436
 Watson v. Poulson, 1004
 Watson v. Russell, 423
 Watson v. Waud, 636
 Watts, *Ex parte*, 435
 Watts v. Fraser, 996
 Watts v. Kelson, 103, 169

- Watts v. Lucas, 239
 Weall v. King, 1131
 Weatherby v. Ross, 163, 188
 Weatherston v. Hawkins, 943
 Weaver v. Bush, 693
 Weaver v. Ward, 2, 466
 Webb's Case, 264
 Webb, *In re*, 595
 Webb v. Bird, 142, 183
 Webb v. Cook, 991
 Webb v. Fairmaner, 716
 Webb v. Fox, 452, 543
 Webb v. Paternoster, 392
 Webb v. Portland Manufact. Co., 10
 Webber v. Gt. Western Rail. Co., 596
 Webber v. Sparkes, 1151
 Webster's Case, 1011
 Webster v. Watts, 694, 794
 Webster v. Webster, 1073
 Wednesbury Bd. of Health v. Stephenson, 1220
 Weekly v. Wildman, 129
 Weeks v. Goode, 408, 540
 Weeks v. Sparke, 1174
 Weems v. Mathieson, 226, 489
 Welch v. Nash, 843, 861
 Welcome v. Upton, 130
 Weld v. Hornby, 262
 Weldon v. Gould, 541
 Welfare v. Brighton Rail., 23, 202, 514
 Weller v. Toke, 873
 Wellesley v. Wellesley, 286, 1076
 Wellock v. Constantine, 40
 Wells v. Gurney, 795
 Wells v. Head, 393, 457, 459
 Wells v. Ody, 183
 Wells v. Watling, 173
 Welsh v. Rose, 642
 Wenman v. Ash, 931, 936, 981
 Wentworth v. Bullen, 754
 West v. Baxendale, 728
 West v. Blakeway, 298
 West v. Francis, 58
 West v. L. & N. W. Rail., 573
 West v. Nibbs, 665, 675
 West v. Skip, 431
 West v. Smallwood, 724, 876
 West v. West, 1086
 West Riding Rail. Co. v. Wakefield Bd. of Health, 220, 509
 Western Bank of Scotland v. Addie, 1010, 1027, 1038
 Weston's Case, 1294
 Weston v. Beeman, 750, 758, 766
 Weston v. Dobniet, 934
 Weston v. Sneyd, 871, 1250
 Westwood v. Bell, 549
 Westwood v. Cowne, 663, 688
 Wettor v. Dunk, 201
 Whaley v. Laing, 81, 87, 177, 1206
 Wharton v. Brook, 953
 Wharton v. Naylor, 649, 817
 Whatman v. Pearson, 34, 915
 Wheatley v. Patrick, 479
 Wheeler v. Branscombe, 680
 Wheeler v. Whiting, 694, 704, 719
 Whistler v. Forster, 423
 White's Case, 612, 1273
 White v. Bailey, 336, 446
 White v. Bass, 114, 151
 White v. Binsteak, 793, 819
 White v. Cohen, 92
 White v. Crisp, 209, 273
 White v. Gainer, 540
 White v. Garden, 420, 541
 White v. Gt. West. Rail. Co., 623, 625
 White v. Humphrey, 529, 593
 White v. Hunt, 424
 White v. Morris, 813, 817
 White v. Phillips, 209, 223
 White v. R. Ex. Ass. Co., 546
 White v. Spettigue, 41, 408, 418
 White v. Steele, 889, 1220, 1238, 1242, 1247
 Whitecomb v. Jacob, 439
 Whitehead v. Bennett, 298
 Whitehead v. Greetham, 499
 Whitehead v. Proctor, 779
 Whitehead v. Scott, 1173
 Whitehead v. Taylor, 679
 Whitehouse's Case, 1011
 Whitehouse v. Birm. Can. Co., 883
 Whitehouse v. Fell, 1163
 Whitehouse v. Fellowes, 243, 886, 899, 913
 Whitehouse v. Wolverhampton Rail., 110
 Whitelegg v. Richards, 777
 Whitely v. Adams, 931
 Whitelock v. Hutchinson, 126
 Whiteman v. King, 172
 Whitfield v. Bewitt, 411
 Whitfield v. Brand, 438
 Whitfield v. S. E. Rail. Co., 972, 1118
 Whitfield v. Le Despenser (Lord), 20
 Whitley v. Roberts, 642
 Whitmore v. Black, 460
 Whitmore v. Greene, 809
 Whitmore v. Humphries, 334
 Whitmore v. Whitmore, 1060, 1087
 Whitstable (Free Fishers of) v. Foreman, 347
 Whitstable (Free Fishers of) v. Gann, 347
 Whittaker v. Jackson, 353, 361
 Whittall v. Campbell, 1225
 Whitten v. Fuller, 448
 Whittington v. Boxall, 360
 Whitworth v. Hall, 755
 Whitworth v. Maden, 688
 Wickham v. Hawker, 363
 Wicks v. Fentham, 767
 Wicks v. Hunt, 1232
 Wieler v. Schilizzi, 1022
 Wiffin v. Kincard, 692
 Wiggins v. Cook, 1215
 Wiggett v. Fox, 490, 493
 Wiggins, *Ex parte*, 435
 Wigmore v. Jay, 227

- Wilby v. Elston, 5, 953, 954, 977, 1149
 Wilby v. West Corn. Rail. Co., 596
 Wilcox v. Marshall, 1143
 Wild v. Holte, 383
 Wilde v. Gibson, 1006
 Wilde v. Minsterley, 74
 Wilde v. Sheridan, 1244
 Wilde v. Waters, 282
 Wilder v. Speer, 670
 Wildes v. Russell, 832, 1269
 Wiles v. Woodward, 456
 Wilford v. Berkeley, 1085
 Wilkes v. Broadbent, 98
 Wilkes v. Hung. Mark. Co., 43, 884
 Wilk's Case, 957
 Wilkin v. Reed, 1181, 1182
 Wilkins v. Bromhead, 437
 Wilkinson v. Fairrie, 201
 Wilkinson v. Haygarth, 356, 376, 1117
 Wilkinson v. Kirby, 387, 1151
 Wilkinson v. Proud, 75, 135
 Wilkinson v. Verity, 345, 1164
 Wilkinson v. Whalley, 450
 Willans v. Taylor, 743
 Williams v. Adams, 842
 Williams v. Allsup, 588
 Williams v. Archer, 566
 Williams v. Baily, 1060
 Williams v. Banks, 746
 Williams v. Blackwall, 233
 Williams v. Clough, 223, 227, 513
 Williams v. Cranston, 620
 Williams v. Currie, 332, 1184
 Williams v. East India Co., 1033
 Williams v. Everett, 421
 Williams v. Eyton, 165
 Williams v. Fitzmaurice, 496
 Williams v. Gardiner, 985
 Williams v. Gibbs, 498
 Williams v. Glenister, 704
 Williams v. Golding, 218, 496
 Williams v. Groucott, 201
 Williams v. Gt. West. Rail. Co., 599
 Williams v. Holmes, 648
 Williams v. James, 182
 Willimas v. Jersey (Earl of), 259
 Williams v. Jones, 308, 507, 681, 692
 Williams v. Millington, 1105
 Williams v. Morland, 80
 Williams v. Morris, 377, 381
 Williams v. Mostyn, 797, 818
 Williams v. Pott, 334, 338
 Williams v. Richards, 476
 Williams v. Roberts, 653
 Williams v. Smith, 720, 757, 799, 810
 Williams v. Stiven, 639, 679
 Williams v. Stott, 985
 Williams v. Wilcox, 183, 238, 1152
 Williams v. Williams, 60, 1060, 1066
 Williamson v. Allison, 1013, 1014
 Willingale v. Maitland, 123, 127
 Willis v. Bernard, 1036
 Willoughby v. Backhouse, 685
 Willoughby v. Horridge, 605
 Willoughby v. Marshall, 657
 Wills v. Maccarmick, 771
 Wills v. Wells, 462
 Wilson's (Carus) Case, 832
 Wilson, *Ex parte*, 425, 431
 Wilson v. Anderton, 403
 Wilson v. Barker, 1122
 Wilson v. Brett, 527
 Wilson v. Fuller, 1036
 Wilson v. Halifax (Mayor of), 888, 915
 Wilson v. Lanc. & York. Rail. Co., 628, 1187
 Wilson v. Merry, 490
 Wilson v. Newberry, 83
 Wilson v. Newport Dock Co., 518
 Wilson v. Peto, 176, 245, 507
 Wilson v. Rankin, 1027
 Wilson v. Robinson, 940
 Wilson v. Stanley, 143, 158
 Wilson v. Towend, 258
 Wilson v. Tucker, 499
 Wilson v. Tummen, 809, 810, 1122
 Wilson v. Willes, 98, 127
 Wilsons, *In re*, 672
 Wilton v. Girdlestone, 398
 Wiltshere v. Cottrell, 296
 Wiltshire v. Sidford, 353
 Wiltshire Iron Co. v. Gt. West. Rwy., 537
 Windham v. Clere, 836
 Windover v. Smith, 57
 Wingate v. Waite, 774
 Winship v. Hudspeth, 143
 Winsmore v. Greenbank, 2, 11, 43, 242, 1088, 1099
 Winter v. Bartholomew, 792
 Winter v. Brockwell, 100, 161, 180
 Winter v. Henn, 1085
 Winterbottom v. Derby (Lord), 143, 158, 241
 Winterbottom v. Wright, 18, 489, 1102
 Winterburn v. Brooks, 727
 Wintle v. Brist. & S. W. Rail. Co., 1229
 Wintle v. Freeman, 801
 Wise v. Gt. West. Rail. Co., 494
 Wise v. Metcalf, 279, 288, 1129
 Witham, *Ex parte*, 440
 Witham Nav. Co. v. Padley, 724
 Wither v. Dean, etc., of Winchester, 318
 Withers v. Henly, 700
 Withers v. North Kent Rail. Co., 219
 Withers v. Parker, 796
 Witte v. Hague, 245
 Woburn Abbey, The, 481
 Wolf v. Somers, 603
 Wolton v. Gavin, 708
 Wontner v. Shairp, 1009
 Wood v. Bell, 463
 Wood v. Boosey, 54, 55
 Wood v. Brown, 973
 Wood v. Chart, 52
 Wood v. Clarke, 645, 648
 Wood v. Gunstone, 966
 Wood v. Hewett, 296
 Wood v. Lane, 698

Wood v. Leadbitter, 99, 113, 180
 Wood v. Morewood, 383, 457
 Wood v. Nunn, 654
 Wood v. Riley, 1211
 Wood v. Sutcliffe, 257
 Wood v. Veal, 153, 270
 Wood v. Waud, 77, 90, 147
 Wood v. Wedgewood, 378
 Wood v. Zimmer, 60
 Woodgate v. Knatchbull, 802, 809, 815
 Woodgate v. Naylor, 1068
 Woodger v. Gt. West. Rail. Co., 629
 Woodhall v. Voight, 1224
 Woodhouse v. Murray, 427
 Woodin v. Burford, 1037
 Wooding v. Oxley, 704
 Woodley v. Coventry, 402
 Woods v. Finnis, 783, 797
 Woods v. Russell, 435
 Woodward v. Gyles, 317
 Woodward v. Lander, 932
 Woodyer v. Hadden, 268, 269
 Wookey v. Pole, 545
 Wooldridge, *Ex parte*, 1140
 Woollen v. Wright, 809, 1122
 Woolley v. Clark, 800
 Woolley v. North London Rail. 1154
 Woolley v. Scovell, 476
 Woolnoth v. Meadows, 969
 Worc. Co. Bank v. Dorch. and Milt. Bank, 405
 Wordsworth v. Harley, 912
 Workman v. Gt. North. Rail. Co., 1186
 Wormer v. Biggs, 566, 666
 Wormwell v. Hailstone, 1121
 Worrall Waterworks Co. v. Lloyd, 888
 Worsley v. Stuart, 316
 Worth v. Gilling, 254, 1181
 Worth v. Terrington, 726, 730
 Worthington v. Gimson, 169
 Worthington v. Hulton, 1277, 1279
 Wotherspoon v. Currie, 1052
 Wray v. Toke, 838, 851
 Wren v. Weild, 36, 969, 970, 979
 Wright's Case, 1011
 Wright v. Child, 783
 Wright v. Clements, 973
 Wright v. Court, 691, 700, 867
 Wright v. Crookes, 1036, 1043
 Wright v. Goodlake, 52
 Wright v. Hitchcock, 62, 65
 Wright v. Howard, 80
 Wright v. Lainsón, 812
 Wright v. Leonard, 44, 1031, 1125
 Wright v. Pearson, 30
 Wright v. Snell, 601
 Wright v. Tallis, 53
 Wright v. Williams, 145, 158
 Wright v. Woodgate, 945
 Wrightup v. Chamberlain, 1190

Wrightup v. Greenacre, 802, 812
 Wyatt v. Gore, 977, 978, 996
 Wyatt v. Gt. West. Rail. Co., 220, 495
 Wyatt v. Harrison, 73
 Wyatt v. White, 749, 751, 828
 Wyer v. Dorch., etc., Bank, 405
 Wyld v. Pickford, 585
 Wylde v. Radford, 545
 Wylie v. Birch, 801
 Wynne v. Tyrwhit, 1175
 Wynstanley v. Lee, 92, 188
 Wyrley Canal Co. v. Bradley, 110

Y

Yarborough v. Bank of England, 119
 Yard v. Ford, 17
 Yarmouth (Great), Mayor of v. Groom 16
 Yates v. Dunster, 315
 Yates v. Jack, 153, 189
 Yates v. Palmer, 1240, 1249
 Yates v. Whyte, 310, 519, 1159, 1198
 Yearsley v. Heane, 796
 Yeatman v. Yeatman, 1065, 1067
 Yellowly v. Gower, 278
 Yeo v. Tatem, 1162
 Yeoman v. Ellison, 637
 York v. Grindstone, 615
 York (Mayor of) v. Pilkington, 190
 York & N. Mid. Rail. Co. v. Milner, 1281
 York & N. Mid. Rail. Co. v. The Queen, 1257
 Yorke v. Grenaugh, 539, 616
 Young v. Cooper, 450
 Young v. Davis, 21, 171, 888
 Young v. Edwards, 45, 47
 Young v. Fletcher, 426
 Young v. Grattridge, 233
 Young v. Grote, 23
 Young v. Hichens, 15, 414
 Young v. Higgon, 716, 875
 Young v. Hope, 430, 432
 Young v. Lambert, 551
 Young v. Macrae, 952
 Young v. Matthews, 419
 Young v. Spencer, 280, 311
 Yrisarri v. Clement, 930

Z

Zetland (Earl of) v. Glover Incorp. of Perth, 132
 Zinck v. Walker, 487
 Zouch v. Willingale, 635, 640
 Zunz v. S. E. Rail., 590, 597
 Zychlinski v. Maltby, 1225

THE LAW OF TORTS.

CHAPTER I.

THE LAW OF TORTS.

SECTION I.—*Of actionable wrongs, and injuries that are not actionable.*—Of the conjunction of damage and wrong necessary to constitute a tort—Damage without wrong—Damage too remote to give rise to a cause of action—Damage sufficiently connected with the wrong—Actual pecuniary damage not necessary—Injury to a right—Procurement of the violation of a right—General legal rights—Injuries to property—Literary and artistic property—Interference by force or fraud with the free exercise of another's trade or occupation, or means of livelihood—Fair competition—Disturbance of ferries and markets—Torts founded on contract and breach of duty—Duties of public officers—Consignors and bailors of chattels—Torts founded on negligence—Contributory negligence on the part of the plaintiff—Liability in respect of the remote ulterior and unusual consequences of a negligent act—Liability of masters for negligence of servants—Indemnification of masters by servants—Fraud and falsehood creating a cause of action—Disobedience of judicial decrees—Malicious injuries—Malicious procurement of loss or damage to another—Abuse of authority by governors and naval and military officers—Torts committed by British subjects abroad—Suspension of remedy by action when the tort amounts to a felony—Public and private wrongs—Maxim of no wrong without a remedy—Waiver of tort.

SECTION II.—*Of rights, duties and obligations created by by-law and by statute.*—By-laws imposing penalties for the suppression of torts—By-laws of municipal corporations—Bathing by-laws—By-laws of commissioners, local boards and public companies—Enforcement of statutory duties and obligations—Imposition of a penalty as a cumulative, exclusive or alternative remedy for the protection of a right or the suppression of a wrong—Infringement of statutory copyright—Penalties and actions—Dramatic literary property and musical compositions—Sculpture Copyright Acts—Piracy of useful and ornamental designs, prints, engravings, paintings, drawings and photographs—Piracy of trade-marks—Penalties for the commission of nuisances—Patent right and its infringement—Statutory benefits and burthens.

SECTION I.

OF ACTIONABLE WRONGS, AND INJURIES THAT ARE NOT ACTIONABLE.

1 *Of the conjunction of damage and wrong necessary to create a Tort.*—To constitute a TORT, two things must concur, actual or legal damage to the plaintiff, and a wrongful act committed by the defendant(a).

Ex damno sine injuriâ non oritur actio—is a very ancient rule or maxim of the common law. "There must," observes Hobart, C.J., "be a damage either already fallen upon the party or inevitable; there must also be a thing done amiss"(b). "By *injuria*," observes Willes, C.J., "is meant a tortious act; it need not be wilful and malicious, for though it be accidental, an action will lie"(c).

2 *Damage and wrong—Dangerous things set in motion.*—If the damage done is the immediate result of force exercised by the defendant, in a place where the probable and natural result of misdirected force would be to cause injury to others, the defendant will be responsible for the damage done, though it happen accidentally, or by misfortune(d), unless the force was used strictly in self-defence. Thus, where one shooting at butts for a trial of skill with the bow and arrow accidentally wounded a man, it was holden that he was responsible in damages, though he was doing an act lawful in itself, and had no unlawful purpose in view(e). And the same was holden where a like unfortunate accident happened whilst persons were lawfully exercising themselves in arms(f).

"If I put in motion a dangerous thing, as, if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in an action of trespass"(g). "If I turn

(a) Bayley, J., *Rex v. Pagham Commissioners, etc.*, 8 B. & C. 362.

(b) *Waterer v. Freeman*, Hob. 266. One person cannot maintain an action against another for a mere illegal or wrongful act, unless he has thereby sustained an injury. *Nichols v. Valentine*, 36 Maine, 322. *Lambard v. Pike*, 33 Maine, 151.

(c) *Winsmore v. Greenbank*, Willes, 577.

(d) *Dickenson v. Watson*, 2 Jones, 205.

(e) 21 Hen. 7, 28 a. *Bullock v. Babcock*, 3 Wend. (N. Y.) 391. So a person shooting at a mark with a pistol is liable for injuries inflicted by the glancing of the ball. *Welch v. Durand*, 36 Conn. 182.

(f) *Weaver v. Ward*, Hob. 134. Thus, where a spectator at a regimental parade was severely wounded by a ball from a musket supposed to be loaded with blank cartridge only, the colonel in command, who gave the order to fire, was held liable for the injury, although he had taken proper precaution to prevent the possible use of ball cartridges. *Castle v. Duryee*, 2 Keyes (N. Y.), 169; *post*, ch. 8, s. 1.

(g) *Ld. Ellenborough, Leame v. Bray*, 3 East, 595. A person who suffers animals of a kind dangerous to person or property to run at large, is liable for all damages resulting from their acts. *McManus v. Finan*, 4 Iowa, 283.

suddenly round and knock a man down without intending it, I am responsible for the injury I do him"(h).

3 Damage without wrong.—A man may, however, sustain grievous damage at the hands of another; and yet, if it be the result of inevitable accident or a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages(i). An act of force, for example, done in necessary self-defence, causing injury to an innocent by-stander, is *damnum sine injuriâ*, "for no man does wrong or contracts guilt in defending himself against an aggressor"(ii). Thus, if a lighted firework is thrown into a coach full of company, and is flung out again in necessary self-defence, and falls against and burns a by-stander, or explodes in his face and blinds him, the person throwing out the firework is not answerable for the damage, as his act was inevitable, and he has done no wrong(j). The wrong-doer is the party who originally threw the burning material into the coach; and as against him there is that conjunction of damage and wrong which constitute a tort, and will support an action(k).

4 If a landowner whose land is exposed to inroads of the sea, or to inundation from the overflowing of an adjoining creek or river, erects sea-walls, groins, or dams, for the protection of his land, and by so doing causes the tide, the current, or the waves to flow against the land of his neighbor and wash it away, or cover it with water, the landowner so causing an injury to his neighbor is not responsible in damages to the latter, as he has done no wrong, having acted in self-defence, and having a right to protect his land and his crops from inundation(l). But if he runs out a wharf or embankment into the stream for the mere purpose of acquiring additional land, and improving the value of his property, and encroaches upon the waterway of a navigable river, and thereby gives a new direction to the current, and causes his neighbor's land to be washed away, he commits a tort or wrong, and is responsible for all its injurious consequences; for "if an individual,

(h) Lawrence, J., ib. 596; *post*, ch. 8, s. 1.

(i) Bizzell v. Booker, 16 Ark. 308. Harvey v. Dunlop, Hill & Denio (N. Y.), 193. Fahn v. Reichart, 8 Wis. 255.

(ii) De Grey, C.J., 3 Wils. 412. Morris v. Platt, 32 Conn. 75.

(j) Gould, J., 2 W. Bl. 898.

(k) Scott v. Shepherd, 2 W. Bl. 892.

(l) Rex v. Pagham Com., etc., 8 B. & C. 360. It has been decided in New Hampshire that the owner of land adjoining a river, who builds a breakwater to prevent the water from encroaching upon his land, and thereby causes the current to be thrown upon and wash away the lands of the opposite proprietor, is responsible to the latter for the resulting damages. Gerrish v. Clough, 48 N. H. 9.

for his own benefit, makes an improvement on his own land, and thereby unwittingly injures his neighbor, he is answerable”(*m*).

5 If a man sells a house commanding a fine sea view, or a lovely prospect, and then builds on his own adjoining land, so as to shut out the sea view or the prospect, and thereby greatly diminishes the marketable value of the house he has just sold, a great damage is done to the purchaser thereof; but there is no tort or wrong, as the vendor has done nothing which restrains him from interfering with his neighbor's prospect(*n*). So the building of a gasometer which obstructs the view, by the public, of the plaintiff's place of business, is not an injury for which an injunction can be maintained(*o*).

6 The simple sale of horses diseased with glanders, or of horned cattle infected with the lung disease, or sheep infected with the scab, has been held not to be unlawful; and therefore, if a man buys horses, cattle or sheep so infected, and mixes them with his own flocks and herds, and sustains grievous damage from the spread of the disease, he has no remedy; although the vendor knew at the time of the sale that the animals had the disease upon them, and the purchaser was wholly ignorant of it. The maxim of *caveat emptor* has been applied to such a case; and the purchaser, it is said, ought to have had a warranty(*p*). The damage, however, resulting from the spread of infectious and contagious disorders amongst sheep and cattle is so serious, that every vendor who sells an animal, knowing it to be laboring under a highly contagious or infectious disorder, ought to be held responsible for fraudulent concealment, if he fails to disclose the fact at the time he makes the bargain(*q*).

7 By the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), it is provided (ss. 6 & 57) that if any person exposes, either in a public market or private sale-yard, or places in a lair adjacent to a market or fair, or sends by railway, canal or coasting vessel, or drives along a highway any cattle, sheep, goats or pigs affected with a con

(*m*) *Gibbs, C. J.*, 6 Taunt. 44; *post*, ch. 4.

(*n*) *Aldred's case*, 9 Co. 58 b. *Knowles v. Richardson*, 5 Mod. 55. *Att.-Gen. v. Doughty*, 2 Ves. senr. 453. There is a broad distinction between the right to obstruct the view from a window, and the right to obstruct the free passage of light and air. An action does not lie for obstructing a view, unless upon express covenant. *Harwood v. Tompkins*, 4 Zab. (N. J.) 425. But the rule is otherwise where the obstruction extends to light and air. Thus, if a man builds a house, at the same time owning both the site of the house and the adjoining land, and then sells the house, neither he nor his grantee can afterwards so build upon the vacant ground as to obstruct the windows of the house. *Lampman v. Milks*, 21 N. Y. 505. *Story v. Odin*, 12 Mass. 157. *Grant v. Chase*, 17 Mass. 443. *Hubbard v. Town*, 33 Vt. 295.

(*o*) *Butt v. Imperial Gas Co., L. R.*, 2 Ch. App. 158.

(*p*) *Hill v. Balls*, 2 H. & N. 302.

(*q*) *Post*, Fraud and Falsehood. *Blakemore v. Brist. & Ex. Rail. Co.*, 8 Ell. & Bl. 1051. *Anderson v. Buckton*, 1 Str. 192.

tagious or infectious disease, he is liable to a penalty (s. 103); and by sec. 58, that any person keeping on any common or uninclosed land, or in any field insufficiently fenced, or on the side of a highway, any animal so affected, is liable to a similar penalty, unless, in either case, he did not, and could not reasonably have known that the animals were diseased(^r). 8 *Wrong without damage*.—There may, on the other hand, be a wrong done to another, but if it has not caused what the law terms actual legal damage to the plaintiff, there is no tort in respect of which an action is maintainable. Thus, in cases of slander by word of mouth, where the words do not convey any imputation of an indictable offence, there is no cause of action in respect of them, unless the injured party has sustained some pecuniary loss, or has been deprived of some gainful occupation and employment, or has been injured in his trade, occupation, or profession, or means of livelihood, or has lost a marriage by reason of the slander(s). An imputation, for example, by words, however gross, and on an occasion however public, upon the chastity of a modest matron or a pure virgin is not actionable, without proof that it has actually produced special temporal damage to her(^t); neither is it actionable to call a man a swindler or a cheat, a blackguard or a rogue, or to say that he is a low fellow, a disgrace to the town, and unfit for decent society, unless it can be proved that actual legal damage has resulted to the plaintiff from the slander(^u).

(^r) Very extensive powers are also given by the Act to the Privy Council as to the importation, etc., of foreign animals (ss. 16—21, and schedule 4). See *Cullen v. Trimble*, L. R., 7 Q. B. 416. But where the owner of sheep having an infectious disease, turns them into his own lot, and thus causes the disease to be communicated to a neighbor's sheep, pastured in an adjoining lot, this will not be deemed such an act of wrong or negligence as to give the latter a legal cause of action for the injury sustained. *Fisher v. Clark*, 41 Barb. (N. Y.) 329.

(^s) *Post*, ch. 17, s. 2.

(^t) *Ld. Wensleydale*, *Lynch v. Knight*, 8 Jur., N. S. (H. L.) 724. 9 H. of L. Ca. 577, S. C. *Wilby v. Elston*, 8 C. B. 142. *McQueen v. Fulgham*, 27 Texas, 463. *Linney v. Meaton*, 13 Texas, 449. *Underhill v. Welton*, 32 Vt. (3 Shaw) 40. See *Davies v. Solomon*, L. R., 7 Q. B. 112. The rule requiring proof of special damage to support an action of slander for words imputing a want of chastity to a female has never been recognized in some of the States, and has been changed by express statute in most of the others. By the common law of Connecticut, words imputing a want of chastity to a female are actionable *per se*. *Frisbie v. Fowler*, 2 Conn. 707. In New York it is provided by statute that an action may be maintained by a female, whether married or single, to recover damages for words spoken imputing unchastity to her, and that it shall not be necessary to allege or prove special damages in order to maintain the action. *Laws of New York* (1871), ch. 219. A similar rule exists in Alabama. *Sidgreaves v. Myatt*, 22 Ala. 617; *Downing v. Wilson*, 36 Ala. 717. In Kentucky, *Smalley v. Anderson*, 2 Monroe, 56. In Illinois, *Spencer v. McMasters*, 16 Ill. 405. In Missouri, *Moberly v. Preston*, 8 Mo. 462; *Stieber v. Wensel*, 19 Mo. 513. In Ohio, *Malone v. Stewart*, 15 Ohio, 319. In Maryland, *Terry v. Bright*, 4 Md. 430. In Indiana, *Shields v. Cunningham*, 1 Blackf. 86; *Rodgers v. Lacey*, 23 Ind. 507. In North Carolina, *Snow v. Witcher*, 9 Ired. 346. In South Carolina, *Freeman v. Price*, 2 Bailey, 115. In Iowa, *Beardsley v. Bridgman*, 17 Iowa, 290; *Smith v. Silence*, 4 Iowa, 321; *Truman v. Taylor*, 4 Iowa, 424; *Dailey v. Reynolds*, 4 Greene (Iowa), 354. In Wisconsin, *Ranger v. Goodrich*, 17 Wis. 78; and in Georgia, *Richardson v. Roberts*, 23 Ga. 215.

(^u) *Savile v. Jardine*, *Hopwood v. Thorn*, *Barnett v. Allen*, *post*, ch. 17, s. 2. *Artieta v.*

- 9 If instructions for an action are given, and through the mistake of the attorney a wrong person is sued, and the latter fails to appear and plead, and judgment goes against him by default, and he is imprisoned, or his goods are seized in execution, this is "*damnum absque injuriâ*," and no action is maintainable. If he defends the action, and incurs costs which he cannot recover, he is in no better situation(*x*).
- 10 *Damage too remote to give rise to a cause of action*.—If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or "concatenated as cause and effect to support an action"(*y*). Thus, a defendant has been held not to be liable either for the wrongful act of a third party, or the arbitrary choice of a fourth party, detrimental to the plaintiff, but not proximately caused by the defendant's wrong(*z*).

Where the manager of a theatre brought an action against the defendant for a libel on an opera-singer, who had been engaged by him to sing at his theatre, and who had been deterred from singing by reason of the publication of the libel, whereby the plaintiff lost the benefit of her services, it was held that the damage was too remote, and was not recoverable by the plaintiff, for the opera-singer was deterred from singing, not directly in consequence of anything done by the defendant, but in consequence of her fear that what he did might induce somebody else to assault and ill-treat her(*a*).

- 11 If the wrong would not have been followed by the damage, if other circumstances had not intervened, for which circumstances the defendant is not responsible, the damage is not the proximate result of the wrong, and is not sufficiently "concatenated" therewith(*b*). Thus, where the defendant's servant, in breach of an Act of Parliament (2 & 3 Vict. c. 47, s. 54), washed a carriage in a public street, and allowed the waste water to run down a gutter towards a grating leading to a sewer, but in consequence of the grating being stopped up, without the knowledge of the defendant, the water flowed over the

Artieta, 15 La. An. 43. Ford *v.* Johnson, 21 Ga. 399. Chase *v.* Whitlock, 3 Hill (N. Y.) 139. Idol *v.* Jones, 2 Dev. 162. Caldwell *v.* Abby, Hardin, 529.

Acts showing an unlawful intent, but not occasioning actual damage, are no ground for a civil action. Morgan *v.* Bliss, 2 Mass. 111. Chatfield *v.* Wilson, 28 Vt. 49. Occum Co. *v.* Sprague, etc., Co., 34 Conn. 529.

(*x*) Rolfe, B., Davies *v.* Jenkins, 11 M. & W. 755.

(*y*) Ld. Campbell, Gerhard *v.* Bates, 2 Ell. & Bl. 490.

(*z*) Vicars *v.* Wilcox, *post*, ch. 17.

(*a*) Ashley *v.* Harrison, 1 Esp. 49.

(*b*) Hoey *v.* Felton, 11 C. B., N. S. 146; 31 Law J., C. P. 105; *post*, p. 18.

road and subsequently froze, and the plaintiff's horse slipped upon the ice and injured himself, it was held that this was a consequence too remote to be attributed to the wrongful act of the defendant. And in actions for slander, where a defendant is proved to have uttered slanderous words in respect of the plaintiff, not imputing to him any indictable offence, and creating a cause of action only in case the utterance of the slander has caused actual legal damage to the plaintiff, and no such damage has accrued to the plaintiff directly from the utterance of the words, and they would have failed to produce any injurious consequences to the plaintiff if they had not been repeated by another person, the injury resulting from the intervention of that other person cannot be visited upon the defendant(c).

12 *Damage, though remote, sufficiently connected with the wrong.*—The general rule of law, however, is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provided their acts, causing the damage, were the necessary or legal and natural consequence of the original wrongful act(cc). Thus, where the defendant threw a lighted squib into the market-house, in a market-place, during a fair, and the squib fell upon a ginger-bread stall, and the stall-keeper, to protect himself and his wares, threw the squib across the market-house, where it fell upon another stall, and was again thrown off and exploded near the plaintiff's eye and blinded him, it was held that the original thrower was responsible in damages for the injury sustained by the plaintiff, through the intervening agency of the others. "All the injury," observes De Grey, C.J., "was done by the first act of the defendant. That, and all the intervening acts of throwing, must be considered as one single act. It is the same as if a cracker had been flung, which had bounded and rebounded again and again before it had struck out the plaintiff's eye"(d). So, where the defendant, having had a

(c) *Ward v. Weeks*, *Parkins v. Scott*, *post*, ch. 17, s. 2. *Sharp v. Powell*, L. R., 7 Exch. 253. *Olmsted v. Brown*, 12 Barb. (N. Y.) 657. Slanderous words contained in a letter sent by the defendant to the plaintiff will not sustain an action in the absence of proof of publication. *McIntosh v. Matherly*, 9 B. Mon. 119.

(cc) *Scott v. Hunter*, 46 Penn. St. 192. Where an injury to one is caused by, and is the natural and probable result of the wrongful act or omission of another, such other is liable therefor, although other causes put in motion by the act and omission, which in the absence thereof, would not have produced the result, contribute to the injury. *Pollett v. Long*, 56 N. Y. 200.

(d) *Scott v. Shepherd*, 3 Wils. 403; 2 W. Bl. 892.

quarrel with a boy in the street, took up a pickaxe, and pursued the boy, and the latter ran for safety into a wine-shop and upset a cask of wine, it was held that the defendant, the pursuer of the boy, was responsible in damages for the loss of the wine(e). "If I ride upon a horse, and J. S. whips the horse so that he runs away with me, and runs over any other person, he who whipped the horse is guilty of the assault and battery, and not I"(f).

- 13 Wherever a party is guilty of misconduct in leaving anything dangerous in a place, where he must know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third person, and that injury is brought about, the sufferer may have redress by action against both the wrong-doers(g), unless he has himself been a co-operative cause of the injury of which he complains, under circumstances which deprive him of a claim to legal redress(h).
- 14 If the natural result of a wrongful act committed by a defendant has been to plunge the plaintiff into a chancery suit, and thereby to cause him to incur costs and expenses, whatever may be the event of the suit, there is that conjunction of wrong and damage which will give the plaintiff a good cause of action(i). If a seaman, or a passenger on board ship, engages in acts of smuggling, and thereby causes the vessel to be condemned and forfeited, the shipowner is entitled to recover the value of the vessel from the wrong-doer who has caused the loss; and it is no answer to the action to show that the plaintiff's servants on board participated in the illegal transaction(k).
- 15 *It is not necessary to show that actual pecuniary damage has been sustained* in order to establish that conjunction of damage and wrong which is necessary to create a tort; for a party may be legally damaged although he has sustained no pecuniary loss. "The damage," observes Lord Holt, "is not merely pecuniary, for if a man gets a cuff on the ear from another, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal damage." So, a man shall have an action against another for riding

(e) *Vandenburgh v. Truax*, 4 Denio, 464. So, where a person ascended in a balloon, and in descending became so entangled in a neighboring garden as to be obliged to call for help, it was held that he was answerable in trespass for damages done to the garden by persons rushing to his assistance. *Guille v. Swan*, 19 Johns. (N. Y.) 381.

(f) *Gibbons v. Pepper*, 1 Ld. Raym. 38.

(g) *Illidge v. Goodwin*, 5 C. & P. 190. *Lynch v. Nurdin*, 1 Q. B. 29. Thus where a horse left unhitched and unattended in a public street runs away and does damage to the person or property of others, the owner of the horse and the person who caused the animal to become frightened are liable for the damages. *McCahil v. Kipp*, 2 E. D. Smith (N. Y.), 413.

(h) *Earhart v. Youngblood*, 27 Penn. St. 331. *Neal v. Gillett*, 23 Conn. 437; *post*, pp. 23-24.

(i) *Dixon v. Fawcus*, 30 Law J., Q. B. 137.

(k) *Blewitt v. Hill*, 13 East, 14.

over his ground, though it do him no pecuniary injury, for it is an invasion of his property, and the other had no right to come there(l); and if the trespasser wilfully perseveres in trespassing after being warned off, exemplary damages will be recovered(m).

A landowner who starts a pheasant on his own land, and shoots the bird whilst it is flying over the adjoining land of his neighbor commits a trespass if he goes on such adjoining land to pick it up; and if he carries the dead bird away with him, he would now probably be held guilty of another tort, and liable to an action for the conversion to his own use of the dead bird as well as for the original trespass(n).

Every unauthorized interference by one man with the goods and chattles and personal property of another constitutes a tort, and gives rise to a cause of action, although no pecuniary damage may be sustained(o). If a man, without having any legal authority to excuse or justify the act, writes any remarks or observations upon a cab-driver's licence, or upon another man's certificate of character or good conduct, he is guilty of a tort, and is responsible in damages, although no pecuniary loss has been incurred(p).

Damages are recoverable from a person who takes up tombstones from a churchyard, and defaces the inscriptions, for although the freehold of the churchyard is in the parson, the property in the tombstones remains in the persons who erect them(q).

16 *Every injury to a right imports a damage*, though it does not cost the party one farthing(r), for wherever the plaintiff establishes some legal right or title in himself which has been invaded, weakened, or destroyed by the unlawful or malicious act of the defendant, there is a wrong and damage in law resulting therefrom, in respect of which an

(l) *Holt, C.J., Ashby v. White*, 2 Ld. Raym. 955. *Sears v. Lyons*, 2 Stark. 318. It is no bar to an action for a constantly recurring wrongful act that present damages resulting therefrom may not be susceptible of proof. *Delaware & Hudson Canal Co. v. Torrey*, 33 Penn. St. 143. And it has been held that a person may maintain an action of trespass for an unauthorized entry upon his land, not only when the act constituting the trespass resulted in no actual damage, but even when it was positively beneficial. *Parker v. Griswold*, 17 Conn. 288. *Post*, ch. 6.

(m) *Merest v. Harvey*, 5 Taunt. 441. See *Perkins v. Towle*, 43 N. H. 220; *Devaughn v. Heath*, 37 Ala. 595; *Wylie v. Smitherman*, 8 Ired. 286; *Mitchell v. Billingsley*, 17 Ala. 391; *Pierce v. Hall*, 41 Barb. (N. Y.) 142. *Post*, ch. 6, s. 3; ch. 22, s. 1, DAMAGES.

(n) *Osmond v. Meadows*, 12 C. B., N. S. 10; 31 Law J., C. P. 281; M. C. 238. *Blades v. Higgs*, 34 L. J., C. P. 286. See *post*, ch. 7, s. 3. *Kenyon v. Hart*, 34 Law J., M. C. 87.

(o.) *Post*, ch. 7, s. 1. *Wintringham v. Lafoy*, 7 Cow. 735; *Stevens v. Somerindyke*, 4 E. D. Smith (N. Y.) 418; *Dudley v. Tilton*, 14 La. An. 283; *Dexter v. Cole*, 6 Wis. 319.

(p) *Rogers v. Macnamara*, 14 C. B. 37; 23 Law J., C. P. 1.

(q) *Spooner v. Brewster*, 3 Bing. 139. *Frances v. Ley*, Cro. Jac. 367. As to tombstones in a private cemetery, see *Ashby v. Harris*, L. R., 3 C. P. 523.

(r) *Bonomi v. Backhouse*, Ell. Bl. & Ell. 657. *Holt, C.J., Ashby v. White*, 2 Ld. Raym. 954.

action is maintainable, for pecuniary compensation, though no actual pecuniary loss can be proved(s).

Where a man is entitled to have a stream of water flowing through his land, he may maintain an action for substantial damages for the diversion of the water, though he has not used, and does not want to use, the water(t). So where a tenant makes material alterations in property demised to him, by opening new doors, putting up new buildings, taking down partitions, or changing the form and appearance of a house without the consent of the landlord, he is responsible in damages for infringing upon the proprietary rights of the latter, although the premises may be improved and rendered more valuable by the alterations(u).

17 Every invasion of the plaintiff's right by the fraudulent act of the defendant entitles the plaintiff to some damages. Thus, where an inventor or manufacturer adopts a particular trade-mark, and the defendant imitates it and uses it for the purpose of palming off his own goods as the goods of the plaintiff, the plaintiff is entitled to nominal damages at all events, as his right has been invaded, although no specific damage be proved(v). And there is nothing to prevent the jury from giving more than nominal damages(w). But upon an injunction in equity to restrain the infringement of the plaintiff's trade-mark, some evidence of damage must be given, and proof of the sale by the defendant of an inferior article at a different price is

(s) *Embrey v. Owen*, 6 Exch. 353; 20 Law J., Exch. 212. *Rochdale Canal Co. v. King*, 14 Q. 135. *Webb v. Portland Manuf. Co.*, 3 Sumner, 197. *Bowe v. Hill*, 1 Sc. 526. The removal of the division walls on the ground floor of a building is such a violation of the right of the owner of the upper stories of the building to the support of the walls as will entitle him to maintain an action for the infringement of the right without proof of special damages. *McConnel v. Kibbe*, 33 Ill. 175. The law presumes damages where a right has been invaded. *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 235.

(t) *Embrey v. Owen*, 6 Exch. 353. Proof of actual injury is not necessary to enable the owner of land through which an ancient water course runs, to maintain an action for nominal damages against one who diverts it above him so as to materially diminish the flow of water by his land. *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191, 204. *Stowell v. Lincoln*, 11 Gray (Mass.), 434. *Tyler v. Wilkinson*, 4 Mason, 400. *Tillotson v. Smith*, 32 N. H. 90. *Stein v. Burden*, 24 Ala. 130. *Newhall v. Ireson*, 8 Cush. 595. *Whipple v. Cumberland Manuf. Co.*, 2 Story, 661. *Blanchard v. Baker*, 8 Greenl. 253. *Butman v. Hussey*, 3 Fairf. 407. The wrongful diversion of a stream of water implies some damage, though merely nominal. *Chatfield v. Wilson*, 1 Williams (Vt.), 670. But an action of nuisance cannot be maintained for any obstruction or diversion of the water of a stream for domestic, agricultural or manufacturing purposes unless the damages occasioned thereby are real, material and substantial. *McElroy v. Goble*, 6 Ohio (N. S.), 187. *Post*, ch. 2, s. 1.

(u) *Cole v. Green*, 1 Lev. 309, and cases cited *post*, ch. 5, s. 1.

(v) *Blofield v. Payne*, 4 B. & Ad. 410.

(w) *Rodgers v. Nowill*, 5 C. B. 125. In an action to recover for the violation of a trade-mark it is not erroneous for the court to award as damages the whole profit realized by the defendant from sales of the spurious articles under the simulated trade-mark. *Graham v. Plate*, 40 Cal. 593; *post*, ch. 18.

not such evidence(*x*). Every infringement of a right *ex contractu* also creates a claim to damages. Therefore, when one person maliciously procures or persuades another to break a contract, or interferes between an employer and workman to prevent the latter from completing work he has undertaken to perform, or procures the non-delivery of goods according to contract(*y*), or deprives a woman of her marriage by false representations, substantial damages are recoverable(*z*).

A refusal by a banker to pay the order or draft of his customer, he having at the time in his hands sufficient funds of the customer for the purpose, is a wrongful act, injurious to the credit of the customer, entitling him to substantial damages, although no actual damage can be proved at the trial(*a*).

18 *The procurement of the violation of a right creates a cause of action in all instances where the violation is an actionable wrong* — as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent, for the wrong done(*b*).

Where the plaintiff complained that his wife had unlawfully left him and lived apart from him, and that whilst she was so living apart a large fortune was left her, to her separate use, and she being desirous of returning to the plaintiff to cohabit with him, and the plaintiff being willing and desirous to be reconciled to her, the defendant unlawfully and unjustly persuaded, procured, and enticed her to continue absent and apart from the plaintiff and conceal herself from him, whereby the plaintiff lost the comfort and society of the said wife, and her aid and assistance in his domestic affairs, and the enjoyment of the fortune that had been left her, it was held that this was a wrong and damage such as the law would not leave without a remedy(*c*).

(*x*) *Leather Cloth Co. v. Hirschfeld*, L. R., 1 Eq. Ca. 299.

(*y*) *Green v. Button*, 2 C. M. & R. 707. *Lumley v. Gye*, 2 Ell. & Bl. 238.

(*z*) *Sheppard v. Wakeman*, 1 Lev. 53. *Moody v. Baker*, 5 Cow. 351. One who misrepresents the quality of lands to one about to purchase the same, and thereby prevents the owner from making an advantageous sale, is liable in damages in a suit in the nature of an action of slander for defamation of title. *Paull v. Halferty*, 63 Penn. St. 46.

(*a*) *Marzetti v. Williams*, 1 B. & Ad. 415. *Robin v. Steward*, 14 C. B. 595; 23 Law J., C. P. 148; *post*, ch. 8, s. 1.

(*b*) *Erle, J., Lumley v. Gye*, 2 Ell. & Bl. 216.

(*c*) *Winsmore v. Greenbank*, Willes, 577. Where a wife applies to a stranger for aid, shelter and protection against the cruelty and oppression of her husband, and this aid and protection is given in good faith and from motives of humanity, no action can be maintained by the husband against such party for harboring the wife. The burden is on the husband to show that the protection was given from an unworthy motive. *Barnes v. Allen*, 1 Keyes (N. Y.) 390. *Hutchinson v. Peck*, 5 Johns. 196. *Schuneman v. Palmer*, 4 Barb. 225. A father may lawfully receive his married daughter into his house, and even advise her to leave her husband, if the character of the husband is such as to excuse her leaving him. *Bennett v. Smith*, 21 Barb. 439. See *Burnett v. Burkhead*, 21 Ark. 77.

19 *The general legal rights of mankind* are the rights of personal security, personal liberty, or private property; and private property is either property in possession, property in action, or property that an individual has a special right to acquire(*d*).

Wherever personal security has been violated by an assault, or individual liberty has been infringed by unlawful restraint of the person (*post*, ch. 12), an action for substantial damages is maintainable, although the personal inconvenience and suffering may be of the slightest character; and wherever the wrong is accompanied by circumstances of personal insult, or by a false charge or accusation of some crime or misdemeanor, exemplary damages will be recoverable(*e*).

There are many cases in which an act is perfectly lawful in itself, and will continue to be so, until damage has been done to the property or person of another; but from the moment such damage arises the act becomes unlawful, and an action is maintainable for the injury. This is the case where a man sinks mines and makes excavations in his own land, or lights a fire thereon, doing no damage in the first instance to his neighbor, but subsequently causing his neighbor's land to slide down into the artificial hollow(*f*), or the neighbor's house to be burned by the unexpected spreading of the fire(*g*).

20 *Injuries to property* indirectly brought about by menaces, false representation, or fraud, create as valid a cause of action as any direct injury from force or trespass. Thus, if the plaintiff's tenants have been driven away from their holdings by the menaces of the defendant, damages are recoverable for the wrong done(*h*).

Questions of proprietary right often involve nice distinctions. Thus, as regards the right of a landowner or occupier of lands to the preservation on his land, and to the means of reducing into his possession, birds and animals *feræ naturæ*, it has been held that the owner of a decoy pond may maintain an action against a person who wilfully discharges guns near the decoy pond, and frightens away the wild

(*d*) Bayley, J., *Hannam v. Mockett*, 2 B. & C. 937.

(*e*) *Goddard v. Grand Trunk R. R. Co.*, 57 Maine, 202. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304. *Atlantic & Great Western R. R. Co. v. Dunn*, 19 Ohio St. 162. *Hunt v. Bennett*, 19 N. Y. 173. *Ellsworth v. Potter*, 41 Vt. 685. *Baltimore, etc., R. R. Co. v. Blocher*, 27 Md. 277. *Block v. McGuire*, 18 La. An. 417. *Ahern v. Collins*, 39 Mo. 145. *Hodgson v. Millward*, 3 Grant (Penn.) 406. *Foote v. Nichols*, 28 Ill. 486. For the rule as to exemplary damages see *Hamilton v. Third Avenue R. R. Co.*, 53 N. Y. 25. *Post*, ch. 22, s. 1.

(*f*) *Bonomi v. Backhouse*, Ell. Bl. & Ell. 662; 28 Law J., Q. B. 378. *Smith v. Thackerah*, L. R., 1 C. P. 564. *Moody v. McClelland*, 39 Ala. 45. *Austin v. Hudson River R. R. Co.*, 25 N. Y. 334. *McGuire v. Grant*, 1 Dutch. (N. J.) 356. *Charles v. Rankin*, 22 Mo. (1 Jones) 566. *Farrand v. Marshall*, 21 Barb. (N. Y.) 409.

(*g*) *Filister v. Phippard*, 11 Q. B. 347. *Tubervil v. Stamp*, 1 Salk. 13. *Webb v. Rome*, Watertown & Ogdensburg R. R. Co., 49 N. Y. 420. *Higgins v. Dewey*, 107 Mass. 494.

(*h*) 1 Roll. Abr. 108, pl. 21. See *Carew v. Rutherford*, 106 Mass. 1.

fowls(*i*), because wild fowl are protected by the statute 25 Hen. 8, c. 11, and constitute a known article of food; and the keeping of a decoy pond is useful to the public, and a profitable mode of employing the land; but that no such action is maintainable against a person who has wilfully and maliciously discharged guns near the plaintiff's rookery, and frightened away the rooks, and caused them to forsake the plaintiff's trees, for rooks have been declared to be a nuisance by the legislature; and no person can claim a right to have them resort to his lands, nor can any person become a wrong-doer by preventing their so doing(*k*). So it is an actionable injury to fire off guns to frighten your neighbor's grouse, and prevent them going from your land to his(*l*).

21 *Literary and artistic property.*—Every one has at common law a right to the exclusive possession and enjoyment of his intellectual and manual labors, so that if a man devotes his private hours to literary composition, or artistic works, another person has no right to appropriate to himself the produce of his labor without his consent. The unpublished manuscript of the author, for example, cannot be used, copied, or published, without his authority(*m*); nor the unpublished lectures of a lecturer(*n*); nor the picture, etching, or portrait of the painter or photographer(*o*). If, therefore, a geologist gets a fossil engraved or photographed, in order to send it to his friends, or the owner of a picture or a portrait lends it to a friend to get it engraved, any one who gets possession of the photograph or the engraving has no right at common law to take copies of it for sale. And whoever handles or deals with photographs, without the consent of the owner of them, in order to get negatives from them, or for any other purpose, is guilty of an act of trespass(*p*).

22 *Interference by force or fraud with the free exercise of another's trade or occupation, or means of livelihood,* is a tort—such as preventing people by the use of threats and intimidation from trading with the plaintiff's

(*i*) *Keeble v. Hickeringill*, 11 Mod. 74, 130; 3 Salk. 9; Holt, 14. *Carrington v. Taylor*, 11 East, 571.

(*k*) *Hannam v. Mockett*, 2 B. & C. 943.

(*l*) *Ibbotson v. Peat*, 34 Law J., C. P. 118.

(*m*) *Queensberry (Duke of) v. Shebbeare*, 2 Eden, 329. *Palmer v. De Witt*, 47 N. Y. 532.

(*n*) *Abernethy v. Hutchinson*, 1 H. & Tw. 40; 3 Law J., Ch. 209. *Bartlett v. Critenden*, 4 McLean, 300; 5 id. 32.

(*o*) *Prince Albert v. Strange*, 1 Mac. & Gord. 42; 18 Law J., Ch. 126. *Oertel v. Wood*, 40 How. (N. Y.) 10. The same rule applies to uncopyrighted musical compositions. *Wall v. Gordon*, 12 Abb. N. S. (N. Y.) 349. To an uncopyrighted and unpublished manuscript drama. *Palmer v. De Witt*, 47 N. Y. 532. And to letters not intended for publication. *Woolsey v. Judd*, 4 Duer (N. Y.), 379. *Grigsby v. Breckinridge*, 2 Bush (Ky.), 480.

(*p*) *Mayall v. Higby*, 1 H. & C. 148; 31 Law J., Exch. 329; *post*, s. 2, and *post*, ch. 7.

vessel in a foreign port(*q*), or dealing at the plaintiff's shop, or sending their children to the plaintiff's school, or placing obstructions and impediments in the way of the exercise of the right of free access to and from a man's place of business(*r*).

Where the plaintiff's declaration of his cause of action set forth that he was a mason, and possessed of a stone quarry, and quarried and dug stones therefrom, as well to sell as to build stone buildings, and that the defendant, intending to deprive him of the benefit of his quarry, disturbed his workmen and all comers, threatening to maim and vex them with suits if they worked or bought stones there, whereupon all the buyers desisted from buying and the workmen from working there, it was held that this was a great damage to the plaintiff and a good cause of action(*s*). And in a case of intimidation by trades' unionists, an injunction was granted against issuing placards enjoining workmen not to work for the plaintiff till the dispute between the plaintiff and the trade union was settled, on the ground that, although the act of such unionists amounted to a crime, yet it also tended to the destruction or deterioration of the plaintiff's property(*t*).

"There are two sorts of acts for doing damage to a man's employment, for which an action lies: the one is in respect of a man's privilege, the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another should use the like liberty, though out of his limits, he shall be liable to an action, though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit and that wherein the public is not concerned. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But where one man doth damage to another by using the same employment no action will lie, because one man has as much liberty to use an employment as another." Thus, where one schoolmaster sets up a new school to the damage of an ancient school, and thereby the old scholars are allured from the old school to come to the new school, an action is not maintainable (*u*). But "if a man should lie in wait and fright the

(*q*) *Tarleton v. McGawley*, Peake 270.

(*r*) *Bell v. Mid. Rail. Co.*, 10 C. B., N. S. 307; 30 Law J., C. P. 273.

(*s*) *Garrett v. Taylor*, Cro. Jac. 567. See *Carew v. Rutherford*, 106 Mass. 1; *Commonwealth v. Hunt*, 4 Metc. 111, 129.

(*t*) *Springhead Spinning Co. v. Riley*, L. R., 6 Eq. Ca. 551. See *State v. Donaldson*, 8 Vroom. (N. J.) 151.

(*u*) 11 Hen. 4, fol. 47, pl. 21; fol. 14, pl. 23.

boys from going to school, that schoolmaster might have an action for the loss of his scholars"(v).

23 *Interference with a man's trade by fair competition* is never actionable.

The loss in such a case is not, in fact, caused by wrong, but by another's exercise of his undoubted right; and in every complicated society the exercise, however legitimate, by each member of his particular rights, or the discharge, however legitimate, by each member of his particular duties, can hardly fail to cause conflicts of interest which will be detrimental to some. It is essential, therefore, to the maintenance of an action of tort, that the action complained of should be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will do him harm is not enough(x).

If a fisherman fits out a boat with lines and nets, and goes to fish, in the high seas, and another fisherman comes and fishes beside him, and with tempting baits, or other contrivances, draws away the fish from the lines and nets of the first comer, with a view of catching them himself, an injury may be done; but there is no tort or wrong, for the one had as much right to fish, and use fair and reasonable means to catch fish, as the other; but if the rival fisherman lays hold of the nets of the first comer, or violently disturbs the water and drives away the fish, and prevents the latter, by force or violence, from exercising his occupation and calling, there is then a wrong done to him, and he is entitled to compensation in damages(y).

24 *Disturbance of a ferry*.—The owner of a ferry has a cause of action against every intruder who carries in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way, and whoever makes a landing-place near the ferry so as to be in substance the same as the ferry landing-place, making no material difference to travellers, is guilty of a tort. And this is on the ground that the owner of the ferry is bound to maintain proper boats, boatmen, and all other things necessary to maintain the ferry in an efficient state for the use of the public. It does not, therefore, necessarily apply to a monopoly of passage created by a statute(z).

(v) Per Holt, C.J., *Keeble v. Hickeringill*, 11 East, 576, n.

(x) *Rogers v. Ragendro Dutt*, 13 Moore, P. C. C. 241. If one person intentionally makes false statements in regard to goods manufactured by another, for the purpose of preventing sales by the latter, and does, in fact, prevent such sales, the person making such statements will be liable to the manufacturer for the resulting damages. *Snow v. Judson*, 38 Barb. (N. Y.) 210.

(y) *Young v. Hichens*, 6 Q. B. 606.

(z) *Letton v. Goodden*, L. R., 2 Eq. Ca. 123. See p. 14, *supra*. A ferry franchise will not be construed as exclusive by mere implication. An exclusive privilege can be claimed and pro-

However, if the public convenience requires a new passage at such a distance from the old ferry as makes such new passage a real convenience to the public, the proximity seems not to be actionable. The area for the monopoly of a ferry, therefore, depends on the need of the public for a new passage(*a*). In an action for the disturbance of a ferry, it is sufficient for the plaintiff to prove that he was in possession of the ferry at the time the cause of action accrued. The right is an incorporeal right, unaccompanied in general with any property in the soil(*b*). Being an hereditament, however, it comes within the term "lands" in the Lands Clauses Act, and statutory compensation, therefore, is claimable from a railway company, who in pursuance of their Act, erect a bridge for foot passengers so near the ferry as to disturb it(*c*).

25 Disturbance of a market.—If people come to a market to sell their wares, they are subject to toll, which is payable to the owner of the market(*d*); and if they come near the boundary of the market, and avail themselves of the concourse of persons coming to and fro, to find customers, and sell without the boundary of the market, so as to avoid the payment of the toll, an action is maintainable against them by the owner of the market for a disturbance of the market(*e*). But it must be proved that the thing was done wilfully and intentionally(*f*). It is not necessary that the defendant should actually have sold any thing; any active interference by him in the conduct of the new market, or participation in its profits or risk, is sufficient(*g*). And a new

tected only under the express terms of the ferry charter or license. *McEwen v. Taylor*, 4 Greene (Iowa), 532. *Perrin v. Oliver*, 1 Minn. 202. *Shorter v. Smith*, 9 Ga. 517. See *Mills v. St. Clair Co.*, 8 How. (U. S.) 569.

(*a*) *Newton v. Cubitt*, 12 C. B., N. S. 32. 31 Law J., C. P. 246. *Bush v. Peru Bridge Co.*, 3 Ind. 21. A ferry franchise can be conferred only by the State government, and must be founded on grant, license or prescription. *Cason v. Stone*, 1 Oregon, 39. *Prosser v. Wapello Co.*, 18 Iowa, 327. *McRoberts v. Washburne*, 10 Minn. 23. *Newport v. Taylor*, 16 B. Mon. (Ky.) 699. Either State lying along a boundary river may grant an exclusive right to ferry from its own shore. *Conway v. Taylor*, 1 Black (U. S.) 603. But neither State can grant an exclusive license to ferry from the shore of the other. *Weld v. Chapman*, 2 Clarke (Iowa) 524. *Newport v. Taylor*, 16 B. Mon. (Ky.) 699. As to the jurisdiction of determining whether the public convenience requires additional ferries, see *Fall v. Paine*, 23 Cal. 302. *Norris v. Farmers' & Teamsters' Co.*, 6 Cal. 590. *Cañon v. Stone*, 1 Oregon, 39.

(*b*) *Peter v. Kendal*, 6 B. & C. 710. Ownership of the soil on both sides of a river does not give the owner a right to maintain a public ferry. *Prosser v. Wapello Co.*, 18 Iowa, 327. *McRoberts v. Washburne*, 10 Minn. 23. *Richmond, etc., Co. v. Rogers*, 1 Duval (Ky.) 135. *Gant v. Drew*, 1 Oregon, 35.

(*c*) *Reg. v. Cambrian Railway*, L. R. 6 Q. B. 422. See *Taylor v. Wilmington & Manchester R. R. Co.*, 4 Jones Law (N. C.), 277. *Aikin v. Western R. R. Co.*, 20 N. Y. 370.

(*d*) *Great Yarmouth (Mayor, &c.) v. Groom*, 32 Law J., Exch. 74.

(*e*) *Bridgland v. Shapter*, 5 M. & W. 375.

(*f*) *Breon (Mayor, &c., of) v. Edwards*, 31 Law J., Exch. 368.

(*g*) *Mayor, &c., of Dorchester, v. Ensor*, L. R., 4 Exch. 335.

market held on the same day as the old is a disturbance by intendment of law(*h*).

According to *Fleta*, a new market, opened within seven miles of an existing legally established market, is actionable(*i*). Such a limit might be suited to the simple wants of a rude life, where inhabitants are few, but is unfitted for large towns; where daily wants are greatly multiplied. Under the latter circumstances, it seems that the area within which a new market would become actionable would be diminished, and would now depend upon the public need for it(*k*).

26 *Market tolls*.—A toll imposed on the occupier of every stall erected for the sale of articles is a toll on the stall itself, and not on the articles sold at the stall, for the occupier is to pay the toll, whether he brings the article to the market or not, and he pays in respect of the space his stall occupies, and not on the articles he sells(*l*). But when the toll is placed on the specific article, such as a toll on every horse sold within the limits of the market, then the article cannot be lawfully sold without the payment of the toll(*m*). An immemorial toll may be sustained as a claim to a reasonable toll, varying in amount from time to time with the value of money, and its lawful origin may be presumed within legal memory, by means of a dedication of the streets to the public, and a contemporaneous reservation of the toll on the part of the crown between the time of Henry III. and Charles I.(*n*).

27 *Torts founded on contract*.—A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract; so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for the breach of duty, may be brought at the option of the plaintiff. When there is a violation of a legal right existing independent of any contract between the parties, such as an invasion of a right of property or of the right of personal security, or an injury to character and reputation, then the tort is not founded on contract and an action is alone maintainable. Whenever an action of

(*h*) *Yard v. Ford*, 2 Wms. Saund. 174.

(*i*) *Fleta*, lib. 4, c. 28, s. 13.

(*k*) *Willes, J.*, 31 Law J., C. P. 254.

(*l*) *Caswell v. Cook*, 11 C. B., N. S. 637; 31 L. J., M. C. 185.

(*m*) *Llandaff, etc., Market Co. v. Lyndon*, 30 Law J., M. C. 105, as to sale of horses by a licensed auctioneer. See also as to stock sales, *Fearon v. Mitchell*, L. R., 7 Q. B. 690. And as to penalties for carrying things for sale from house to house within the boundaries of a market, *Caswell v. Cook, supra*. As to the right to a stall in an ancient market, and the right of shopkeepers to place stalls in the street in front of their houses on market days, *Ellis v. Mayor, &c.*, of Bridgnorth, 15 C. B., N. S. 52. *Ashworth v. Heyworth*, L. R., 4 Q. B. 316; 38 L. J., M. C. 91.

(*n*) *Lawrence v. Hitch*, L. R., 3 Q. B. 521.

tort is founded on contract, an action is maintainable for nominal damages, although no actual damage can be proved(o); but the plaintiff who brings the action must be a party to the contract, for no person can in general sue in respect of a tort founded on contract who was not party, or privy to, and could not have been sued upon, the contract(p); and the cause of action cannot be transferred to one to whom the contract itself is not transferable(q). Thus an electric telegraph company, though it would be answerable to a person transmitting messages to a third person by its line for delay or mistakes in the transmission of the message, is not liable for any mistakes made in transmitting the answer to such message, unless the person so answering can be considered as the agent of the original sender(r).

28 *Breach of duty*.—Wherever facts and circumstances can be shown to exist which create a duty on the part of the defendant towards the plaintiff, and there has been a breach of that duty, and a consequent damage to the plaintiff, an action for damages is maintainable. “If several are jointly bound to perform the duty, they are liable jointly and severally for the failure or refusal to perform it; and if it is a duty which the majority of the number is bound to perform, those who by their refusal prevent the greater number

(o) *Marzetti v. Williams*, 1 B. & Ad. 423.

(p) *Winterbottom v. Wright*, 10 M. & W. 109, explained in *Blackmore v. Brist. & Ex. Rail. Co.*, 8 Ell. & Bl. 1049. *Robertson v. Fleming*, 4 Macq. H. L. C. 167. *Gray v. Ottolengui*, 12 Rich. Law. (S. C.) 101. Thus the manufacturer and vendor of a steam boiler is liable to the purchaser only for defective iron or want of care or skill in its construction; and if after its delivery to and acceptance by the vendee and while in use by him, a third person is injured in person or property by an explosion resulting from such defects, the injury will give such person no cause of action against the manufacturer. *Losee v. Clute*, 51 N. Y. 494. So an architect or builder of a public work is liable only to his employer for want of care and skill, and any accident or injury to third persons occurring after the completion of the work will not give such persons a cause of action against him. *Mayor, etc. of Albany v. Cunliff*, 2 N. Y. 165. So the manufacturer and vendor of an article containing defects pointed out to the purchaser is not liable to a third person for injuries resulting from such defects while using the same with the consent of the purchaser, unless the article is in its nature imminently dangerous. *Loop v. Litchfield*, 42 N. Y. 351. But where a druggist carelessly labels a deadly poison as a harmless medicine and sends it into the market, he is liable to all persons injured by using the same, notwithstanding that it may have passed through the hands of many dealers before reaching the hands of the person injured. The liability of the druggist in such case arises out of the duty which the law imposes upon him to avoid acts in their nature imminently dangerous to the lives of others, and not out of any privity of contract between him and the person injured. *Thomas v. Winchester*, 6 N. Y. 397.

(q) *Howard v. Shepherd*, 9 C. B. 321. An agent who falsely represents his authority to contract in behalf of another, is not liable in contract or in tort unless the principal would have been bound by the contract made, if the agent had such authority. *Dung v. Parker*, 52 N. Y. 494.

(r) *Playford v. United Kingdom Telegraph Co.*, L. R., 4 Q. B. 706. See *Henkel v. Pape*, L. R., 6 Exch. 7. As to electric telegraph companies in England, see 31 & 32 Vict. c. 110: 32 & 33 Vict. c. 7b; *post*, p. 20.

from concurring are answerable to the party injured"(s). But before an action can be maintained, it must of course be clearly proved that the law imposes upon the defendant the duty which he is charged with neglecting(t). Thus, where the declaration alleged that the defendant wrongfully and negligently hung a chandelier in a public house, knowing that the plaintiff and others were likely to be under the chandelier, and that if not properly hung it would probably fall upon them, and that the chandelier fell upon the plaintiff, it was held that the declaration did not disclose any duty by the defendant to the plaintiff for the breach of which an action could be maintained(u).

If facts are proved showing it to be the duty of a joint-stock company to register the plaintiff as a shareholder, and grant him a certificate of proprietorship of shares in the company, the company will be responsible in damages for neglecting their duty in that behalf, though no actual pecuniary damage is proved to have been sustained by the plaintiff(v). So it is the duty of the shareholder who has sold shares to execute a transfer of them, although the company is winding up, and he will be liable to his broker, who has been obliged by the rules of the Stock Exchange to buy other shares for the purpose of delivery to the purchaser accordingly(w).

29 Breach of duty on the part of assignees of leases.—Where a party accepts an assignment of a lease subject to the payment of the rent and the performance of the covenants, but enters into no express contract that he will pay the rent and perform the covenants, the law, nevertheless, imposes that duty upon him as incident to the position he has chosen to occupy, and if by neglecting that duty a burthen is cast upon the person from whom he took the estate, an action on the case is maintainable against him by the latter(x). A similar duty towards the original lessee is, it seems, imposed upon each successive assignee, so far as regards any breaches of covenant during the continuance of his term(y).

30 Breach of duty on the part of public officers.—Public functionaries

(s) *Ld. Brougham, Ferguson v. Earl Kinnoul*, 9 Cl. & Fin. 305.

(t) *Curlewis v. Broad*, 31 Law J., Exch. 473. *Mayor, etc. of Albany v. Cunliff*, 2 N. Y. 165; *Losee v. Clute*, 51 N. Y. 494.

(u) *Collis v. Selden*, L. R., 3 C. P. 495.

(v) *Catchpole v. Ambergate, etc. Rail. Co.*, 1 Ell. & Bl. 120; 22 Law J., Q. B. 35.

(w) *Biederman v. Stone*, L. R., 2 C. P. 504.

(x) *Burnett v. Lynch*, 5 B. & C. 589. As to the lessee's duty to obtain his landlord's consent to an assignment, see *Lehmann v. M'Arthur*, L. R., 3 Ch. App. 496; *Bain v. Fothergill*, L. R., 6 Exch. 59.

(y) *Moule v. Garret*, L. R., 5 Exch. 132; 7 *Ibid.* 101.

appointed to act ministerially are liable to an action at the suit of any one who suffers damage from their neglect or refusal to perform the functions of their offices. Where there is a ministerial act to be done by persons who on other occasions act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were on any occasion intrusted to them; but where the functions of the public officer are partly ministerial and partly judicial, an action cannot be brought against him unless malice be averred and proved^(z).

Public officers, employed in the public departments, in the conduct and management of the public business of the country, are not responsible for the negligence and misconduct of those who act under them, although such subordinate officers have been appointed by them. Thus the Lords Commissioners of the Treasury, the Commissioners of Customs and Excise, the auditors of the Exchequer, etc., have never been held liable in damages for the negligence or misconduct of the inferior officers in their several departments. A Queen's officer stationed on board ship to do his duty there, is not responsible for the negligent acts of his subordinate officers, nor is the Postmaster-General responsible for the negligence or misconduct of clerks and letter-sorters employed and appointed by him for the execution of certain public duties in the Post-office, but these public functionaries are responsible to every individual who sustains damage by reason of their own personal neglect or misconduct^(a). Thus, if a man who carries the letters to the Post-office loses any of them, he is answerable; so is the sorter in the business of his department; so is the postmaster for any fault of his own^(b). The collector of customs is, in like manner, responsible in damages to all who sustain a direct and immediate injury from a neglect by him to execute the duties of his office, as for refusing to sign a bill of entry which it was his duty to sign, or to make an order which it was his duty to make^(c).

^(z) Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influenced him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong done; but where duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated; the public officer, though for most purposes, a judge is still civilly responsible for such misconduct. *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463. *Wilson v. Mayor of New York*, 1 Denio, 599. But a ministerial officer acting in good faith, will not be liable for more than compensatory damages for an injury done. *Plummer v. Harbut*, 5 Clark (Iowa), 308. *Tracy v. Swartwout*, 10 Pet. 80. *Post*, ch. 15.

^(a) *Lane v. Cotton*, 1 Salk. 17. To the same effect see *Sawyer v. Corse*, 17 Gratt. (Va.) 230; *Richmond v. Long*, 17 Gratt. (Va.) 375.

^(b) *Whitfield v. Lord Le Despenser*, Cowp. 755.

^(c) *Barry v. Arnaud*, 10 Ad. & E. 670.

Whenever a public officer abuses or neglects the powers or duties of his office, either by an act of commission or omission, and in consequence thereof an injury accrues to an individual, and no special remedy for enforcing performance of the public duty is appointed by statute, an action for damages is maintainable against such public officer; and every one who is appointed to discharge a public duty, and receives a compensation, whether from the crown or otherwise, is constituted a public officer(*d*). If a bishop, by neglecting to perform the plain duties of his office, inflicts an injury upon another, an action for damages is maintainable against him. And if a clergyman wrongfully refuses to administer the sacrament to a man, who is thereby prejudiced in his civil rights, or the registrar of births should refuse to register the birth of a person, and so cause him to lose an estate, an action for damages would be maintainable. So if a lord of a manor were to refuse or neglect to hold a court, by which a copyholder should be prevented from having admission to his copyhold, an action for damages would lie against such lord(*e*).

If a superintendent of customs uses the power he possesses for the purpose of obstructing or ruining the trade of a particular merchant, he is responsible in damages for the injury he occasions(*f*). But a surveyor of highways, upon whom is imposed the obligation of keeping in repair the highways of which he has charge, is not liable to an action by reason of his omission to repair the highways, a statutory remedy for the enforcement of the public duty being provided by the Highway Act(*g*).

31 Breach of duty by postmasters—Non-delivery of letters.—A postmaster is bound to deliver letters at the respective places of abode of the persons to whom they are directed, and is liable to an action on the case for substantial damages if he fails to do so. All deputy-postmasters are responsible for their own personal misfeasance, for they are all made public officers, and charged with a great public trust since the legislative establishment of the Post-office. If, therefore, a person to whom a letter is addressed cannot be found at the place indicated, it is the duty of the postmaster to make reasonable inquiry after him(*h*).

(*d*) See *Irwin v. Grey*, L. R., 1 C. P. 171; 3 F. & F. 635. *Robinson v. Chamberlain*, 34 N. Y. 389. A contractor engaged to perform the duties of a public officer comes within this rule. *Id*.

(*e*) *Henley v. Mayor of Lime*, 5 Bing. 106. *Ferguson v. Earl Kinnoul*, 9 Cl. & Fin. 251.

(*f*) *Rogers v. Ragendro Dutt*, 13 Moore, P. C. C. 209.

(*g*) *Young v. Davis*, *post*, ch. 16; 5 and 6 Wm. 4, ch. 50, ss. 20, 41. For the rule in New York as to the liability of commissioners of highways for failure to keep the highway in repair, see *Robinson v. Chamberlain*, 34 N. Y. 389; *Hover v. Barkhoof*, 44 N. Y. 113. See *post*, ch. 4, s. 3, and ch. 16, s. 1.

(*h*) *Rowning v. Goodchild*, 2 W. Bl. 908. *Smith v. Powdich*, 1 Cowp. 182. A postmaster

32 *Negligence and breach of duty on the part of consignors and bailors of chattels.*—The law imposes upon all persons employing others to carry explosive, corrosive, or dangerous articles, concealed in bottles, boxes, or packages, the duty of giving reasonable notice to the persons they employ of the character of such articles, in order that proper precautions may be taken to prevent injury to themselves and to others; and if no such notice is given by the employer, and damage is sustained by the party employed from the want of notice, there is that conjunction of damage and wrong which will support an action(*i*).

Every person, also, who hires out or lends a chattel to another, knowing at the time that the chattel has dangerous defects which may make the thing perilous to use, is bound to disclose to the hirer or borrower the existence of such defects, and if damage is sustained by reason of the non-disclosure thereof, there is both damage and wrong, and an action is maintainable(*j*). But it is otherwise if such person was wholly ignorant of any secret defect or hidden source of danger, as he cannot of course disclose what he does not know(*k*). Where the duty grows out of a contract between the parties, no one can, in general, sue for a breach of that duty, who was not privy to, and could not have sued upon, the contract, as has been before observed (p. 14.)

33 *Torts founded on negligence.*—"The action for negligence proceeds upon the idea of an obligation on the part of the defendant towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury"(*l*). As a rule there must be affirmative proof of negligence on the part of the defendant to support an action, for where it is a perfectly even balance on the evidence whether the injury has resulted from the want of proper care on the part of one side or the other, the party who founds his claim on the imputation of negligence

who improperly detains a newspaper from the person to whom it is addressed is liable in damages for the conversion in an action brought in a State court, although such detention is under color of the laws of the United States and the regulations of the post-office department. *Teall v. Felton*, 1 N. Y. 537; 12 How., U. S. 284.

(*i*) *Farrant v. Barnes*, 32 Law J., C. P. 137; *post*, ch. 8, s. 1. *Barras v. Maitland*, 6 Ell. & Bl. 470; 26 Law J., Q. B. 49.

(*j*) *Blakemore v. Brist. & Ex. Rail. Co.*, 8 Ell. & Bl. 1051; *post*, ch. 9.

(*k*) *MacCarthy v. Young*, 6 H. & N. 329. One who lets a carriage for hire is answerable to the hirer for injuries happening by reason of a defect in the carriage, which might have been discovered by a careful examination, but is not answerable for injuries resulting from hidden defects which could not have been so discovered. *Hadley v. Cross*, 34 Vt. 586.

(*l*) *Wilde B.*, 7 H. & N. 603. *Swan v. North Brit. Austr. Co.*, 31 Law J., Exch. 437. It is therefore a relative term, and the term "gross negligence" is only ordinary negligence with a vituperative epithet. See *Grill v. General Iron Screw Collier Co.*, L. R., 1. C. P. 600.

fails to establish it(*m*). However, where the accident is one which would not, in all probability, happen if the person causing it was using due care, and the actual machine causing the accident is solely under the management of the defendant, it has been held that the mere occurrence of the accident is sufficient *prima facie* proof of negligence to impose on the defendant the onus of rebutting it(*n*). The damage, too, must be proximately caused by the negligence, and must not be the immediate result of any intervening negligence on the part of the plaintiff himself (*ante*, pp. 5, 6); for if the plaintiff's own carelessness has directly conduced to the damage he has sustained, he is the author of his own misfortune, and cannot charge it upon others(*o*). As between the plaintiff and a third person, however, not the defendant, the defendant will be liable if the proximate cause of the injury be his negligence, although some other person might have omitted to perform some duty, the omission to perform which indirectly contributed to cause the injury complained of. Thus, where a company for its own profit maintained a channel for carrying off water, the outfall to which channel other persons were bound to maintain of certain dimensions, but failed to do so, and consequently the water accumulated in the channel, and because the banks were not sufficiently strongly made, ultimately burst the embankment and flooded the plaintiff's land, it was held that he could recover against the company(*p*). So, conversely; if the defendant's negligence be the main cause of the injury, the fact that the injury was caused immediately by the negligent act of a stranger will not exonerate the defendant. Thus where a gas company so negligently constructed a pipe, that the gas escaped into the plaintiff's house, and a workman who happened to be in the house went near the place where the gas escaped with a lighted candle

(*m*) *Cotton v. Wood*, 8 C. B., N. S. 568; 29 Law J., C. P. 333. *Hammack v. White*, 11 C. B., N. S. 588. *Ld. Wensleydale*, *Morgan v. Sim*, 11 Moore, P. C. C. 312. *Welfare v. Brighton Rail.*, L. R., 4 Q. B. 693. *Kearney v. Lond. & Brighton Rail.*, L. R., 5 Q. B. 411; 6 *Ibid.* 759. See *Illinois etc. R. R. Co. v. Middlesworth*, 43 Ill. 64; *Warner v. N. Y. Central R. R. Co.*, 44 N. Y. 465; *Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Holbrook v. Utica & Schenectady R. R. Co.*, 12 N. Y. 236; *Walker v. Herron*, 22 Texas 55; *Peoria Bridge Association v. Loomis*, 20 Ill. 235.

(*n*) *Scott v. Lond. Dock Co.*, 34 Law J., Exch. 17; *Ibid.* 220. *Briggs v. Oliver*, 35 Law J., Exch. 163. *Czech v. General Steam Navigation Co.*, L. R., 3 C. P. 14. See *Moffat v. Bateman*, L. R., 3 P. C. Ca. 115; *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 534.

(*o*) See *post*, ch. 8, s. 1, as to contributory negligence. *Young v. Grote*, 12 Moore 494; 4 Bing. 253. *Butterworth v. Brownlow*, 34 Law J., C. P. 266. *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 430. *Baltimore etc. R. R. Co. v. State*, 29 Md. 252. *Conlin v. Charleston*, 15 Rich. (S. C.) L. 201. *Harper v. Erie R. R. Co.*, 3 Vroom (N. J.) 88. *Meyer v. Pacific R. R.*, 40 Mo. 151. *Haley v. Chicago etc. R. R. Co.*, 21 Iowa 15. *Toledo etc. R. R. Co. v. Goddard*, 25 Ind. 185. *McAunrich v. Mississippi etc. R. R. Co.*, 20 Iowa 328. *Heil v. Glandring*, 42 Penn. St. 493. *Michigan etc. R. R. Co. v. Leahy*, 10 Mich. 193.

(*p*) *Harrison v. Great Northern Rail. Co.*, 33 Law J., Exch. 266.

in his hand, which caused an explosion, it was held that the gas company was nevertheless responsible(*q*).

34 *Contributory negligence on the part of the plaintiff*, who complains that he has been damnified by the negligence of the defendant, is in general an answer to the action, on the ground that a man cannot complain of that which he has himself helped to bring about. Thus, where a man hid one hundred pounds sterling in some hay in an old nail bag, and delivered it to a common carrier to be carried to a banker, and the money was lost, it was held that the common carrier was not responsible for the loss, as the consignor had neglected to inform the carrier of the exceeding value of the bag, and had thereby prevented him from taking proper care of it(*r*).

So, where the consignor concealed a quantity of guineas in an ordinary brown paper parcel tied with a string(*s*), and a number of sovereigns in a packet of tea(*t*), and several hundred pounds' worth of bank-notes and gold in an ordinary school-boy's box, and the money so sent was lost by the way, it was held that the common carrier was not responsible for the loss of it(*u*). And if glass, or china, or fragile articles requiring great care for their safe conveyance, are put into boxes and packages and delivered to a carrier to be carried, and no notice is given to the latter of the peculiar nature of the contents of such packages, and of the additional care required for their safe conveyance, and the things are damaged in the course of the transit, the carrier is not bound to make good the damage, as the consignor has himself directly contributed to the injury by concealing the peculiar nature of the articles, and the amount of care requisite for their safe conveyance.

Wherever, indeed, the immediate and proximate cause of the damage is the plaintiff's own supineness, carelessness, or unskilfulness, he has no ground of action against the defendant, though the primary and original cause of damage be the defendant's wrongful act. Thus, where some bricklayers employed by the defendant had 'wrongfully laid several barrowfuls of lime rubbish before the defendant's door, by the side of a highway, and whilst the plaintiff was passing in his

(*q*) *Burrows v. March Gas Co.*, L. R., 5 Exch. 67; *quare* whether they would have been liable if the workmen had been the plaintiff's servant; *Ibid.* See *Lannen v. Albany Gas-light Co.* 44 N. Y. 459. The case of *Burrows v. March Gas Company* has been affirmed on appeal, L. R., 7 Exch. 96.

(*r*) *Gibbon v. Paynton*, 4 Burr. 2298. See Story on Bailments, § 665; *Relf v. Rapp*, 3 Wal. & Serg. 21; *Richards v. Westcott*, 2. Bosw. (N. Y.) 604, 589.

(*s*) *Clay v. Willan*, 1. H. Bl. 298.

(*t*) *Bradley v. Waterhouse*, 3 C. & P. 318.

(*u*) *Batson v. Donovan*, 4 B. & Ald. 37. *Mayhew v. Eames*, 3 B. & C. 601; 5 D. & R. 487.

chaise, the wind raised a whirlwind of this rubbish, which frightened the plaintiff's horse and caused it to start on one side, in the direction of an approaching wagon, and the plaintiff, to prevent the horse from running against the wagon, pulled him sharp round, and the horse then ran over a lime-heap lying before another man's door, and the shaft was broken by the shock, and the horse, being then still more frightened, ran away and upset the chaise, and threw the plaintiff out and injured him, it was held that although the defendant was to blame for putting the rubbish by the side of the road, yet if the plaintiff's running against the second heap of rubbish was owing to his pulling the horse round too sharp, the immediate cause of the injury was his own unskilfulness in the management of his horse, rather than the wrongful act of the defendant(v).

Where the plaintiff complained that the defendant had hired him to carry a load of timber to Ipswich, and that he carried the timber there and asked the defendant where it was to be deposited, but the defendant would give no directions, and made the plaintiff's horses, which were heated, stay so long in the wagon that they took cold and some of them died, and the rest were spoiled, it was held that the immediate and proximate cause of the injury to the horses was the plaintiff's own neglect, in not having them taken out of the wagon and put into a stable, and that the original wrongful act of the defendant, in not finding a place of deposit for the timber, was not sufficiently connected with the loss of the horses to render the defendant responsible for such loss(w).

But the negligence or misconduct on the part of the plaintiff disentitling him to an action for compensation must be such as he is legally responsible for, and such as the law recognizes as a co-operative cause of the injury. Where the defendant left his horse and cart for a long time unattended in the street, where some little boys were at play, and some of the boys got into the cart, and another boy led the horse on to give them a ride, and one boy fell off the shafts and got his leg crushed under the wheel, it was held that the defendant was responsible for the fall and the broken leg, as it was the natural result of his misconduct in leaving the cart unattended, and that the boy, in consequence of his tender years, and natural instinct for play, and want of reflection and foresight could not be considered legally responsible for the damage he had sustained, so as to be precluded from recovering compensation from

(v) *Flower v. Adam*, 2 Taunt. 314.(w) *Virtue v. Bird*, 2 Lev. 196.

the defendant (x). However, where the defendant left the wooden covering of a cellar leaning against the wall, and the plaintiff, a child of seven years old, got upon it and jumped from it in play, by means of which it fell upon and injured him, it was held he could not recover(y). And so where the defendant exposed for sale, without superintendence, a machine which any passer by might set in motion, and which, when set in motion, was dangerous, and the plaintiff, a boy of four years old, by the direction of his brother, put his hands in the machine while his brother set it in motion, it was held he could not recover(z).

And though a man may not disaffirm his own careless or culpable acts, and complain of the consequences which those acts have brought

(x) *Lynch v. Nurdin*, 1 Q. B. 29. Negligence cannot be imputed to a child of such tender years as to be wholly incapable of the exercise of care. *Daley v. Norwich R. R. Co.*, 26 Conn. 591. *Birge v. Gardiner*, 19 Conn. 507. All that can be required of such a child is the exercise of such care as it is capable of. *Robinson v. Cone*, 22 Vt. 213. *Smith v. O'Connor*, 48 Penn. St. 218. *Kerr v. Forgue*, 54 Ill. 482. *Lynch v. Smith*, 104 Mass. 52. The law has not fixed the age at which an infant shall be deemed in law, *non sui juris*. It has been held that contributory negligence cannot be imputed to a child under the age of two years. *Hartfield v. Roper*, 21 Wend. 615. Nor to a child of three or four years of age. *Mangame v. Brooklyn R. R. Co.*, 38 N. Y. 455. *North Pennsylvania R. R. Co. v. Mahoney*, 57 Penn. St. 142. But it may be imputed to infants of the age of sixteen, or thirteen. *Neal v. Gillett*, 23 Conn. 437. See *Achtenhagen v. Watertown*, 18 Wis. 331. *Haycroft v. Lake Shore & Michigan Southern R. R. Co.*, 5 Sup. Co. R. (N. Y.) 49. Or to an intelligent boy of the age of eleven years. *McMahon v. Mayor, etc.*, of New York, 33 N. Y. 642. But whether an intelligent boy of six or seven years of age can be held *sui juris* is a question for the jury. *Honesburgher v. Second avenue R. R. Co.*, 33 How. (N. Y.) 195. See *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455. As to the comparative responsibility of an infant of tender years and that of an adult in respect to the doctrine of contributory negligence, see *Lafayette, etc., R. R. Co. v. Huffman*, 28 Ind. 287. That in an action by an infant against third persons for injuries the negligence of the parent or guardian is defence. See *Hartfield v. Roper*, 21 Wend. 615; *Chicago v. Starr*, 42 Ill. 174; *Lynch v. Smith*, 104 Mass. 53; *Pittsburgh, etc., R. R. Co. v. Vining*, 27 Ind. 513; *Wright v. Malden, etc., R. R. Co.*, 4 Allen (Mass.) 283; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *Callahan v. Bean*, 9 Allen (Mass.) 401. To the contrary, see *Robinson v. Cone*, 22 Vt. 213; *Daley v. Norwich, etc., R. R. Co.*, 26 Conn. 598; *Philadelphia, etc., R. R. Co. v. Spearen*, 47 Penn. St. 305; *Smith v. O'Conner*, 48 Id. 218; *City of Chicago v. Mayor*, 18 Ill. 360; *City of St. Paul v. Kirby*, 8 Minn.; *Boland v. Missouri R. R. Co.*, 36 Mo. 490; *Whirley v. Whittemore*, 1 Head. 620; *Illinois Central R. R. Co. v. McClellan*, 42 Ill. 356. That the negligence of the parent will bar an action by him for his child's services, see *Glassey v. Hestonville M. & F. R. R. Co.*, 57 Penn. St. 172. All the cases in which the negligence of parents or custodians of infants not *sui juris* is held to preclude a recovery by such infants or their representatives, necessarily assume that the conduct of the infant was such as would, in the case of a person *sui juris*, have amounted to contributory negligence, and hold that the negligence of the parent or custodian, but not the personal conduct of the infant, constitutes the bar. But if an infant not *sui juris*, while exercising proper care, is injured through the negligence of a third person, such third person is liable therefor without regard to the negligence of the parent or custodian. If, on the other hand, an infant old enough to be regarded *sui juris* is injured through his own negligence and that of a third person, his negligence will be a bar without regard to that of his parents. *Ihl v. Forty-second street, etc., R. R. Co.*, 47 N. Y. 317. *Lynch v. Smith*, 104 Mass. 52.

(y) *Abbott v. Macfie*, 33 Law J., Exch. 177. As to two children playing together, see S. C. Where the defendant placed barrels and a counter on a public street, and a child twelve years of age placed his hands upon the counter, as if to jump upon it, and it fell and fractured his leg, it was held that the defendant was liable for the damages resulting from his negligence. *Kerr v. Forgue*, 54 Ill. 482.

(z) *Mangan v. Atterton, L. R.*, 1 Exch. 239. As to the death of a child between verdict and judgment, see *Kramer v. Waymark*, *Ibid.* 241.

about in the conduct or omission of others, yet the rule must be limited to such consequences as are in some degree direct and not collateral; probable, though perhaps not necessary(a). Although there may have been contributory negligence on the part of the plaintiff, yet if the damage is not the necessary, or ordinary, or likely result of such negligence, but is due to some wholly unlooked-for and unexpected event, which could not reasonably have been anticipated or expected to be likely to occur, such contributory negligence will be too remote to be set up as a bar to the action. Thus, if the customer of a banker, who is desired to keep his cheque-book locked up, nevertheless negligently leaves it on his table, and thereby enables his servant to get possession of it, and tear out a cheque and forge his master's signature to it, and commit a fraud upon the bankers, this will not enable the bankers to throw the loss upon their customer, as being the result of his negligent keeping of his cheque-book, for it could not reasonably have been anticipated that the power of obtaining a cheque would induce a servant to commit a forgery(b).

Where negligence on the part of the plaintiff is remotely connected with the cause of injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the remote and indirect negligence of the plaintiff cannot be set up as an answer to the action(c).

Thus, where the plaintiff negligently left his donkey in a public highway, tied together by the fore-feet, and the defendant carelessly drove over and killed the ass with his horses and wagon in broad daylight, the animal being unable to get out of the way of the wagon, it was held that the misconduct of the plaintiff, in leaving the ass in the highway, was no answer to the action; for, although the ass

(a) *Wilde, B., Swan v. North Brit. Austr. Co.*, 31 Law J., Exch. 437; 32 Ib. (Exch. Ch.) 273. *Haley v. Earle*, 30 N. Y. 208. In a recent case it was held that where a boy, while standing in a gangway from which he had been previously warned off by the defendant on account of the danger from passing trucks, wheelbarrows, etc., was killed by the falling of a car negligently pushed off a tramway overhead, no contributory negligence could be imputed to the boy, there being no reason to expect danger from the cars above. *Gray & Bell v. Scott & Wife*, 60 Penn. St. 345.

(b) *Bank of Ireland v. Trustees of Evans's Charity*, 5 H. L. C. 411. *Swan v. North Brit. Austr. Co.*, *supra*. *Taylor v. Gt. Ind. Penins.*, 28 Law J., Ch. 285; Ib. 714. See *Donaldson v. Gillott*, L. R., 3 Eq. Ca. 274; *Johnson v. Renton*, L. R., 9 Eq. Ca. 181; *re United Service Co.*, L. R., 6 Ch. App. 212.

(c) *Greenland v. Chaplin*, 5 Exch. 248; *Trow v. Vermont Central R. R. Co.*, 24 Vt. 487. *Button v. Hudson River R. R. Co.*, 18 N. Y. 248. *Kerwhacker v. Cleveland, Columbus & Cincinnati R. R. Co.*, 3 Ohio (N. S.) 172. *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380. *Chicago R. R. Co. v. Triplett*, 38 Ill. 482. *Richmond v. Sacramento, etc.*, R. R. Co., 18 Cal. 351. *Stucke v. Milwaukee, etc.*, R. R. Co., 9 Wis. 202. *Indianapolis, etc.*, R. R. Co. *v. Cauldwell*, 9 Ind. 397. *State v. Manchester & Lawrence R. R. Co.*, 52 N. H. 528.

might have been wrongfully there, still the defendant was bound to go along the road with care, and at such a pace as would be likely to prevent mischief. "Were this not so, a man might justify the driving over goods left in a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road" (d).

Contributory negligence on the part of the plaintiff, therefore, will not disentitle him to recover damages, unless it were such that, but for that negligence, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff (e).

35 *Liability of the defendant in respect of the remote ulterior and unusual consequences of a negligent act.*—"I entertain," observes Pollock, C.B., "considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. I am inclined to consider the rule of law to be this,

(d) *Davis v. Mann*, 10 M. & W. 549. *Mayor of Colchester v. Brooke*, 7 Q. B. 376.

(e) *Tuff v. Warman*, 5 C. B., N. S. 585. *Scott v. Dub. & Wick. Rail. Co.*, 11 Ir. C. L. R. 396. The accuracy of the proposition contained in the first part of this paragraph may well be doubted. The counter-proposition, "that in an action to recover damages for negligence there can be no recovery unless it appears that the injury happened or would have happened irrespectively of any negligence on the part of the plaintiff," more nearly states the rule of law recognized in this country. *Murphy & wife v. Deane*, 101 Mass. 455. See *Walker v. Westfield*, 39 Vt. 246. The rule most generally recognized and adopted in this country in determining the effect of mutual negligence on the right of action, is thus stated in the well considered case of *Trow v. Vermont Central R. R. Co.*, 24 Vt. 487. "Where there is mutual negligence on the part of the plaintiff and defendant, and the negligence of each was the proximate cause of the injury, no action can be sustained."

So where the negligence of the plaintiff is proximate and that of the defendant remote or consisting in some other matter than what occurred at the time of the injury, no action can be sustained.

But where the negligence of the defendant is proximate and that of the plaintiff remote, the action for the injury can well be sustained though the plaintiff were not entirely without fault. So that if there were negligence on the part of the plaintiff, yet if at the time when the injury was committed it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury." See *Button v. Hudson R. R. Co.*, 18 N. Y. 248, 256. By proximate cause of injury must be understood the cause which naturally led to, and which might have been expected to produce the injury. *State v. Manchester and Lawrence R. R.*, 52 N. H. 528. For a review of the English and American authorities on the subject of contributory negligence, and the application of the rule in the several states, see the case last cited.

The contributory negligence which excuses another from liability for injuries caused, in part at least, by his negligence, must be the *personal* act of the party injured, otherwise as to him all contributing thereto are joint wrong doers. *Artic Fire Ins. Co. v. Austin* 6 Sup. Ct. (N. Y.) 63.

The fact that the party injured through the negligence of another, was at the time intoxicated, will not preclude a recovery for the injury unless such intoxication contributed thereto, and whether it did so contribute, is a question for the jury. *Healey v. Mayor of New York*, 6 Sup. Ct. (N. Y.) 92. And see *Alger v. Lowell*, 3 Allen, 402; *Robinson v. Pioche*, 5 Cal. 460.

that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur"(*f*).

Where the owner of a horse negligently allowed his horse to stray on the high road, it was held that the owner would be responsible for all such damage as in the ordinary sequence of events might be expected to occur therefrom, such as the horse's walking into a neighboring pasture, and consuming the grass there, or wandering into a corn-field and trampling down the corn; but not for a kick to a child in the road, unless it could be shown that the horse was naturally of a vicious disposition, and wont to kick, and that the owner knew of it at the time he allowed the horse to stray into the highway (*g*). Where cattle afflicted with a contagious disorder trespassed upon an adjoining pasture and infected other cattle there with the disease, it was held that the owner of the trespassing beasts was responsible for the damage arising from the spread of the disorder, as well as for the injury to the grass and herbage (*h*). But the mere fact of the defendant's scabby sheep getting amongst the plaintiff's healthy flock, and infecting them with the disorder, establishes no cause of action, unless it be proved that the defendant knew them to be infected, and neglected to take proper and reasonable precautions to prevent them from getting mixed with healthy flocks (*i*), or that he knowingly and wilfully turned them out on some common or waste, etc., or exposed them for sale in a public market or private sale-yard, etc. (*j*).

(*f*) *Greenland v. Chaplin*, 5 Exch. 248. *Bank of Ireland v. Trustees of Evan's Charities*, 5 H. L. C. 411. *McGrew v. Stone*, 53 Penn. St. 436. See *Webb v. Rome*, Watertown & Ogdensburg R. R. Co., 49 N. Y. 420; *Ryan v. N. Y. Central R. R. Co.*, 35 N. Y. 210; *Pennsylvania Railroad v. Kerr*, 62 Penn. St. 353.

(*g*) *Holden v. Shattuck*, 34 Vt. 336. *Cox v. Burbidge*, 13 C. B., N. S. 430; 32 Law J., C. P. 89. This is not necessary where the form of action is trespass, *Lee v. Riley*, 34 Law J., C. P. 212. So it is necessary to allege the natural viciousness of the animal in these cases, only where but for the vice of the animal the owner would be free from fault. Thus where the owner of a horse permitted him to go unattended upon the sidewalk of a populous city where in passing he kicked and injured a child, it was held that the owner was liable for the injury resulting from his negligence without any allegation or proof of the viciousness of the horse. *Dickson v. McCoy*, 39 N. Y. 400. So it was held that where a sucking colt was kicked and killed by a horse which had been turned loose in the highway, the owner of the colt could, in the absence of negligence on his part, recover damages of the owner of the horse, although the horse was not vicious. *Barnes v. Chapin*, 4 Allen, (Mass.) 283.

(*h*) *Andrews v. Buckton*, 1 Str. 192.

(*i*) *Cooke v. Waring*, 32 Law J., Exch. 262.

(*j*) See *ante*, pp. 3, 4. Where one person, occupying the land of another as a mere licensee, pastures upon it sheep infected with an infectious disease, and the owner of the land, relying upon the false representations of the licensee as to the absence of danger from contagion, subsequently moves his own sheep upon the same land, whereby the disease is communicated to them, the original occupant or licensee is liable to the owner of the land for the damages.

If the owner of a dog allows the dog to stray away and trespass on his neighbor's land, and the dog worries and kills the neighbor's sheep, the owner of the dog is not responsible at common law for the damage done, as the worrying and killing of sheep is, it is said, not in accordance with the ordinary instinct of the animal, and would not in the ordinary sequence of events be expected to result from a dog being allowed to stray away from his master's premises; but, if the dog had previously worried sheep with the knowledge of the owner, the law throws upon the latter the duty of keeping the animal on his own premises, and not suffering him to go at large^(k). But so far as injuries to cattle and sheep by dogs are concerned, this is altered by the 28 & 29 Vict. c. 60^(l). The word "cattle" in this Act includes horses and mares^(m). The mere keeping of an animal of a fierce nature, such as a tiger or a bear, or a dog known to be wont to bite, is unlawful, and, therefore, if any person is bitten or injured by such an animal, an action is maintainable against the person who keeps it⁽ⁿ⁾.

36 Liability of the master for the negligence of his servant.—Every servant acting in the execution of his master's business represents the master himself, and his acts are, in contemplation of law, the acts of his master. This rule of law applies not only to domestic servants, who have the care of carriages, horses, and other things in the employ of the family, but to other servants whom the master or owner selects and appoints to do any work, or superintend any business, although such servants be not in the immediate employ, or under the superintendence, of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint

Eaton v. Winnie, 20 Mich. 156. Communicating disease to the flocks of an adjoining owner by merely pasturing diseased sheep in an adjoining lot, will not give the party injured a cause of action against the owner of the sheep communicating the disease. *Fisher v. Clark*, 41 Barb. (N. Y.) 329.

^(k) *Anon. Dyer*, pl. 162. *Baker v. Webberly*, Het. 171. *Jenkins v. Turner*, Ld. Raym. 109. *Card v. Case*, 5 C. B. 622. As to dogs known to have a mischievous propensity for pursuing and destroying game, *Read v. Edwards*, 17 C. B., N. S. 245; 34 Law J., C. P. 31. As a general rule the owner of a domestic animal is not liable at common law for an injury committed by such animal, unless it be alleged and shown that the owner had notice of its vicious propensity. But the owner is liable without an allegation or proof of scienter, if it be alleged and shown that the injury was committed by the animal while unlawfully in the close of another. *Van Leuven v. Lyke*, 1 N. Y. 515. And see *Dearth v. Baker*, 22 Wis. 73; *Smith v. Causey*, 22 Ala. 568.

^(l) And as to sheep only, in Ireland, by 25 & 26 Vict. c. 59. For decisions under similar statutes of the various States, see *Job v. Harlan*, 13 Ohio (N. S.) 485; *Osincup v. Nichols*, 49 Barb. (N. Y.) 145; *Woolf v. Chakler*, 31 Conn. 121; *Brewer v. Crosby*, 11 Gray (Mass.) 29; *Campbell v. Brown*, 1 Grant's Cas. (Penn.) 82; *Fish v. Skut*, 21 Barb. (N. Y.) 333; *Auchmuty v. Ham*, 1 Denio 495.

^(m) *Wright v. Pearson*, L. R. 4 Q. B. 582.

⁽ⁿ⁾ *May v. Burdett*, 9 Q. B. 112. *Cox v. Burbidge*, 13 C. B., N. S. 440.

and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind, or hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him; if any damage happen through their default, the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So, in the case of a mine, if the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner, these under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer(o). But whenever one man employs another to execute a particular work respecting personal moveable property, and that other furnishes his own servants to do the work, the servants so furnished are not to be considered in the same light as if they were servants selected, hired and paid by the person who orders the execution of the work.

A master is responsible for the wrongful act of his servant, even if it be wilful, or reckless, or malicious, provided the act is done by the servant within the scope of his employment, and in furtherance of his master's business, or for the master's benefit(p); but if the servant, at

(o) *Laugher v. Pointer*, 5 B. & C. 554. *Dalyell v. Tyrer*, 28 Law J., Q. B. 52.

(p) *Huzzey v. Field*, 2 Cr. M. & R. 432, 440. The American authorities as to the liability of the master for the wrongful acts of his servants are not harmonious, nor is there perfect uniformity in the theory of the origin of that liability. From a review of the authorities and statutes of the several States, it seems that a master may be liable for the wrongful act of his servant.

I. When the act was committed under the express authority or direction of the master.

II. When the act was committed in the master's service, and within the scope of the employment of the servant.

III. When the act violates a contract between the master and the party injured.

IV. When the act is one for which the statute makes the master liable.

It needs no citation of authorities to support the first proposition; but the converse of the proposition, that the master will not be liable for a wrongful act which he has not authorized, is not law, as the master may be liable for a wrongful act of his servant which he did not authorize or know of, or even which he disapproved or forbade. *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202. *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 468. *Higgins v. Watervliet Turnpike & R. R. Co.*, 46 N. Y. 23. *Duggins v. Watson*, 15 Ark. 118. *Southwick v. Estes*, 7 Cush. 385. And see *Story on Agency*, § 452; *Smith on Master and Servant*, 152. There are a class of cases which hold that a master is not liable for the trespass of his servant, unless the trespass was committed under his express direction. *Wesson v. Seaboard, etc., R. R. Co.*, 4 Jones' Law (N. C.), 379. *Yerger v. Warren*, 31 Penn. St. 319. *Cox v. Keahey*, 36 Ala. 340. *McCoy v. McKown*, 26 Miss. (4 Cush.) 487. *Church v. Mansfield*, 20 Conn. 284. *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122. *Fraser v. Freeman*, 43 N. Y. 566. And that

the time he does the wrong, is not acting in the execution of the master's business, and within the scope of his employment as his servant, but is carrying into effect some exclusive object of his own, the master will not be answerable for his act. Thus it is said, "if I command my servant to distrain, and he ride on the distress, he shall be punished, and not I" (q). So, "if my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished (r); and if my servant, without my knowledge, put my beasts in another's land, my servant is the trespasser, and not I, because, by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts" (s).

But where the servant, though acting contrary to his duty to his master, is nevertheless acting in the course of his employment, the master will be answerable for his misconduct (t). Thus, where a partially intoxicated passenger in an omnibus refused to get out and to pay his fare when the omnibus arrived at its destination, and the con-

even in the latter case the liability of the master does not depend on the relationship of master and servant, but on the fact that the wrongful act is personally and immediately his own. *Yerger v. Warren*, 31 Penn. St. 319. *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn. 40.

That the master is liable civilly for the wrongful act of his servant, committed in the master's service, and within the scope of the employment of the servant, is undisputed. *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122. *Howe v. Newmarch*, 12 Allen (Mass.), 49. *Passenger R. R. Co. v. Young*, 21 Ohio St. 518. *Little Miami R. R. Co. v. Wetmore*, 19 Ohio, 131. *Bryant v. Rich*, 106 Mass. 180. *Higgins v. Watervliet Turnpike & R. R. Co.*, 46 N. Y. 23. *Ramsden v. Boston & Albany R. R. Co.*, 104 Mass. 117. *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 468. *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108. *Duggins v. Watson*, 15 Ark. 118. *Walker v. Bolling*, 22 Ala. 294. *Southwick v. Estes*, 7 Cush. 385. *Armstrong v. Cooley*, 5 Gillman, 599. And in such cases it is immaterial whether the act is wilful or merely negligent. *Indianapolis, Peru & Chicago R. R. Co. v. Anthony*, 43 Ind. 183. *Railroad Co. v. Rogers*, 38 Ind. 116. *Ramsden v. Boston & Albany R. R. Co.*, 104 Mass. 117. *Howe v. Newmarch*, 12 Allen, 49. *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 468. But see *Jackson v. Second Ave. R. R. Co.*, 47 N. Y. 274; *Isaacs v. Third Ave. R. R. Co.*, id. 122. But ordinarily the master is not liable for the wrongful or tortious act of his servant, unless committed by his express authority, or in his service, and within the scope of the employment of the servant. *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122. *Howe v. Newmarch*, 12 Allen (Mass.), 49. *Yates v. Squires*, 19 Iowa, 26. *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 373. *Sherley v. Billings*, 8 Bush (Ky.), 147. That the master ordinarily is not liable for wilful or malicious acts of his servants, committed without his express or implied authority, see *Evansville, etc., R. R. Co. v. Baum*, 26 Ind. 70; *Fraser v. Freeman*, 43 N. Y. 566; *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122.

That the master is liable for any wrongful act of his servant which violates a contract between the master and the party injured, see note u, *post*.

For an illustration of the statutory liability of the master for the wrongful act of his servant, see note y, *post*.

(q) Noy's Maxims, ch. 44.

(r) Bro. Abr. TRESPASS, pl. 435. If a servant is directed to drive cattle out of a certain field, and he drives them somewhere else, and one of them dies, the master is not liable. *Oxford v. Peter*, 28 Ill. 434.

(s) 2 Roll. Abr. 553.

(t) See further, as to injuries from negligence, *post*, ch. 8, s. 2. *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23.

ductor dragged him out violently and recklessly, and caused him to fall under the wheel of a passing cab, it was held that there was evidence for the jury of the wrongful act having been done by the servant in the course of his employment about the master's business, and the omnibus proprietor was made responsible for the injury(u). So, where a porter of a railway company so negligently managed a truck containing luggage that a portmantau fell from it and injured the plaintiff, it was held that the railway company were responsible, although the plaintiff had neither arrived nor was going by the defendant's line, and was merely passing along a platform used in common by three railway companies(v).

Wherever the master intrusts a horse, or carriage, or anything which may readily be made an implement of mischief, to his servant, to be used by him in furtherance of his master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing intrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment. Where the master was riding along a public highway with a mounted groom behind him, and the master having suddenly quickened his pace, the groom spurred his horse to keep up with him, whereupon the horse struck out with his hind legs and kicked a waggoner who was walking in the road at the head of his team, it was held that the master was responsible for the injury(x).

(u) *Seymour v. Greenwood*, 6 H. & N. 359; 7 Ib. 355; 30 Law J., Exch. 189, 327, qualifying *M'Manus v. Cricket*, 1 East, 107. See *Bayley v. Manchester, Sheffield, and Linc. Rail. Co.*, L. R., 7 C. P. 415. A new element enters into the question of the liability of the master for the wrongful acts of his servants when the master is a common carrier of passengers and the party injured is a passenger with whom he has entered into a contract for carriage. In addition to the contract for carriage the law implies a contract for the protection of the party carried from the insults and wanton interference of strangers, fellow passengers and the carrier and his servants; and for every violation of this implied contract by force or negligence, the carrier is liable in an action of contract or of tort. *Bryant v. Rich*, 106 Mass. 180. *Sherley v. Billings*, 8 Bush. (Ky.) 147. *Passenger R. R. Co. v. Young*, 21 Ohio St. 518. *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202. *Railroad v. Blocher*, 27 Md. 277.

In the following cases common carriers have been held liable for the wilful assaults of their servants upon passengers: *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202; *Railroad v. Finney*, 10 Wis. 388; *Railroad v. Vandiver*, 42 Penn. St. 365; *Passenger R. R. Co. v. Young*, 21 Ohio St. 518; *Bryant v. Rich*, 106 Mass. 180; *Sherley v. Billings*, 8 Bush. (Ky.) 147; *Sanford v. Eighth Avenue R. R. Co.*, 23 N. Y. 343; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Railroad v. Blocher*, 27 Md. 277.

In the following cases the liability has been denied: *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122; *Hibbard v. New York & Erie R. R. Co.*, 15 N. Y. 455; *Evansville etc. R. R. Co. v. Baum*, 26 Ind. 70.

(v) *Tebbutt v. Bristol & Exeter Railway*, L. R., 6 Q. B. 73.

(x) *North v. Smith*, 10 C. B., N. S. 572. Where the owner of a horse and cart permits his servant to use them in going to a fair, the owner will not be liable for damages resulting from the negligent management of the horse by the servant. *Bard v. Yohn*, 26 Penn. St. 482. The fact that a servant, who negligently rode over a traveler, was at the time of the injury in the general employment of a third person, is not a sufficient defence in an action against

In all cases of negligent and improvident driving by a servant employed to drive, the master will be responsible if the servant was driving about the master's business, or using the master's horses and carriage for the master's benefit; and the master cannot exonerate himself from liability by showing that the servant was acting in disobedience of his orders. Where, therefore, an omnibus company gave written instructions to their drivers. "to drive at a steady pace, and not on any account to race with or obstruct other omnibuses," and a driver disobeyed these instructions, and wilfully drew across the road to obstruct another omnibus, and ran against it and upset it, it was held that the instructions given by the omnibus company to their servants could not exonerate the company from responsibility for the careless, wilful, or malicious acts of such servants whilst carrying passengers for the benefit of the company(y). So, where the carter of a contractor, in defiance of his masters orders, left his cart standing in the street while he went away for dinner, and the horse ran away and injured the plaintiff's railings, it was held that the contractor was responsible(z). Where, however, both the party injured and the person inflicting the injury are fellow-servants in the same employment, the master is generally, as we shall presently see, exempt from liability(a).

37 *Indemnification of the master by the servant.*—If damages have been recovered from the master by reason of the servant's negligence in doing the master's work, or in executing his orders, these damages may be recovered by the master from the servant, and the verdict and

the owner of the horse, unless it appears that the relation of such third person to the subject matter of the business in which the servant was at the time engaged was such as to give him exclusive control of the means and manner of its accomplishment and exclusive direction of the person employed therefor. *Kimball v. Cushman*, 103 Mass. 194.

Where an agent negligently injures a horse, carriage and harness hired by him for the transaction of the business of his principal, the latter will be liable for the damages, although the agent was under no particular instructions, was under no orders as to the route or mode of travel he should adopt, and did not disclose his principal at the time of the hiring. *Pickens v. Diecker*, 21 Ohio St. 212.

(y) *Limpus v. Lond. Gen. Om. Co.*, 1 H. & C. 526; 32 Law J., Exch. 34. *Betts v. De Vitre*, L. R., 3 Ch. App. 441 acc. In New York the statute makes the owner of every carriage running or traveling upon any turnpike road or public highway, for the conveyance of passengers, liable to the party injured, in all cases, for all injuries and damages done by any person in the employment of such owner as a driver, while driving such carriage, to any person or to the property of any person, and that whether the act occasioning such injury or damage be wilful or negligent or otherwise, in the same manner as such driver would be liable; and the term carriage, as used in the act is declared to include stage coaches, wagons, carts, sleighs, sleds, and every other carriage or vehicle used for the transportation of persons and goods, or either. 1 R. S. 696, §§ 6, 7. This act does not apply to the employees of a street railway. *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122. *Whitaker v. Eighth Avenue R. R. Co.*, 51 N. Y. 295.

(z) *Whatnan v. Pearson*, L. R., 3 C. P. 422.

(a) *Post*, ch. 8, s. 1.

judgment in the action against the master are evidence of the amount of these damages, but not of the circumstances under which they were recovered(b). If the captain of a ship engage in smuggling transactions, and thereby causes the ship to be forfeited and condemned, he is responsible in damages to the shipowner for causing the latter to lose his property(c).

38 *Fraud and falsehood* are *mala in se*, and wrongful in the eye of the law, so that if damage results therefrom, there is the damage and wrong necessary to create a cause of action. "An action cannot be supported for telling a bare naked lie, where no loss or damage is caused by the lie, but if it be attended with damage, it then becomes the subject of an action"(d). Fraud may consist in the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true, and which it was his duty to make known(e).

If *A* fraudulently makes a representation which is false, and which he knew to be false, to *B*, meaning that *B* shall act upon it, and *B*, believing it to be true, does act upon it, and thereby suffers damage, *B* may maintain an action against *A* for the deceit, there being here that conjunction of wrong and loss which entitles an injured and suffering person to compensation in damages(f). Where the father of the plaintiff went to the defendant, a gunmaker, and told him that he wanted a gun, safe and fit to use, for the plaintiff, his son, and the defendant gave the father a false and fraudulent warranty with a gun which he sold and delivered to him for the use of the plaintiff, and the plaintiff was injured by the bursting of the gun in his hand, it was held that, there being here both fraud and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the defendant was responsible to the plaintiff for the injury he had sustained(g).

(b) *Green v. New River Co.*, 4 T. R. 590.

(c) *Blewitt v. Hill*, 13 East, 12.

(d) *Kenyon, C.J.*, *Pasley v. Freeman*, 3 T. R. 65. *Collins v. Cave*, 6 H. & N. 131; 30 Law J., Exch. 55. *Croke, J.*, *Bailey v. Merrell*, 3 Bulstr. 95. *Nye v. Merriam*, 35 Vt. 438. One who by falsely and fraudulently assuming to be authorized to make a contract in behalf of another draws a third party into a contract, is liable to such party for the injury sustained, provided such contract could have been enforced against the principal had the pretended agent the authority he assumed. Otherwise if the contract was void under the statute of frauds. *Dung v. Parker*, 52 N. Y. 494.

(e) *Horsfall v. Thomas*, 1 H. & C. 90; 31 Law J., Exch. 322. See *Lee v. Jones*, 34 Law J., C. P. 131; *Devoe v. Brandt*, 53 N. Y. 462; *Grove v. Hodges*, 55 Penn. St. 504; *Wintz v. Morrison* 17 Texas, 372; *Belden v. Henriques*, 8 Cal. 87; *Marsh v. Webber*, 13 Minn. 109.

(f) Com. Dig. Action on the Case for a Deceit (A 9), (A 10). *Pasley v. Freeman*, 3 T. R. 51. *Garhard v. Bates*, 2 Ell. & Bl. 489. *Marsh v. Falker*, 40 N. Y. 562; *post*, ch. 18.

(g) *Langridge v. Levy*, 2 M. & W. 529. *Levy v. Langridge*, 4 Ib. 338. See *George v. Skivington*, L. R., 5 Exch. 1.

Where the defendant wrongfully and maliciously caused certain persons to refuse to deliver goods to the plaintiff, by asserting that he had a lien upon them, and ordering those persons to retain the goods until further orders from him, he well knowing at the time that he had no lien, it was held that the action was maintainable, though the persons who had the goods were under no legal obligation to obey the orders of the defendant, and their refusal was their own spontaneous act(*h*).

39 *A refusal to obey the lawful decree of a court of justice is wrong; and if a party is thereby prejudiced, or impeded, or hindered in the exercise of his legal rights, there is that conjunction of wrong and damage which will support an action(i).*

40 *Malicious injuries.*—The foundation of every action of tort is a wrongful act, but it need not be malicious, for malice is not a necessary ingredient in a wrong. An imprisonment of the person, for example, a battery or a trespass on land may be committed without any express or implied malice, and yet an action for damages may be maintained(*k*). But every malicious act is wrongful in itself in the eye of the law, and if it causes hurt or damage to another, it is a tort, and may be made the foundation of an action. Malice may be proved by evidence of personal hostility and spite entertained against the injured party, or of any other corrupt or improper motive(*l*). If a free burgess of a corporation or any other person having an undoubted right at law to give his vote at an election of a burgess or knight to serve in parliament, be maliciously hindered or impeded in the exercise of his right, an action for damages is maintainable against the disturber(*m*). Any person has a right to stand for a place in parliament, or to offer himself as a candidate for a vacant office; and if an election takes place, and it becomes difficult to determine who has the majority, he is entitled to demand a poll; and if the public officer who ought to have granted the poll maliciously denies it, he is liable to an action for substantial damages(*n*); for if public officers will maliciously infringe men's rights, and "refuse to receive a vote which the party tendering has a right to give, and if an action for it comes to be tried before me, observes Holt, C.J., "I will direct the jury to

(*h*) *Green v. Button*, 2 C. M. & R. 707. See *Wren v. Weild*, L. R., 4 Q. B., 730.

(*i*) *Ferguson v. Earl of Kinnoul*, 9 Cl. & Fin. 311.

(*k*) *Rogers v. Ragendro Dutt*, 13 Moore, P. C. C. 209. *Prell v. McDonald*, 7 Kansas, 426.

(*l*) *Tozer v. Child*, 7 Ell. & Bl. 381. *Lyon v. Hancock*, 35 Cal. 372.

(*m*) *Holt, C.J., Ashby v. White*, 2 Ld. Raym. 954.

(*n*) *Starling v. Turner*, 2 Lev. 50.

make them pay well for it”(o). In order to maintain the action, the plaintiff must show that the refusal was founded in malice; for “if the returning officer has acted honestly and uprightly, according to the best of his judgment, he is not amenable to an action”(p).

The functions of a returning officer are not wholly ministerial, but are partly judicial and partly ministerial; and a judicial officer cannot be made responsible for an erroneous or wrong judgment, where he has acted *bonâ fide* in a matter of which the law gives him cognizance(q). “It cannot be contended that he is to exercise no judgment, no discretion whatever, in the admission or rejection of votes, and he could not discharge his duty without great peril and apprehension if, in consequence of a mistake, he became liable to an action”(r).

In the celebrated case of *Ashby v. White*, where an action was brought against a returning officer for maliciously hindering an elector in the enjoyment of his electoral right, by refusing to receive his vote at an election, Lord Holt observes, “I do not find that the defendants did by force of arms drive the plaintiff away from the election, nor by menaces deter him, but I find they did maliciously hinder him; and so it is charged by the plaintiff in his declaration, and so found by the jury, that they did it by fraud and malice. And so the defendant is an offender within the very words of the statute of Westminster”(s).

41 *Malicious procurement of loss or damage to another*, whether brought about by libel or slander (*post*, chap. 17), or by instigating servants to leave their service or desert their employment, to the injury of their masters, or by maliciously inducing a party to a contract to break his contract, to the injury of the person with whom the contract was made, creates that conjunction of wrong and damage which will support an action(t). If one person incites another to commit perjury, or forgery, or a nuisance, or to bring a false charge or accusation, and the accused party is acquitted of the charge, the instigator of the wrongful act is

(o) *Ashby v. White*, 2 Ld. Raym. 958. *Herring v. Finch*, *ib.* 250.

(p) *Abbot, C.J., Cullen v. Morris*, 2 Stark. 587. In support of the English rule that malice must be shown to maintain the action, see *Chrisman v. Bruce*, 1 Duval (Ky.) 63. *Jenkins v. Waldron*, 11 Johns. (N. Y.) 114. *Caulfield v. Bullock*, 18 B. Mon. (Ky.) 494. *Rail v. Potts*, 8 Humph. 225. *Carter v. Harrison*, 5 Blackf. 138. That proof of malice is not necessary to maintain the action, see *Gillespie v. Palmer*, 20 Wis. 544; *Lincoln v. Hapgood*, 11 Mass. 350; *Blanchard v. Stearns*, 5 Met. 298; *Harris v. Whitcomb*, 4 Gray, 433; *Jeffries v. Ankeny*, 11 Ohio, 373; *Anderson v. Milliken*, 9 Ohio St. 568.

(q) *Post*, ch. 15.

(r) *Abbot, C.J., Cullen v. Morris*, 2 Stark. 587.

(s) Lord Holt's judgment in *Ashby v. White*; cited in *Tozer v. Child*, 7 Ell. & Bl. 381.

(t) *Lumley v. Gye*, 2 Ell. & Bl. 228. *Green v. Button*, 2 C. M. & R. 707.

responsible for all its injurious consequences(*u*). Thus, where the mistress of a wine-shop brought an action against the defendant for procuring a soldier and others to come into her house with a man dressed in woman's clothes, and there conduct themselves with indecency, and collect a crowd, and raise a cry of "bawdy house," by reason whereof the mob threw stones and broke the plaintiff's windows, and damaged and destroyed her furniture, it was held that the defendant was responsible for all the damage sustained by the plaintiff, although he did not himself appear upon the scene, or join in the cry(*x*).

42 *Abuse of authority by governors of colonies*.—An officer representing his sovereign in all functions, civil and military, may be made to answer for an abuse of his authority, and for the exercise of arbitrary power, above and beyond the law. An act of authority, lawful in itself if rightly done, may become wholly unlawful and unjustifiable by the harsh, oppressive, and cruel manner in which it is executed; for, where the law authorizes an act to be done, it does not protect unnecessary violence or cruelty in the doing of it(*y*).

Every governor of a colony is responsible in damages for unlawfully spoiling, plundering, or imprisoning Her Majesty's subjects. But whatever is a justification in the place where the thing is done, may be pleaded as a justification in the place where the cause of action is tried(*z*); and if the colonial legislature pass an act of indemnity which is assented to by the crown before any action is commenced in this country, such act of indemnity is pleadable in bar to an action in the courts here, although the governor was a necessary party to the passing of the act and was himself interested in it(*a*). Where a carpenter, who followed a train of artillery, but who was not subject to martial law, brought an action against the Governor of Gibraltar for an assault and battery, and showed that he had been tried by court-martial, and sentenced to be whipped, and that the governor confirmed the sentence, which was then carried into effect, it was held that the action was maintainable against the governor, by reason of his participation in the unlawful whipping, and the plaintiff recovered 700*l.* damages(*b*).

(*u*) Com. Dig. Action upon the Case, A. *Coxe v. Smith*, 1 Lev. 119. *Fitzjohn v. Mackinder*, 9 C. B., N. S. 516; 30 Law J., C. P. 257.

(*x*) *Plunket v. Gilmore*, Fortescue, 221.

(*y*) *Sutherland v. Murray*, 1 T. R. 538; *post*, ch. 5.

(*z*) *Mostyn v. Fabrigas*, Cowp. 161.

(*a*) *Phillips v. Eyre*, L. R., 4 Q. B. 225; 6 Ibid. 1; 38 L. J., Q. B. 113.

(*b*) ——— *v. Sabine*, cited Cowp. 175.

43 *Abuse of authority on the part of naval and military officers.*—An action is not maintainable by a subordinate officer against his superior officer for an act done in the course of discipline, and under powers incident to his position(c); but for a corrupt and malicious abuse of authority a commanding officer is responsible. Every superior officer has a right to imprison his subordinate officer for any military offence, and to bring him to a court-martial; but this gives him no right to act in an arbitrary and oppressive manner, and to inflict a prolonged, harsh, and cruel imprisonment, without bringing the person imprisoned to trial. If an officer has been guilty of a scandalous abuse of a public trust, he will not be allowed to shelter himself under the thin veil of legal forms, nor escape under the cover of a justification, the most technically regular, from the consequences of his wrong-doing(d).

A naval or military officer is not responsible for acts done by him in obedience to the commands of his superior officer, or of the government he serves, unless the commands are manifestly illegal. The justification of an officer sued for acts of force and violence may be made to rest upon a subsequent ratification of his acts by his government, as well as upon a precedent authority(e).

Where two vessels were chartered by the government for a naval expedition, and the captains of the vessels were to pay implicit obedience to the orders of the officers commanding the expedition, and one of the vessels sustained damage from the other whilst acting in obedience to orders, it was held that the owner of the vessel doing damage could not be made responsible to the owner of the vessel to which the damage was done, if the damage was the natural result of the execution of the orders given, and was not caused by negligence or want of nautical skill in the execution of the orders(f).

Where commissioners of public works, exercising powers given to them by statute, and acting within their jurisdiction, nevertheless act in an arbitrary, wanton, or negligent and oppressive manner, and inflict unnecessary injury upon private individuals, they are responsible for their wrong-doing of what might have been rightly done, and cannot protect themselves under cover of their statutory powers from the consequences of their negligence and misconduct(g).

44 *Torts committed by British subjects in foreign countries.*—Actions may

(c) *Johnstone v. Sutton*, 1 T. R. 544.

(d) *Ld. Mansfield, Wall v. M'Namara*, 1 T. R. 536.

(e) *Buron v. Denman*, 2 Exch. 167; *Riggs v. State*, 3 Cold. (Tenn.) 85.

(f) *Hodgkinson v. Fernie*, 2 C. B., N. S. 436.

(g) *Leader v. Moxon*, 2 W. Bl. 296; 3 Wils. 461; *post*, ch. 16, s. 1.

be maintained in this country for wrongs committed by one of the Queen's subjects against another of her subjects in a foreign country, if all that is sought is reparation in damages, or satisfaction to be made by process against the person of the wrongdoer or against his effects, within the jurisdiction of the court(h). Thus, when Captain Gambier pulled down some sutlers' houses in Nova Scotia, who supplied spirits to his sailors, and afterwards inadvertently brought one of the sutlers home in his own ship, and the sutler, as soon as he landed, brought an action against the captain, it was held that the action was maintainable(i). But, in order to support an action in this country for an injury sustained abroad, it must, it is apprehended, be shown that the act producing damage was a wrongful act by the law of the country in which it was done; for if it was justifiable there, the justification would, it is apprehended, be available here(k).

45 *Suspension of the remedy by action when the tort amounts to felony.*—

Whenever a wrongful act amounts to a felony, the remedy for the tort, or civil wrong, is postponed until the requirements of public justice have been satisfied by the prosecution of the offender(l). "The policy of the law," observes Lord Ellenborough, "requires, that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence; and after a verdict, either of acquittal or conviction, the judgment is so far conclusive in any collaterel proceeding *quoad* the particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action, which was a proper subject-matter of a criminal prosecution. Where, therefore, the defendant has been tried and acquitted of a felony, the objection founded upon the general policy of the law does not apply. The only difference which can be suggested between the case of a prior conviction and that of an acquittal is, that the acquittal may have been

(h) *Scott v. Lord Seymour*, 1 H. & C. 219; 31 Law J., Exch. 457.

(i) *Per* Ld. Mansfield, *Cowp.* 180.

(k) *Per* Ld. Mansfield, *Mostyn v. Fabrigas*, 1 *Cowp.* 175; 1 *Smith's L. C.* 607. *Dobree v. Napier*, 2 *Bing. N. C.* 797. *Duke of Brunswick v. King of Hanover*, 6 *Beav.* 1. *Philips v. Eyre*, *ante*, p. 38. *Contra* *Wightman, J.*, *Scott v. Lord Seymour*, *ut sup.*

(l) *Wellock v. Constantine*, 7 *Law T. R.*, N. S. 751; 2 *F. & F.* 791. This is otherwise, it seems, in some of the United States. See *Foster v. Tucker*, 3 *Greenl.* 458; *Boody v. Keating*, 4 *Greenl.* 164; *Morgan v. Rhodes*, 1 *Stew.* 70; *McGrew v. Cato*, *Minor*, 8; *Pettingill v. Rideout*, 6 *N. H.* 454; *Robinson v. Calp*, 1 *Const. Rep.* 231; *Gordon v. Hostetter*, 37 *N. Y.* 99, 105. And see *Cross v. Guttery*, 2 *Root*, 90. The late case of *Wells v. Abrahams*, *L. R.*, 7 *Q. B.* 554, throws considerable doubt on the above position, and it seems probable that the only way of enforcing the suspension on the part of the defendant, the felon, is by application to the summary jurisdiction of the court.

brought about by the defendant's colluding with the prosecutor; but if the acquittal be shown, either in pleading or by evidence, to have been obtained by collusion, it would be put aside, and the objection would still remain. All the mischief, therefore, that could result from extending the same rule to cases of acquittal which has established the right to sue after a conviction of the felon, is done away by letting the defendant in to show that the judgment of acquittal was obtained *per fraudem*"(m).

46 *The doctrine of the merger of a trespass in a felony*, therefore, only means that all redress by action for the private injury is suspended until the criminal law has been put in force. It was never intended to take away redress absolutely after the ends of public justice were attained, but only to stimulate the party injured to bring the offender to trial for the public offence, and to prevent any compromise thereof. Where, therefore, a robber had been convicted of felony for breaking into a house and stealing 250*l.*, it was held that an action for the trespass and the taking of the money was maintainable against him after his conviction for the felony(n). And if money has been taken under a claim of right, and under circumstances manifestly not amounting to a felony, an action may be brought for the money, notwithstanding that the criminal law has not been put in force; and it does not lie in the mouth of the defendant to say that he is a thief, and that he stole the money, if the surrounding circumstances do not establish a case of felony, for "*nemo allegans suam turpitudinem est audiendus*"(o). And if the injured party has preferred a bill of indictment, which has been thrown out, or not proceeded with, by the suggestion of the judge, he has satisfied the requirements of the law in respect of the prosecution of the public offence, and is remitted to his civil remedy(p).

This rule of law prohibiting an action for the recovery of stolen property or its value, until the criminal law has been put in force, does not extend beyond the person robbed, and the thief or the felonious receiver; for if stolen property is innocently taken in pledge by a pawnbroker, or purchased out of market overt, an action may be brought against the pawnbroker or purchaser before the institution of any prosecution for the felony(q).

And whenever the death of a person has been caused by any wrong-

(m) *Crosby v. Leng*, 12 East, 413; 1 Hale, P. C. 546.

(n) *Dawkes v. Coveleigh*, Styles, 346. *Markham v. Cobb*, W. Jones, 147.

(o) *Luttrell v. Reynell*, 1 Mod. 283. *Stone v. Marsh*, 6 B. & C. 564

(p) *Dudley and West Bromwich Bank. Co. v. Spittle*, 1 Johns. & H. 14.

(q) *White v. Spettigue*, 13 M. & W. 608. *Lee v. Bayes*, 18 C. B. 599; *post*, ch. 7, s. 2.

ful act, neglect, or default, an action for damages is maintainable, although the death has been caused under such circumstances as amount in law to a felony(*r*).

47 *Cheating by forgery*.—If a forgery has been committed, and the party injured has prosecuted for the offence, he may maintain an action for the recovery of the money of which he has been defrauded. Where the plaintiff's declaration of his cause of action set forth that, the plaintiff's servant having 65*l.* of the plaintiff's money in his custody, the defendant, in order to defraud the plaintiff of the money, procured a letter to be written in the name of the plaintiff, directed to his said servant, requiring the latter to pay the money to the defendant, and counterfeited the signature of the plaintiff to the letter, and also the plaintiff's seal, and caused the said counterfeit letter to be delivered to the plaintiff's servant, as being the plaintiff's letter, and thereby obtained possession of the plaintiff's money, and converted it to his own use, it was held that there was a good cause of action(*s*). "If a man forge a bond in my name, I can have no action, unless I am sued upon the bond; but then I may for the wrong and damage, though I can avoid the bond by plea. But if it were a recognizance or a fine, I should have a writ of deceit presently"(*t*).

48 *Actions for bigamy*.—Where the plaintiff declared that she was a virgin, and sought for in marriage, and that the defendant, pretending to be a single person, made love to her and married her, when in truth he was married to another woman, the court held that the action lay. But, bigamy being now made a felony by statute, a prosecution for the public offence is a condition precedent to the right of action(*u*).

49 *Actions for misdemeanors*.—Where the wrongful act amounts only to a misdemeanor, the remedy for the wrong is not suspended until the offender has been brought to trial for the indictable offence; but the injured party may at once bring an action for damages, whether he does or does not subsequently prosecute(*x*). This is the case where the money of the plaintiff has been obtained by the defendant by false pretences and converted to his own use, and the action is brought to recover back an equivalent for the money fraudulently obtained. Where persons conspire together to procure a forgery of title deeds,

(*r*) 9 & 10 Vict. c. 93, s. 1.

(*s*) *Tracey v. Veal*, Cro. Jac. 223.

(*t*) 43 Ed. 3, 20. *Waterer v. Freeman*, Hob. 266.

(*u*) *Anon. Skin.* 119. Where a person, having a wife living from whom he is not lawfully divorced, fraudulently induces a woman to marry him and to cohabit with him, he is liable to her in damages for the fraud. *Blossom v. Barrett*, 37 N. Y. 434.

(*x*) *Reg. v. Hardey*, 14 Q. B. 541.

and give them in evidence on a particular trial, and the deeds are forged and given in evidence, and any person's land is thereby lost, all the parties to the conspiracy are liable to an action for damages, as well as to an indictment for misdemeanor(y). If two men conspire to make it appear that a third person has been guilty of a felony, by placing stolen goods upon his premises, and he is in consequence thereof convicted, an action for damages would be maintainable against the conspirators, whether the parties had or had not been indicted for the misdemeanor(z).

50 *Public and private wrongs.*—For an injury which affects all persons alike, such as an obstruction in a public thoroughfare, merely impeding the right of passage, and rendering the way less convenient, the only mode of proceeding is by indictment. For any special injury which affects an individual beyond his fellows, such as being delayed in making a journey, and compelled to take a circuitous course(a), or driving against the obstruction during a dark night, compensation in damages may be obtained(b).

51 *Of the legal maxim that there is no wrong without a remedy.*—The maxim of the law, “ubi jus, ibi remedium,” has at all times been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case, where the novelty of the complaint is no objection to the action, provided an injury cognizable by law be shown to have been inflicted on the plaintiff(c); for “this form of action was introduced for the reason that the law would never suffer a wrong and a damage without a remedy”(d); but there are many cases where persons have suffered serious injury from the acts and doings of others of which the law takes no cognizance. An action, for example, cannot be maintained against a commanding officer in the army or navy for maliciously accusing, arresting, and bringing to a court-martial a subordinate officer, however great may have been the perversion of his authority, and however false and unfounded the charge(e); and a wife has no remedy for being deprived of the society of her husband by slander, not amounting to a charge of adultery, causing him to desert her, and treat her with

(y) Fitzh. N. B. 116, D.

(z) *Post*, ch. 13.

(a) *Greasly v. Codling*, 2 Bing. 263. *Rose v. Miles*, *post*, ch. 4.

(b) *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281. *Post*, ch. 4, s. 2, DAMAGES. See *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95. *Blane v. Klumpke*, 29 Cal. 156. *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44. *Yolo County v. Sacramento*, 36 Cal. 193.

(c) See note to *Ashby v. White*, 1 Smith's L. C. 213-223.

(d) Willes, C.J., *Winsmore v. Greenbank*, Willes, 577.

(e) *Sutton v. Johnstone*, *Johnstone v. Sutton*, 1 Bro. P. C. 76; 1 T. R. 512.

cruelty(*f*). No action will lie against a witness for uttering false statements in the course of a judicial proceeding, even though it is alleged to have been done falsely and maliciously, and without any reasonable or probable cause, the proper course being a prosecution for perjury(*g*).

Damages are not recoverable from an infant for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to lend him money (*post*, ch. 18): nor from a married woman and her husband for a false and fraudulent representation by such married woman that she was a feme sole whereby she induced the plaintiff to make a contract with her, which he could not enforce by reason of her being married(*h*); or that the signature to a bill of exchange was her husband's signature, whereby the plaintiff was induced to advance money upon the bill(*i*); nor from a man who has seduced a female infant, not being at the time of her seduction in her father's service, actual or constructive, even though the father be therefore obliged to provide nurses and medical attendance for her, and to maintain her(*k*).

52 *Waiver of tort*.—If a man has taken possession of property, and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrong-doer, and sue him for a trespass or for a conversion of the property; or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as an agent, he cannot afterwards treat him as a wrong-doer, nor can he affirm his acts in part, and void them as to the rest. If, therefore, goods have been sold by a wrong-doer, and the owner thinks fit to receive the price, or part thereof, he ratifies and adopts the transaction, and cannot afterwards treat it as a wrong(*l*).

(*f*) *Lynch v. Knight*, 9 H. L. C. 577.

(*g*) *Erle, C.J., Barber v. Lesiter*, 7 C. B., N. S. 187.

(*h*) *Liv. Adelp. Loan Asso. v. Fairhurst*, 9 Exch. 429. See as to fraudulent representations made by infants, *Studwell v. Shapter*, 54 N. Y. 249.

(*i*) *Wright v. Leonard*, 11 C. B., N. S. 258; 30 Law J., C. P. 365.

(*k*) *Grinnell v. Wells*, 8 So. N. R. 741; 7 M. & Gr. 1033. To the contrary see *Furman v. Van Sise*, 56 N. Y. 435. The fact that the person seduced was, at the time of the seduction, indentured to the defendant as a servant, will not defeat an action by the father, if it be shown that the defendant procured her to be indentured for the purpose of effecting the seduction. *Dain v. Wyckoff*, 18 N. Y. 45.

(*l*) *Brewer v. Sparrow*, 7 B. & C. 310. *Lythgoe v. Vernon*, 5 H. & N. 180; 29 Law J., Exch. 164. As to the right to waive the tort and sue on the contract, see *Shaw v. Coffin*, 58 M. 254; *Staat v. Evans*, 35 Ill. 455; *Pearsoll v. Chapin*, 44 Penn. St. 9; *Smith v. Smith*, 43 N. H. 536; *Jones v. Gregg*, 17 Ind. 84; *Halleck v. Mixer*, 16 Cal. 574; *Fratt v. Clark*, 12 Cal. 89; *Balch v. Patten*, 45 Me. 41; *Budd v. Hiler*, 3 Dutch. (N. J.) 43; *Hutton v. Wetherald*, 5 Harring. (Del.) 38; *Cooper v. Berry*, 21 Geo. 526; *Pike v. Bright*, 29 Ala. 332; *Janet v. Buzzard*, 1 Hemp. 240; *Alsbrook v. Hathaway*, 3 Sneed, (Tenn.) 454; *Goodwin v. Snyder*, 3 Iowa, 599; *Elliott v. Jackson*, 3 Wis. 649; *Kelly v. Owens*, 4 Chand. (Wis.) 166; *Humiston v. Smith*, 22 Conn. 19.

SECTION II.

OF RIGHTS, DUTIES, AND OBLIGATIONS CREATED BY BY-LAW AND BY
STATUTE(*m*).

53 *By-laws founded on statute, imposing penalties for the suppression of certain torts*, are cumulative upon the ordinary common law remedy by way of action, and do not prevent a plaintiff who has sustained damage from an injury to his property or person or an infringement of his legal right, from bringing his action just the same as if no by-law had ever been made, for “wherever an action lies at common law, the penalty is accumulative”(*n*). By-laws imposing penalties, and establishing a summary mode of proceeding for the recovery of such penalties, are regarded with the utmost jealousy, and must be made in strict pursuance of statutory authority, more especially where they restrain the freedom and liberty of the subject beyond the requirement of the ordinary law. The power of making them is an extraordinary power, and will be narrowly construed. “We must,” observes Alderson, B., “look closely to the powers given by the legislature, to see whether the by-law is within the scope of the authority, or whether it does not relate to matters which ought to be left to the general law of the land, by which the general conduct of the Queen’s subjects is regulated”(*o*).

54 *By-laws of municipal corporations*.—By s. 90 of the Municipal Corporations Act (5 & 6 Wm. 4, c. 76), the council of any borough is empowered to make by-laws for the good rule and government of the borough, and the suppression of nuisances. By s. 91, all the provisions of the statute relative to offences against the Act, punishable upon summary conviction, are made to apply to offences committed in breach of any by-law made by virtue of the Act(*p*); and by s. 1, all laws, statutes, and usages inconsistent with that Act are repealed and annulled. By-laws of corporations “must ever be subject to the laws of the realm, and subordinate thereto;

(*m*) See further as to this, *post*, ch. 16.

(*n*) Per cur., *Rowning v. Goodchild*, 2 W. Bl. 910. *Beckford v. Hood*, 7 T. R. 627. *Couch v. Steel*, 3 Ell. & Bl. 414.

(*o*) *Calder & Hibble Nav. Co. v. Pilling*, 14 M. & W. 87. *Tailors of Ipswich*, 11 Rep. 101. *Brown v. Local Board of Holyhead*, 32 Law J., C. P. 25. *Young v. Edwards*, 33 Law J., M. C. 237.

(*p*) As to summary convictions upon by-laws, see *post*, ch. 15, s. 1.

and, therefore, though there is no provision for that purpose, the law supplies it. And if the king, in his letters patent of incorporation, do make ordinances himself, yet they are also subject to the same rule of law"(q). The power of making by-laws for the "good rule and government" of a borough has reference to the government of the borough as a corporation, and the making of regulations for carrying into effect the purposes for which it was incorporated; for the election of the mayor, aldermen, and councillors, the appointment of the officers of the corporation, and the enforcement of their several duties(r); the management and disposition of the corporate property; the carrying on trade within the municipality; the prevention of fraud, and the sale of unfit and improper commodities; the prevention of nuisances by butchers, tallow-chandlers, and persons carrying on noxious trades in crowded localities; and generally for securing fair dealing and convenient arrangement amongst the shopkeepers and traders of the municipality(s). It does not enable a town council to carry out any peculiar ideas of general good government, and to impose penalties on persons for the doing of things which are not prohibited by any public statute, nor by the common law(t).

The power of making by-laws for the suppression of nuisances under the above (90th) section, is confined to the suppression and prohibition of acts which, if done, must necessarily and inevitably cause a nuisance (*post*, ch. 4). It does not empower the town council to impose penalties for the doing of things which may or may not be a nuisance, according to circumstances. Thus, where the town council of a borough imposed a fine upon every person who should "keep, or suffer to be kept, any swine within the borough, between the first of May and the first of October," it was held that the by-law was wholly invalid, as the keeping of a pig did not necessarily create a nuisance(u).

By-laws for the government of corporations are binding upon all persons who consent to become members of the corporation, in the nature of a contract founded on mutual promises(x). They are binding also on all persons who come to inhabit a municipality, and to carry on trade within it(y).

(q) *Norris v. Staps*, Hob. 211; 1 Roll. Abr. CORPORATIONS, g. pl. 4.

(r) *Rex v. Westwood*, 4 B. & C. 781.

(s) *Wilcock on Corporations*, pp. 141-146.

(t) *Reg. v. Wood*, 5 Ell. & Bl. 55. *Reg. v. Rose*, 24 Law J., M. C. 130.

(u) *Everett v. Grapes*, 3 Law T. R., N. S., Q. B. 669. See *Wanstead Local Board, etc., v. Hill*, 13 C. B., N. S. 479.

(x) *Tobacco Pipe, etc., Co. v. Loder*, 16 Q. B. 765; *post*, ch. 21.

(y) *Pierce v. Bartrum*, Cowp. 270.

55 *By-laws for the prevention of indecent bathing.*—The bathing clauses in the Town Police Clauses Act, 10 & 11 Vict. c. 89 (s. 69), incorporated into many special Acts recently passed for the government and improvement of towns, enable local authorities, where any part of the sea-shore or strand of any river within the limits of the special Act is used as a public bathing-place, to make by-laws for fixing the stands of bathing-machines on the sea-shore or strand, and the limits within which persons of each sex shall be set down for bathing, and within which persons shall bathe, and for preventing any indecent exposure of the persons of the bathers.

The statutory power here conferred, of fixing the limits within which persons shall bathe, does not enable a town council or local board to impose penalties on persons bathing outside those limits, without reference to the decency or indecency of the proceeding, or its lawfulness or unlawfulness, by the general law of the land. The clauses are enabling, and not disabling clauses. They were framed to facilitate the providing of bathing-machines, and the making of arrangements for enabling persons of both sexes to undress and bathe in public places where, in the absence of such arrangements, no persons could undress and bathe without indecency, and without running the risk of being prosecuted for a misdemeanor^(z). They were not intended to impose any additional restraint upon bathers, beyond what is imposed by the general law; or to authorize the prohibition of bathing by town councils, according to their whim or caprice, without reference to time, circumstance or locality, the lawfulness or unlawfulness of the act in reference thereto, and the existence or non-existence of any nuisance. Nor do they interfere with the rights of the owner of the shore^(a).

All restraints imposed by by-law beyond what is imposed by the general law of the land are invalid, unless a satisfactory reason is shown for them, and an express statutory authority for their imposition^(b). Thus, where a statute, the Local Government Act, 1858 (21 & 22 Vict. c. 98), enacted by s. 34 that the local board might make by-laws "with respect to—privies and ash-pits in connection with buildings," it was held that this did not authorize a by-law directing all houses to be built with a back entrance, so as to afford access to such ash-pit or privy^(c).

(z) *Rex v. Crundun*, 2 Campb. 89.

(a) *Mace v. Philcox*, 33 Law J., C. P. 124.

(b) *Calder & Hebble Nav. Co. v. Pilling*, 14 M. & W. 83. *Young v. Edwards*, 33 Law J., M. C. 227.

(c) *Waite v. Garston Local Board*, L. R., 3 Q. B. 5.

56 *By-laws by public commissioners, local boards and public companies.*—

The power of making by-laws for certain specified purposes, and for imposing penalties for breach of such by-laws(*d*), is also granted by the Companies Clauses Consolidation Act (8 Vict. c. 16, ss. 124–127), the Railways Clauses Act (8 Vict. c. 20, ss. 108–11), the Markets and Fairs Clauses Act (10 Vict. c. 14, ss. 42–49), the Commissioners' Clauses Act (10 Vict. c. 16, ss. 96–98), the Harbors, Docks and Piers Clauses Act (10 Vict. c. 27, ss. 83–90), the Towns' Improvement Clauses Act 10 & 11 Vict. c. 34, ss. 128, 200–207; and the Town Police Clauses Act (10 & 11 Vic. c. 89, ss. 68–71)(*e*). A summary mode of proceeding is established for the recovery of the penalties imposed under the authority of these statutes, but the recovery of the penalty will not protect a wrong-doer from an action for damages, or from a claim for compensation, wherever the commission of the penal offence is in itself a tort, and gives rise to a cause of action at common law (*post*, pp. 39, 40).

Commissioners, or local boards acting under these statutory authorities, have no general power of making by-laws affecting strangers. They cannot make by-laws to carry out the general powers of the statute from which they derive their authority, but only the special powers enabling them to make by-laws for the specified and declared purposes(*f*).

57 *By-laws in restraint of trade, made by trading companies and corporations in the exercise of a power conferred upon them by charter or by statute, must be reasonable and beneficial to the public, or they cannot be supported*(*g*).

A by-law may be good in part and bad in part, when the two parts are entire and distinct from each other, but not otherwise(*h*).

There is no power to apprehend a person for the breach of a by-law, in order to bring him before a magistrate, unless such a power is expressly given by statute(*i*).

58 *Remedies for the enforcement of statutory duties and obligations.*—The statute of Westminster the second (1 stat. 13 Ed. 1), c. 50, gives a remedy by actions on the case to all who are aggrieved by the neglect

(*d*) As to the recovery of penalties generally, see *post*, ch. 15, s. 1.

(*e*) Cox's Consolidation-Acts, by Taylor. As to by-laws for the regulation of markets, under the Markets and Fairs Clauses Act, *Savage v. Brook*, 33 Law J., M. C. 42.

(*f*) *Crompton, J., Reg. v. Wood*, 5 Ell. & Bl. 57. *Child v. Hudson's Bay Co.*, 2 P. Wms. 208.

(*g*) *Gunmakers' Co. v. Fell, Willes*, 389. *Calder & Hebble Nav. Co. v. Philling, supra*. *Rex v. Newcastle Coopers, &c.*, 7 T. R. 543.

(*h*) *Reg. v. Lundie*, 31 Law J., M. C. 157.

(*i*) *Chilton v. Lond. & Croyd Rail. Co.*, 16 M. & W. 212. *Reg. v. Mann*, 23 Law T. R. 12.

of any obligation or duty created or imposed by statute(*k*); and "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law"(*l*). Wherever a statute creates a right, or a duty, or an obligation, then, although it has not in express terms given a remedy, the remedy which by law is properly applicable to that right or obligation follows as an incident(*m*). But when the right or duty is entirely the creature of the statute, and a specific remedy is provided by the statute for its enforcement, that remedy, and that only, must be pursued(*n*), unless the remedy does not cover the entire right(*o*).*

Wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary(*p*), or provides some specific remedy, or particular mode of proceeding for the recovery of the money, and there is no contract or obligation to pay independently of the statute. When the duty or obligation exists independently of the statute, the statutory remedy is simply cumulative, and does not preclude the ordinary common law remedy by way of action, unless there are express words to that effect(*q*). Under the Metropolis Local Management Act (25 & 26 Vict. c. 102), ss. 77, 96, which makes certain paving expenses recoverable by the vestry against the present or future owner of the premises, or from any tenant who subsequently occupies them, an unsatisfied judgment against a former owner is no bar to an action against the occupying tenant of a succeeding owner(*r*).

The remedies provided by the Friendly Societies Acts, for redressing disputes between these societies and their members(*s*), are cumulative upon the common-law remedy by action, where such remedy

(*k*) 2 Instit. 486.

(*l*) Com. Dig. Action upon Statute, F.

(*m*) Maule, B., *Braithwaite v. Skinner*, 5 M. & W. 327.

(*n*) *Stevens v. Evans*, 2 Burr. 1157. *Underhill v. Ellicombe*, M'Clel. & Y. 455. *Doe v. Bridges*, 1 B. & Ad. 859. *Dundalk Western Railroad Co. v. Tapster*, 1 Q. B. 667. *Stevens v. Jeacocke*, 11 Q. B. 741; 17 Law J., Q. B. 163. *St. Pancras Vestry v. Batterbury*, 2 C. B., N. S. 477; 26 Law J., C. P. 243. *Dorman v. City of Jacksonville*, 13 Fla. 538. *Ernst v. Kunkie*, 5 Ohio St. 520. *Andover v. Gould*, 6 Mass. 40. *Hovey v. Mayo*, 43 Me. 322. *Cole v. Muscatine*, 14 Ia. 296.

(*o*) *Shepherd v. Hills*, 11 Exch. 67. *Williams, J., St. Pancras Vestry v. Batterbury*, 26 Law J., C. P. 243.

(*p*) *Parke, B., Shepherd v. Hills*, 11 Exch. 67. *Tilson v. Worwick Gas Light Co.*, 4 B. & C. 967; 7 D. & R. 376. *Cane v. Chapman*, 5 Ad. & E. 659. *Lloyd v. Burrup*, L. R., 4 Exch. 63.

(*q*) Com. Dig. Action upon Statute, C. *Chapman v. Pickersgill*, 2 Wils. 145.

(*r*) *Bermondsey (Vestry of) v. Ramsey*, L. R., 6 C. P. 247.

(*s*) *Addison on Contracts*, 6th ed., pp. 729-733.

exists independently of the statute, unless the right of action is taken away by express legislative enactment(*t*).

59 *Of the imposition of a penalty as a cumulative, exclusive, or alternative remedy, for the protection of a right, or the suppression of a wrong.*—

Where a statute vests a right generally in a person, or imposes some new duty upon one party for the benefit of another, and gives a penalty against those who infringe the right or neglect the duty, and by reason of the infringement of the right, or the neglect of the duty, a special and particular damage has resulted to the plaintiff, the annexation by the statute of the penalty for the offence recoverable by a common informer does not preclude the plaintiff from his common-law remedy by action for damages(*u*), although it is competent to him, if he is first in the field, to sue for the penalty(*x*). The penalty is recoverable for the breach of the public duty, though no damage may have been actually sustained by anybody, and is cumulative upon the ordinary remedy by action for damages. But where the statute, creating a new duty or obligation, provides a mode of obtaining compensation for private special damage, and gives the amount recovered to the party grieved or injured by the neglect of the statutory duty, there is no other remedy than that given by the Act, either for the public or the private wrong.

Where no specific right is created and vested in the plaintiff for his own benefit and advantage, and no specific duty in favor of the plaintiff has been imposed, but the statute merely prohibits a thing from being done under a penalty for doing it, an action for damages is not maintainable. Thus, where statutory regulations were established for the management of the pilchard fishery, and specific penalties appointed for the breach of each regulation, and the plaintiff, a fisherman, brought an action for damages for the breach by the defendant of one of the regulations, whereby the plaintiff lost his proper turn and station in fishing, and the defendant was enabled to make a valuable capture of fish, which would otherwise have fallen to the lot of the plaintiff, it was held that the action was not maintainable, as no particular right was created and vested in the plaintiff, nor any particular duty in his favor imposed upon the defendant. The latter was merely prohibited from doing a particular act under pain of incurring a penalty for disobedience, and the enforcement of the penalty

(*t*) *Sinden v. Bankes*, 30 Law J., Q. B. 102.

(*u*) *Couch v. Steel*, 3 Ell. & Bl. 414. *Rowning v. Goodchild*, 2 W. Bl. 906.

(*x*) *Beckford v. Hood*, 7 T. R. 627.

was the only mode of proceeding against him(y). Where, on the other hand, a statute(z) imposed upon a shipowner the duty of keeping a constant supply of medicines on board for the use of sick seamen, and appointed a penalty for every default, recoverable by the first person who sued for it, the amount, when recovered, to be divided between the informer and the seaman's hospital, and the medicines were not kept, and the plaintiff, being a seaman on board, and having contracted a fever, was deprived of the benefit of the medicines, and in consequence thereof sustained a long and dangerous illness, it was held that he was entitled to maintain an action for damages, notwithstanding the imposition of the penalty(a). So where a duty was imposed by statute(b) on a water company of keeping their pipes, to which fire plugs were fixed, constantly charged with water at a certain pressure, a person whose premises were burnt down in consequence of the neglect of the water company to perform such duty, was held entitled to sue them for the damage caused by such neglect(c).

60 *Infringement of statutory copyright—Penalties and actions for damages(cc).*—To put an end to the doubts which formerly existed as to the extent and duration of the rights of authors of published works(d), the statute 8 Ann. c. 19 was passed, defining those rights and protecting the enjoyment of them by the imposition of penalties. These penalties for the infringement of the right founded upon the statute, were cumulative upon the common-law remedy, so that the author, if he was first in the field, might sue for the penalty as well as for the damages he had sustained(e). The statute of Anne, however, has been repealed by 5 & 6 Vict. c. 45(f), which provides a special remedy by action on the case for the recovery of damages from any person who causes a book to be printed for sale or exportation without the consent in writing of the proprietor of the copyright; or who imports for sale or hire any

(y) *Stevens v. Jeacocke*, 11 Q. B. 741.

(z) 7 & 8 Vict. c. 112, s. 18. And see 30 & 31 Vict. c. 124, ss. 4, 5, 6.

(a) *Couch v. Steel*, 3 Ell. & Bl. 410.

(b) The Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, s. 42.

(c) *Atkinson v. Newcastle and Gateshead Waterworks Co.*, L. R., 6 Exch. 404.

(cc) In the United States copyright is secured by law of Congress. U. S. Rev. Stat. 966, s. 4952, *et seq.*

The common law right and property of authors, in their unpublished productions, is also recognized and protected. *Palmer v. De Witt*, 47 N. Y. 532.

The courts of the several states have jurisdiction of actions for the redress of injuries to the common law rights of authors, but they have no jurisdiction of actions arising under the patent and copyright laws; the federal courts having exclusive jurisdiction in those cases. *Dudley v. Mayhew*, 3 N. Y. 9.

(d) *Donaldson v. Beckett*, 2 Bro. P. C. 129. *Millar v. Taylor*, 4 Burr. 2303. *Jefferys v. Boosey*, 4 H. L. C. 846-989. *Reade v. Conquest*, 11 C. B., N. S. 479; 30 L. J., C. P. 213.

(e) *Beckford v. Hood*, 7 T. R. 627.

(f) This statute repeals also 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156.

such unlawfully printed book, or with a guilty knowledge sells, publishes, or exposes to sale or hire, or has in his possession for sale or hire, any such book, without the consent of the proprietor. Penalties are also imposed (s. 17) upon unauthorized parties unlawfully importing books reprinted abroad, or selling, publishing, etc., such books or having them in their possession for sale or hire. These penalties are cumulative upon the remedy by way of action(*g*).

But no proprietor of copyright in books, etc. (except dramatic pieces), commencing after the 10th June, 1833, can sue or proceed for any infringement of his copyright before making an entry of it at Stationers' Hall, and all actions for offences committed against the Copyright Amendment Act must be commenced within twelve months after the commission of the offence(*h*). The Act applies to alien friends residing temporarily in any part of the British dominions, who during such residence publish a book or part of a book in England(*i*).

The Act guards against piracy of words and sentiments; but it does not prohibit writing on the same subject. Thus, in the case of histories, a man may give a relation of the same facts, and in the same order of time; and in the case of dictionaries, an interpretation may be given of the same words. The same principle holds with regard to charts; whoever has it in his intention to publish a chart, may take advantage of all prior publications(*k*). There is no monopoly of the subject here any more than in the other instances; the jury must decide whether it is a servile imitation or not(*l*). If, however, the great bulk of the work consists of a mere mass of pirated matter, or the appropriation is such that the effect must be to injure or supersede the sale of the original work, the author or composer of the work will be liable to an action for damages, and also to an injunction to prevent the sale of the work(*m*). And it is no answer to say that the appropriation was fully acknowledged, and made without any dishonest intention(*n*). The compiler of a guide-book or directory is not en-

(*g*) *Novello v. Sudlow*, 12 C. B. 188. See *ante*, p. 49. As to forfeiture of copies of piratical editions, *Delfe v. Delamotte*, 3 K. & J. 581; and as to the protection in the colonies of works entitled to copyright in England, 10 & 11 Vict. c. 95; and as to international copyright, 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12. *Avanzo v. Mudie*, 10 Exch. 203. *Wood v. Chart*, L. R., 10 Eq. Ca. 193. As to interrogatories, see *Wright v. Goodlake*, 34 L. J., Exch. 82.

(*h*) 5 & 6 Vict. c. 45, ss. 24, 26. As to articles published in magazines and periodical works, *Mayhew v. Maxwell*, 1 Johns. & H. 312.

(*i*) *Low v. Routledge*, L. R., 1 Ch. App. 43; 3 Eng. & Ir. App. 100. *Low v. Ward*, *infra*.

(*j*) Subject to the qualification stated in *Kelly v. Morris*, *infra*.

(*k*) *Cary v. Longman*, 1 East, 362. *Jarrold v. Houlston*, 3 Kay & J. 708.

(*m*) *Campbell v. Scott*, 11 Sim. 38. *Bohn v. Bogue*, 10 Jur. 420. *Tinsley v. Lacey*, 32 Law J., Ch. 535. *Hotten v. Arthur*, *Ibid.* 771. See *post*, ch. 23.

(*n*) *Scott v. Standford*, L. R., 3 Eq. Ca. 718.

titled to avail himself of the information contained in previous works on the same subject, but must obtain and arrange the requisite information independently for himself(o); and it is not sufficient for him to cut the slips from the rival directory, and send persons round to ascertain their correctness(p). He may, however, use such slips for the purpose of directing his canvassers to the persons from whom the required information is to be obtained(q). And an author who has been led by a former author to refer to older writers may, without committing piracy, use the same passages from the older writers which were used by the former author(r).

No copyright can be gained in a work which is founded on fraudulent representation and deceit, and professes to be written by some celebrated author when it is not so written, or in a work which is subversive of good order, morality, or religion(s). Nor can copyright, it seems, be claimed in a single word, *e. g.*, the title of a periodical publication, "Belgravia"(t), although the proprietor (of a newspaper for instance) has a right to prevent other persons from adopting the name of his newspaper for any similar publication(u). Copyright is, however, divisible, and may be obtained in respect to certain chapters of a work only(x).

The Act does not apply to newspapers, which are not mentioned in it. The proprietor of a newspaper, however, is entitled at common law to the property in any article for which he pays, whether it be the letters of a correspondent, the publication of a tale or treatise, or the review of a book(y).

61 Infringement of copyright in lectures—Penalties and actions for damages.—By 5 & 6 Wm. 4. c. 65, vesting the sole right of printing and publishing lectures in the author and his assigns(z), penalties are imposed upon all persons taking down, or making copy of such lectures, and printing or otherwise copying and publishing them, without leave of the author or his assigns, and upon all persons selling or publish-

(o) *Kelly v. Morris*, L. R., 1 Eq. Ca. 697.

(p) *Morris v. Ashbee*, L. R., 7 Eq. Ca. 34.

(q) *Morris v. Wright*, L. R., 5 Ch. App. 279.

(r) *Pike v. Nicholas*, 38 Law J., Ch. 529; L. R., 5 Ch. App. 251.

(s) *Wright v. Tallis*, 1 C. B. 907; 14 Law J., C. P. 283. Congress has no power to pass a law conferring the privilege of copyright upon an immoral or indecent publication. *Martinetti v. Maguire*, 1 Abb. (U. S.) 356.

(t) *Maxwell v. Hogg*, L. R., 2 Ch. App. 307.

(u) *Kelly v. Hutton*, L. R., 3 Ch. App. 703.

(x) *Low v. Ward*, L. R., 6 Eq. Ca. 415. See *Levy v. Rutley*, *infra*. There may be a valid copyright in the plan of a book. *Greene v. Bishop*, 1 Clifford, Ct. Ct. 186.

(y) *Cox v. Land and Water Journal Co.*, L. R., 9 Eq. Ca. 324. See *Hattan v. Kean*, *infra*.

(z) As to the author's right at common law, see *ante*, p. 13.

ing copies, etc., or exposing them for sale without consent, etc. These penalties are cumulative upon the common law remedy by way of action(a); but it is provided (s. 5), that the Act shall not extend to lectures of which notice in writing has not been given to two justices, in manner therein mentioned, nor to lectures delivered in a university or public school, or college, or on a public foundation, etc. .

In all lectures printed and published by the author or his assigns there is now the same copyright as in printed books(b).

62 *Infringement of copyright in published dramatic literary property and musical compositions.*—Where one man employs another, for reward, to compose a musical or dramatic piece, the composition becomes, upon payment, the property of the employer(c). But a mere contract to write a play will not vest the copyright in the employer, although part of the price agreed upon be paid, nor will the employer become joint owner with the writer by reason of alterations, even to the extent of a whole scene, having been made by others, at the suggestion and expense of the employer(d). To constitute a joint authorship of a dramatic piece or other literary work, it must be the result of a preconcerted joint design(e).

Where the defendant represented the incidents of a published novel in a dramatic form upon the stage, it was held that this was not an infringement of the copyright in the novel, as the defendant had neither printed nor multiplied copies of the work(f). But a person who prints a drama constructed out of a novel infringes the copyright in the novel(g). Where the plaintiff published a drama called "Gold," and then printed and published the drama in the form of a novel, and the defendant's brother dramatized the novel without having seen or known of the plaintiff's drama "Gold," but the consequence was that much of the drama which the defendant caused to be represented was the same as the plaintiff's, it was held that this was an infringement of the copyright of the drama, and that the defendant's brother could not be considered the author of those parts of the drama which he copied directly from the plaintiff's novel, and indirectly from the

(a) See *Beckford v. Hood*, *ante*, p. 51.

(b) 5 & 6 Vict. c. 45.

(c) *Hatton v. Kean*, 7 C. B., N. S. 268.

(d) *Levy v. Rutley*, L. R., 6 C. P. 523.

(e) *S. C.*

(f) *Reade v. Conquest*, 9 C. B., N. S. 755; 30 Law J., C. P. 209. As to assignments of copyright, see *Addison on Contracts*, 6th edit. p. 120-1. *Cumberland v. Copeland*, 31 Law J., Exch. 353. *Wood v. Boosey*, *infra*.

(g) *Tinsley v. Lacy*, 32 Law J., Ch. 535.

plaintiff's drama(*h*). A dramatic production, therefore, to be entitled to copyright, must be an original work, and not a mere copy of novels or works of fiction, in which there is an existing copyright. If, however, the drama is partly made up of new matter, the composer will be entitled to copyright in such new original matter(*i*).

If a musical composer adapts words of his own to an old air, he acquires a copyright in the combination(*k*). So if he arranges an opera for the pianoforte, such an arrangement is an independent musical composition, of which he, and not the composer of the opera, is the author for purposes of registration(*l*), although it does not follow that he would not infringe the copyright of the original author by such an arrangement(*m*).

63 *Unlawful representation of dramatic pieces and musical compositions.*—

The statutes 5 & 6 Vict. c. 45, ss. 20, 21, and 3 & 4 Wm. 4, c. 15, vesting the sole and exclusive right of representing or performing dramatic pieces or musical compositions in the author and his assigns, impose penalties on all persons who, during the continuance of the right, represent or cause to be represented, without the consent in writing of the author or proprietor such dramatic pieces or musical compositions at any place of dramatic entertainment. These penalties are given as an alternative remedy, the author or proprietor having the option of either suing for the penalty or bringing an action for all the profit accruing from the representation, or all the loss he has sustained, at his election; but the action must be brought within twelve calendar months(*n*). An assignment of the copyright of a book consisting of, or containing, a dramatic piece or musical composition, does not convey the right of representation to the assignee, unless the intention of the parties to that effect is duly registered(*o*). But an express assignment of the right of representation, although joined

(*h*) *Reade v. Conquest*, 11 C. B., N. S. 479. 31 Law J., C. P. 153. *Reade v. Lacy*, 30 ib. 655.

(*i*) *Cary v. Longman*, 1 East, 360. Mere spectacles or arrangement of scenic effects are not protected by copyright. *Martinetti v. Maguire*, 1 Abb. (U. S.) 356. See *Daily v. Palmer*, 6 Blatchf. 256.

(*k*) *Lover v. Davidson*, 1 C. B., N. S. 182.

(*l*) *Wood v. Boosey*, L. R., 2 Q. B. 340. *Ib.* 3. Q. B. 223. But see *Rerel v. Carusi*, Taney, 72.

(*m*) Per Blackburn, J., and Kelly, C. B. *S. C.*

(*n*) 3 & 4 Wm. 4, c. 15, ss. 2, 5.

(*o*) 5 & 6 Vict. c. 45, s. 22. The rights of an author of a drama in his composition are two-fold. He is entitled to the profit arising from its performance, and also from the sale of the manuscript, or the printing and publishing of it. The mere public performance of a play does not amount to an abandonment by the author of his title to it, or a dedication of it to the public; and it cannot be lawfully printed or published before or after such public performance without the author's permission. *Palmer v. De Witt*, 47 N. Y. 532.

with an assignment of the copyright, does not require registration to entitle the assignee to sue for penalties(*p*).

No one can be considered as an offender against these statutes so as to be liable to an action at the suit of an author or proprietor unless he, by himself or his agent, actually takes part in the representation(*q*). But the lessee of a theatre, who lets the same, together with the actors, properties, etc., to a third person, for one night, for the purpose of taking a benefit, will be liable if, by the direction of such person, a piece is performed without the consent of the author(*r*).

64 *Infringement of the Sculpture Copyright Acts*.—The statute for the encouragement of the art of making models and casts of busts(*s*) (54 Geo. III., c. 56), vests the sole right of property in every new, original sculpture, model, copy, cast, and bust, for a certain term, in the person who makes or causes it to be made, provided the name of such person, and the date of publication, are put on the work before it is put forth or published. A remedy for the infringement of the right of property by persons making or importing copies, or exposing for sale, or disposing of, pirated copies, or pirated casts, without the consent of the proprietor, is provided by special action on the case, in which double costs of suit are recoverable, but the action must be brought within six calendar months after the discovery of the offence(*t*).

65 *Piracy of useful and ornamental designs*(*u*).—Penalties are recoverable by action or by summary proceedings for the piracy of registered useful or ornamental designs, or the proprietor of the design may elect to bring an action for damages; but he cannot recover both the penalties and the damages(*x*). Penalties also are recoverable for making or exposing for sale pirated copies, or pirated casts, of registered copies, drawings, prints, or descriptions in writing, or prints, of pieces of sculpture, models, etc., within the protection of the Sculpture Copyright Act, and for doing various specified things in derogation of the rights of the proprietor of the design. These penalties are given as an alternative, and not a cumulative remedy(*y*). When utility and

(*p*) *Lacy v. Rhys*, 33 Law J., Q. B. 157. *Marsh v. Conquest*, ib. C. P. 319. As to the rights of assignors of copyright, see *Taylor v. Pillow*, L. R., 7 Eq. Ca. 418.

(*q*) *Russell v. Briant*, 8 C. B. 836; 12 Law J., C. P. 33. *Lyon v. Knowles*, 32 Law J., Q. B. 71.

(*r*) *Marsh v. Conquest*, *supra*.

(*s*) The stat. 38 Geo. III., c. 71, has been repealed by 24 & 25 Vict., c. 101.

(*t*) ss. 3, 4.

(*u*) *Millingen v. Picken*, 1 C. B. 799; 14 Law J., C. P. 254. *Reg. v. Bessel*, 16 Q. B. 810.

(*x*) 5 & 6 Vict., c. 100, ss. 8, 9; 6 & 7 Vict., c. 65; 21 & 22 Vict., c. 70; 24 & 25 Vict., c. 73. As to registration, *Heywood v. Potter*, 1 Ell. & Bl. 439; 22 Law J., Q. B. 133. *Rogers v. Driver*, 16 Q. B. 102; 20 Law J., Q. B. 31. *McCrea v. Holdsworth*, 33 Law J., Q. B. 329; L. R., 1 Q. B. 264; (in error) L. R., 2 H. of L. Ca. 380.

(*y*) 13 & 14 Vict., c. 104, s. 7; 21 & 22 Vict., c. 70, s. 7.

beauty are blended together in the design, it may be registered under both the Useful and the Ornamental Designs Acts; but if there is neither novelty nor utility in the article, it is not entitled to registration under either statute, and cannot claim any statutory protection^(z). If the inventor, instead of describing the design in words, prefers to place the design itself upon the register in the shape of part of the article designed, the design will be infringed by the sale of an article to all appearance the same, though not actually identical^(a).

A combination of old designs, forming a new and original combination, must, in order to obtain the statutory protection, be one new design, and not a mere multiplication of old designs^(b).

The proprietor of a design duly registered loses the benefit of the Acts, unless the proper registration marks are attached to all articles and substances to which the design is applied, whether the same are sold abroad or in the British dominions^(c).

66 *Piracy of prints and engravings.*—The statutes of 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, vesting the sole right and liberty of printing and reprinting historical and other prints in the persons who invent and design them, or cause them to be designed and engraved from their own works and inventions, impose penalties upon all persons who engrave, etch, or in any manner copy and sell, in the whole or in part, by varying, adding to, or diminishing from, the main design, any historical or other print engraved with the name of the proprietor on each plate^(d), and printed on every such print, etc.^(e), or print, reprint, or import for sale, etc., any such print, without the written consent of the proprietor attested as therein mentioned, or publish, sell, etc., without such consent. These penalties are cumulative upon the right of action^(f), but the provision as to double costs of suit has been repealed^(g), and the proceedings must be instituted within the time limited by the statutes^(h).

The copying of prints and engravings by photography, or by any other process by which prints or engravings may be imitated or copied,

(z) *Windover v. Smith*, 9 Jur. N. S. 397.

(a) *McRea v. Holdsworth*, L. R., 6 Ch. App. 418. *Gorham Co. v. White*, 14 Wall. 511.

(b) *Norton v. Nicholls*, 1 Ell. & Ell. 761. *Harrison v. Taylor*, 3 H. & N. 301; 27 Law J., Exch. 315.

(c) *Sarazin v. Hamel*, 32 L. J., Ch. 380.

(d) See *Graves v. Ashford*, *infra*.

(e) *Colnaghi v. Ward*, 12 Law J., Q. B. 1.

(f) 17 Geo. 3, c. 57.

(g) 24 & 25 Vict. c. 101.

(h) 8 Geo. 2, c. 13, s. 1; 7 Geo. 3, c. 38, ss. 2-8.

is within the mischief intended to be provided against(*i*), and so is the selling of a copy with colorable variations(*k*).

Books containing designs and prints which are mere illustrations of the letter-press, are protected by 5 & 6 Vict. c. 45(*l*).

The statute, 8 Geo. 2, c. 13, made it necessary to prove knowledge in proceedings against a person for selling a pirated engraving or print. The 17 Geo. 3, c. 57, which was passed to amend the former act, omits the word "knowingly," and enables the person having a copyright in a print or engraving to maintain an action against persons found selling pirated copies of it, without proof of guilty knowledge(*m*).

67 *Infringement of copyright in paintings, drawings, and photographs.*—

By 25 & 26 Vict. c. 68, conferring upon the authors of paintings, drawings, and photographs, the sole and exclusive right, for a certain term, of copying, engraving, reproducing, and multiplying them, and the designs thereof, and photographs, and the negatives thereof, penalties are imposed upon persons who repeat, copy, colorably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause to be repeated, etc., any painting, drawing, or photograph, in which there shall be subsisting copyright, without the consent of the proprietor of the copyright; also for knowingly importing, selling, etc., repetitions, copies, etc., unlawfully made; also for fraudulently affixing names, etc., to any painting, drawing, or photograph, and doing various other specified things in derogation of the rights of the owner of the copyright. All these penalties are cumulative upon the remedy by action. They are cumulative also upon any remedy which any person aggrieved may be entitled to, either at law or in equity(*n*). The Act applies to a photograph of an engraving which is itself engraved from the original picture(*o*).

68 *Registration of the proprietorship of the copyright* is made a condition precedent to the maintenance of any action at law or suit in equity(*p*), and to the recovery of any penalties under the statute(*q*), which penalties apply to each copy sold. But it is not necessary for the original proprietor to register his title. If he assigns it, his assignee's

(*i*) *Gambart v. Ball*, 32 Law J., C. P. 166. *Graves v. Ashford*, L. R., 2 C. P. 410; See *Wood v. Abbot*, 5 Blatchf. Ct. Ct. 325; *Rossiter v. Hall*, id. 362.

(*k*) *West v. Francis*, 5 B. & Ald. 742.

(*l*) *Ante*, p. 51. *Bogue v. Houlston*, 5 De G. & S. 273; 21 Law J., Ch. 470.

(*m*) *Gambart v. Sumner*, 5 H. & N. 8; 29 Law J., Exch. 98.

(*n*) See s. 11. As to the remedy by Injunction, see *post*, ch. 23.

(*o*) *Ex parte Beal*, L. R., 3 Q. B. 387. *Graves's case*, *infra*.

(*p*) See *Stannard v. Lee*, L. R., 6 Ch. App. 346.

(*q*) See *Ellwood v. Christy*, 34 Law J., C. P. 130. *Mathieson v. Harrod*, L. R., 7 Eq. Ca. 270.

title is good, and such assignee, on a due registration of the assignment, is entitled to sue for an infringement of the copyright, or for penalties, etc.(*r*).

69 *Proof of the copyright*.—When any painting or drawing, or the negative of any photograph, is sold or disposed of, for the first time, or is made or executed for any other person, for good consideration, the person selling or disposing of, or making or executing the same, cannot retain the copyright thereof, unless it is expressly reserved to to him by agreement in writing, by the vendee, or assignee, of the painting, or drawing, or negative, or the person for whom it has been executed; nor can the vendee or assignee claim the copyright, except by virtue of an agreement in writing, signed by the person selling or disposing of the same, or by his duly authorized agent(s).

70 *Penalties for the use of counterfeit trade marks and false descriptions* of articles of manufacture and sale are imposed by 25 & 26 Vict. c. 88, s. 4, and are cumulative upon any remedy which aggrieved parties may be entitled to, either at law or in equity (s. 11).

71 *Penalties for the commission of nuisances* are also cumulative upon the common-law remedy by action; such as penalties for causing water to be corrupted by gas washings or gas refuse, and the creation of preventible nuisances in the exercise of noxious trades(*t*), fouling the water of wells, fountains, or pumps(*u*), wilfully and knowingly turning out upon any common, or unenclosed land, cattle, sheep, etc., affected with contagious or infectious diseases, or knowingly exposing such cattle, sheep, etc., in any public market or private sale-yard(*x*).

72 *Of patent right(y)*.—Unlike copyright, an inventor of a new design has no right at common law to the exclusive property in his own invention. He may, of course, conceal his discovery from the world, but the moment he publishes it, his exclusive right to it is gone(*z*). However, “where any man by his own charge or industry, or by his

(*r*) Graves's case, L. R., 4 Q. B. 715.

(*s*) 25 & 26 Vict. c. 68, ss. 1-3.

(*t*) 18 & 19 Vict. c. 121, ss. 23, 25, 27; 10 & 11 Vict. c. 15, ss. 21-23. See 34 & 35 Vict. c. 41. As to penalties for newly establishing noxious trades without the consent of local boards of health, 11 & 12 Vict. c. 63, s. 64; and as to what are noxious trades within the meaning of the statute, see *Wanstead Local Board v. Hill*, 13 C. B., N. S. 479; 32 Law J., M. C. 135.

(*u*) 23 & 24 Vict. c. 77, s. 8.

(*x*) *Ante*, p. 4.

(*y*) As to assignment of patent right, see Addison on Contracts, 6th ed., pp. 121-2. For the United States patent laws see U. S. Rev. Stat. 953 *et seq.*

(*z*) See *Canham v. Jones*, 2 V. & B. 218. The communication of his secret to one person, however, in confidence, is not a publication. *Morgan v. Seaward*, 2 M. & W. 544. And will not, therefore, if it goes no further, prevent another person taking out a patent subsequently for the same invention. *Jones v. Pearce*, 1 Webst. R. 122, 542. *Lewis v. Marling*, 10 B. & O. 22.

own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm, in such cases the king may grant to him a monopoly patent for some reasonable time until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth, otherwise not"(a). And this prerogative of the Crown, which is the original source from which the existing law and practice of letters patent for inventions are derived, and on which (subject to the modifications subsequently introduced by statute) they still rest(b), was confirmed by the Statute of Monopolies (21 Jac. 1, c. 3), which is declaratory of the common law, and by which, after declaring that all monopolies should be void, it was enacted (s. 6) that "any declaration before-mentioned shall not extend to any letters patent and grants of privilege for the term of fourteen years or under(c), hereafter to be made, of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grant shall not use, so as also they be not contrary to the law nor mischievous to the State by raising prices of commodities at home, or hurt of trade, or generally inconvenient," etc.

It results from the principles mentioned above that a patent is a kind of equitable contract made by the Sovereign with the patentee, or a purchase made by the discoverer of an invention from the Sovereign acting on behalf of the public, the consideration for such purchase being the novelty and utility of the invention discovered or first introduced into this country by the patentee(d); and the condition precedent to the validity of such contract or purchase being, that after the lapse of the prescribed period the inventor shall make public his invention for the general benefit(e). It is still, however, legally speaking, an exercise of prerogative, and being so, is not available against the Crown itself; otherwise an invention essential to the defence of the

(a) *Darcy v. Allin, Noy*, 182. And see 3 Inst. 184.

(b) See *Feathar v. The Queen*, *infra*.

(c) Which may, under 5 & 6 Will. 4 c. 83, s. 4, and 7 & 8 Vict. c. 83, s. 2, be further extended for fourteen years or less. See *Bovill v. Finch*, L. R., 5 C. P. 523. *Re Saxby's Patent*, L. R., 3 P. Ca. 292. *Re Clark's Patent*, *Ibid.* 421. *Houghton's Patent*, *Ibid.* 461. And as to an application for a prolongation by an assignee; *Normand's Patent*, L. R., 3 P. C. Ca. 193. An imported patent, however, expires on the expiry of the foreign patent, 15 & 16 Vict. c. 83, s. 25.

(d) See *Williams v. Williams*, 3 Mer. 160; 11 East, 107. *Cartwright v. Eamer*, cited 14 Ves. 131, 136.

(e) Lord Tenterden, C.J., *Crompton v. Ibbotson*, Dan. & Lloyd, 38. *Gibbs, C.J., Wood v. Zimmer*, Holt, 58. *Abbott, C.J., in Savory v. Price*, Ky. & M. 1.

realm might be unavailable on behalf of the public, whilst a foreign power at war with this country might be profiting by it (*f*).

The grant must be "to the true and first inventor." "It is a material question," said Tindal, C.J., "to determine whether the party who got the patent was the real and original inventor or not, because these patents are granted as a reward not only for the benefit that is conferred upon the public by the discovery, but also to the ingenuity of the first inventor; and although it is proved that it is a new discovery so far as the world is concerned, yet if anybody is able to show that, although that was new, the party who got the patent was not the man whose ingenuity first discovered it; that he had borrowed it from *A* or *B*(*g*), or taken it from a book that was printed in England(*h*), and which was open to all the world; then, although the public had the benefit of it, it would become an important question whether he was the first and original inventor of it(*i*). And not only must the patentee be the actual inventor, but he must have invented every part of what he claims to have invented(*k*); for if a man claims by his patent to have invented a number of things, and some of them are not original, his patent is void(*l*). There is nothing, however, to prevent him from employing his servants in assisting him to bring a design to perfection, or to work out an idea first suggested by him(*m*), or from employing third persons for such a purpose(*n*). He is still the true and first inventor. If the invention be publicly known in any part of the realm, in Ireland or the colonies for instance, he is not the true and first inventor(*o*). But a description of a similar process in a book, or in the specification of a previous patent, must, to defeat a patent, impart such information as to enable any one of reasonable intelligence in that department of art or industry to reckon with confidence on the result(*p*).

73 *The subject-matter of a patent.*—The subject-matter of the grant is "any manner of new manufactures." The word "manufacture" in the statute may be construed in one of two ways. It may mean the

(*f*) *Feather v. The Queen*, 35 L. J., Q. B. 200.

(*g*) *Barber v. Walduck*, cited 1 C. & P. 567.

(*h*) *Stead v. Williams*, 7 M. & G. 818. See *Heurteloup's case*, 1 Webst. R. 558.

(*i*) *Cornish v. Keene*, 1 Webst. R. 507.

(*k*) *Tennant's case*, 1 Webst. R. 125.

(*l*) *Losh v. Hague*, 1 Webst. R. 202. See *R. v. Arkwright*, Dav. P. C. 61.

(*m*) *Minter v. Wells*, 1 Webst. R. 132.

(*n*) *Bloxam v. Elsee*, 1 C. & P. 558.

(*o*) *Brown v. Annandale*, 1 Webst. R. 433. *Roebuck v. Sterling*, ib. 45, 451

(*p*) *Betts v. Neilson*, L. R. 3 Ch. App. 429; 5 Eng. & Ir. App. 1.

machine when completed, or the mode of constructing the machine(*q*). "The word 'manufacture,'" said Abbott, C.J.,(*r*) "has been generally understood to denote either a thing made which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope and many others; or to mean an engine or instrument, or some part of an engine or instrument, to be employed either in the making of some previously known article, or in some other useful purpose—as a stocking frame, or a steam-engine for raising water from mines; or it may, perhaps extend also to a new process to be carried on by known implements, or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. No merely philosophical or abstract principle can answer to the word 'manufactures.' Something of a corporeal and substantial nature—something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is required to satisfy this word"(*s*). And it is now perfectly well established that a method or process in itself, and apart from its produce or results, or from the substances used in the process, may be the subject of a patent privilege, proved some beneficial result, such as the cheaper or better production of the product, is attained from the use of such method or process(*t*).

Thus there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such articles(*u*), or for the mere omission of one of several parts of a process, by which the article is manufactured cheaper or better(*x*); for a new method of lessening the consumption of fuel in fire-engines(*y*); for a method of securing buildings from fire(*z*); for an improvement in the construction of chairs(*a*); for a method of giving fire to artillery and all kinds of fire-arms(*b*), and the like. So a patent may be sustained for a combination of processes, each of which

(*q*) Parke, B., *Morgan v. Seaward*, 2 M. & W. 558.

(*r*) R. v. Wheeler, 2 B. & Ald. 349.

(*s*) And see *Boulton v. Bull*, 2 H. Bl. 481, 492, per Eyre, C.J., and Heath, J., *Huddart v. Grimshaw*, Dav. P. C. 278, per Ld. Ellenborough.

(*t*) *Crane v. Price*, 4 M. & G. 580. *Wright v. Hitchcock*, L. R., 5 Exch. 37.

(*u*) *Hill v. Thompson*, 3 Mer. 629, per Lord Eldon, C. See *Parkes v. Stevens*, L. R., 9 Eq. Ca. 36.

(*x*) *Russell v. Cowley*, 1 Webst. R. 464.

(*y*) *Hornblower v. Boulton*, 8 T. R. 95.

(*z*) 2 H. Bl. 493, per Eyre, C.J.

(*a*) *Minter v. Wells*, 1 Cr. M. & R. 505.

(*b*) *Forsyth's case*, 1 Webst. R. 95.

was previously well known, provided the combination be new and produces a beneficial result(c). But the use of a new material to produce a known article cannot be the subject of a patent, unless some invention and ingenuity are displayed in the adaptation(d).

However, as the title and terms of the letters patent in most cases convey but very imperfect information as to the real subject-matter of the patent, and as one of the fundamental principles upon which a patent rests is (as has been mentioned before) that the public shall have the benefit of the invention after the prescribed period has elapsed, the grant always provides that the letters patent shall be void, unless a sufficient description of the nature of the invention, and in what manner the same is to be performed,—so as to enable any person of moderate skill and knowledge in that department of manufacture to which it relates, to practise and enjoy the invention at the expiration of the term in as ample and beneficial a manner as the patentee himself(e), — (called the specification)(f), be filed in the Court or Chancery(g) within a given time. It follows from this, that the specification forms an essential part of the patent contract, if such a term be allowable, and that an incorrect or imperfect or ambiguous specification(h), or one calculated to mislead(i), or materially differing from the letters patent, will, if the defence be properly raised by the pleadings(k), and such ambiguity, incorrectness, etc., has not been removed by disclaimer or alteration under the provisions of the several statutes passed for that purpose(l), be sufficient to defeat the plaintiff's claim or avoid the patent(m). Mere generality of the title, however, if not inconsistent with the specification, will not do so, and, indeed, the specification generally limits the description of the patent(n). Nor, on the other hand, will a small and immaterial variation entitle a person to infringe a patent(o).

(c) *Cannington v. Nuttall*, L. R., 5 Eng. & Ir. App. 205.

(d) *Rushton v. Crawley*, L. R., 10 Eq. Ca. 522.

(e) *Campion v. Benyon*, 3 B. & B. 12, per Park, J. *Buller J., R. v. Arkwright*, Dav. P. Ca. 106. *Crossley v. Beverley*, 9 B. & C. 63.

(f) See as to provisional and complete specification, 15 & 16 Vic. c. 83. *Thomas v. Welch*, L. R., 1 C. P. 192. *Ex parte Manceaux*, L. R., 5 Ch. App. 518. 6 *Ibid.* 272. *Ex parte Scott & Young*, *Ibid.* 274.

(g) 15 & 16 Vict. c. 83, s. 27.

(h) *Campion v. Benyon*, 3 B. & B. 5. *Turner v. Winter*, 1 T. R. 602. *Simpson v. Holliday*, L. R., 1 H. of L. 315.

(i) *Savory v. Price*, Ry. & Mo. 1.

(k) See *Derosne v. Fairie*, 2 C. M. & R. 476.

(l) 5 & 6 Will. 4, c. 83; see s. 1. 7 & 8 Vict. c. 69; see ss. 5 & 6. See *Ralston v. Smith*, 35 L. J., C. P. 49.

(m) *R. v. Wheeler*, 2 B. & Ald., 345. *Jessop's case*, cited 2 H. Bl. 489.

(n) *Forsyth's case*, 1 Webst. R. 95.

(o) *Gibbs v. Cole*, 3 P. Wms. 255.

A patent cannot be taken out for a principle, but it can for a principle coupled with the mode of carrying the principle into effect(*p*). Although machinery be employed, the machinery may not be of the essence of the invention, but only incidental to it(*q*). It follows from this that an invention may be infringed by adopting the same general idea, although carrying it on by different means(*r*). The invention must be new to satisfy the terms of the statute, yet every novelty is not an invention for which a patent may be granted(*s*), for it must be of public utility also. If, however, it be new and useful, it is not material whether it result from long experiment, profound research, and great expense, or whether from some sudden and lucky thought or mere accidental discovery(*t*).

74 *Remedies for infringement.*—The infringement of letters patent is prohibited by a clause contained in the letters patent, and the remedy for such infringement is either by action at law for damages(*u*), in which action an injunction and an account may now be ordered(*v*), or by a bill in equity for an injunction, which the court granted formerly on the principle of the fraudulent interference by the defendant with property to which the plaintiff had, at all events, a colorable possessory title(*x*), and upon which the Court of Chancery, under recent acts, may now give complete remedy, without sending the applicant to a court of law for redress(*y*). The Court of Chancery may also award damages under 21 & 22 Vict. c. 27(*z*).

A person is guilty of a breach of patent privilege who, directly or indirectly, by himself or his servants, has used the art or invention which has been made the subject of the privilege, or applied it in any way for his own profit or benefit(*a*). And if the defendant has employed means only colorably different to produce the same or a similar result, yet he is guilty of an infringement if he has, in fact, used the art which is the subject of the privilege(*b*).

(*p*) *Jupe v. Pratt*, *infra* per Alderson, B.

(*q*) *Boulton v. Watt*, 2 H. Bl. 496, per Eyre, C.J.

(*r*) *Jupe v. Pratt*, 1 Webst. R. 146.

(*s*) Webster on Patents, pp. 24, 25, Supplement. *Ralston v. Smith*, *supra*.

(*t*) *Crane v. Price*, 4 M. & G. 605, per Tindal, C.J.

(*u*) 21 Jac. 1, c. 3, s. 2. Com. Dig. Patent, E. 2. As to particulars of breaches, 15 & 16 Vict. c. 83, s. 41.

(*v*) 15 & 16 Vict. c. 83, s. 42.

(*x*) Per Lord Eldon, 6 Ves. 707. *Hill v. Thompson*, 3 Mer. 622. *Bickford v. Skewes*, 4 My. & Cr. 500. See *post*, ch. 23, s. 1. But see *Collard v. Allison*, 4 My. & Cr. 487.

(*y*) *Betts v. Neilson*, *infra*.

(*z*) *Penn v. Jack*, L. R., 5 Eq. Ca. 81.

(*a*) *Betts v. Neilson*, L. R., 3 Ch. App. 429; 5 Eng. & Ir. App. 1, in which case the user was simply by transmission through this country. *Upman v. Elkan*, L. R., 12 Eq. Ca. 140, *acc.*

(*b*) *Hindmarch on Patents*, 257. See *Gillett v. Wilby*, 9 C. & P. 334; *Jupe v. Pratt*, *supra*.

The vending of the patented article is prohibited by the terms of the grant, and is, therefore, an infringement, though done in ignorance(c); and so is the importation and sale in England of articles manufactured abroad, according to the specification of an English patent(d). But this does not extend to an exposure for sale only(e), nor is the sale of a patented article, as part of the effects of a bankrupt or deceased person, it would seem, within the objects intended to be prohibited(f).

The letters patent, so long as they exist, that is, until cancelled by the judgment on a *scire facias*, entitle the patentee to assert his right at law, although he may have been defeated in other actions(g).

The unauthorized use of the name of the patentee is made an infringement, and a penalty of 50*l.* is imposed for such user by 5 & 6 W. 4, c. 83, s. 7.

Letters patent may be granted for an improvement on an existing patent(h), but the user of such, without a license, or before the expiration of the term, would be an infringement on the first patent(i), provided that be useful; but, although the original patent be useless, and therefore not the subject of an infringement, it does not follow that the improvement upon it is useless(k).

75 Remedies for infringement by assignees and licensees.—The letters patent are granted to the patentee and his personal representatives, or assigns(l). The assignments which may be made are of two kinds—either by the act of the party(m), or by act and operation of law, as in the case of a bankrupt(n) or administrator. Such assignment confers as absolute a title as the patentee himself possessed, and the assignee may sue for any infringement, or file a bill for an injunction, either in his own name only(o), or together with the patentee (if the patentee retains any interest in the patent), for though the interest be several, the damage by infringement is joint(p). Each co-owner of a patent,

(c) *Wright v. Hitchcock*, L. R., 5 Exch. 37.

(d) *Elmslie v. Boursier*, L. R., 9 Eq. Ca. 217.

(e) *Minter v. Williams*, 4 A. & E. 251.

(f) See *Sawin v. Guild*, 1 Gallison, U. S. R. 435. And see *Holmes v. L. & N. W. Rail.*, Macr. P. C. 12, 21 *et seq.*

(g) See *R. v. Arkwright*, Dav. P. Ca. 61.

(h) *Morris v. Branson*, Bull. N. P. 76c.

(i) *Ex parte Fox*, 1 V. & B. 67.

(k) *Lewis v. Davis*, 3 C. & P. 502.

(l) See *Duvergier v. Fellows* 10 B. & C. 829, and form given in the schedule to 15 & 16 Vict. c. 83.

(m) *Cartwright v. Amatt*, 2 B. & P. 43.

(n) *Hesse v. Stevenson*, 3 B. & P. 565.

(o) *Bloxam v. Elsee*, 6 B. & C. 169. *Hassall v. Wright*, L. R. 10 Eq. Ca. 509.

(p) 2 Wm. Saund. 115, 116a.

however, may sue for an infringement(*q*), for he is entitled to all the profit he may make by working it(*r*). The patentee may also license others to exercise the invention, provided the terms of the grant authorize such license, and such licenses may be either common or exclusive(*s*). The only right, however, which such licensee (whether a common or exclusive one) obtains being one of user, he cannot sue for any infringement. He may, however, recover for any special damage which he may have sustained from those exercising the invention without license, if the letters patent are valid(*t*). The patentee is estopped from denying the validity of the patent as between himself and his assignee or licensee(*u*). And so may the assignee or licensee be as between himself and the patentee(*x*). As against third persons the assignment must be registered under 15 & 16 Vict. c. 83 (see s. 35), to entitle the assignee to sue(*y*). But as between the assignor and assignee, or licensees from the assignor with notice of the assignment no such registration is, it seems, necessary(*z*). If the owner of a patent manufactures and sells the patented article both in this country and abroad, the sale of the article in one country implies a license to use it in the other. But if he has assigned it in either country, the article cannot be sold in that country so as to defeat the rights of the assignee(*a*).

76 *Pleas—Want of novelty(b) or utility.*—Novelty is an essential condition of the grant, for if the invention were not new, one of the main considerations upon which the exclusive use of the invention is granted would fail, and further, there would be no benefit to the public, so that the grant would be void by the common law. If an invention be new in England, a patent may be granted for it, although it was practised beyond sea before(*c*), and for the purpose of granting a patent the United Kingdom is now one country(*d*). The novelty may consist in the combination of old materials to produce a new result(*e*). But if

(*q*) *Dunncliff v. Mallet*, 7 C. B., N. S. 209. *Walton v. Lavater*, 8 ib. 162.

(*r*) *Mathers v. Green*, L. R., 1 Ch. App. 29.

(*s*) *Protheroe v. May*, 5 M. & W. 675.

(*t*) *George v. Beaumont*, cited in Webster on patents, pp. 24, 128.

(*u*) *Oldham v. Langmead*, 3 T. R. 439.

(*x*) *Baird v. Neilson*, 8 Cl. & F. 726. *Bowman v. Taylor*, 2 A. & E. 278.

(*y*) *Chollett v. Hoffman*, 7 E. & B. 686.

(*z*) *Hassall v. Wright*, L. R., 10 Eq. Ca. 509.

(*a*) *Betts v. Willmott*, L. R., 6 Ch. App. 239.

(*b*) See *Amory v. Brown*, L. R., 8 Eq. Ca. 663.

(*c*) *Edgeberry v. Stephens*, 2 Salk. 446.

(*d*) 15 & 16 Vict. c. 83, s. 18. This was not so formerly. See 6 Ves. 708, per Lord Eldon, C., *Crown v. Armandale*, 1 Webst. R. 433.

(*e*) *Cornish v. Keene*, 3 B. N. C. 570. And see *Parkes v. Stevens*, L. R., 8 Eq. Ca. 358; 33 L. J. Ch. 627.

any part of an invention comprised in a patent and claimed in the specification be not new, although the remainder is, the patent will be void(*f*), for the consideration for the grant of a patent being what is termed in law entire, if any part of it fail, the patent is void(*g*). If the contrivance, or process, or art (whichever term be used) be new, although applied to an old object, the patent is valid; but if the contrivance, or any essential part of it, be old, it is void, although applied to a new object(*h*). So the mere application of an old contrivance in the old way to an analogous subject, without any novelty in the mode of applying such old contrivance to the new purpose, is not a valid subject-matter of a patent (*i*), *e.g.*, the substitution of wooden planking on an iron frame for the construction of ships, instead of, as previously, similar planking on a wooden frame(*k*).

Experiments made upon the same line, and almost, if not entirely, tending to the same result, although they are known to many persons, if they rest in experiment only, and have not attained the object for which a patent is subsequently taken out—mere experiment, afterwards supposed by the parties to be fruitless, and abandoned because not brought to a complete result—will not prevent another person availing himself of their discoveries, so far as they have gone, and, by adding the last link of improvement, bringing it to perfection(*l*). The prior use of an invention need not be general; a single instance would, it seems, suffice(*m*), but it must be public(*n*); and the meaning of public use is this, that a man shall not by his own private invention, which he keeps locked up in his own breast or in his own desk and never communicates, take away the right that another man has to a patent for the same invention(*o*). It must be new at the time of the grant(*p*).

Utility is an essential condition of the validity of letters patent, for a monopoly in an invention altogether useless would be mischievous to the State and to the hurt of trade, and generally inconvenient, by precluding all improvements thereon until the expiration of the

(*f*) *Kay v. Marshall*, 5 B. N. C. 492; 4 M. & G. 193 n.

(*g*) *Brunton v. Hawkes*, 4 B. & Ald. 541.

(*h*) *Losh v. Hayne*, 1 Webst. R. 207, per Lord Abinger, C. B.

(*i*) *Harwood v. Great Northern Railway*, 35 L. J., Q. B. 27.

(*k*) *Jordan v. Moore*, L. R., 1 C. P. 624.

(*l*) *Galloway v. Bleaden*, 1 Webst. R. 529, per Tindal, C. J.

(*m*) *Carpenter v. Smith*, 1 Webst. R. 534. *Betts v. Neilson*, *ante*, p. 64.

(*n*) *Lewis v. Marling*, 4 C. & P. 52.

(*o*) *Abinger, C. B.*, in *Carpenter v. Smith*.

(*p*) 21 Jac. c. 3, s. 6. This is otherwise in the United States, where the question is whether it was new at the time of the discovery. *Phillips on Patents*, p. 152 *et seq.*, 188 *et seq.*

patent(*q*), and if the utility of the invention be denied, affirmative evidence of utility must be given(*r*). But the utility of part, if on the whole a beneficial effect is produced, will not vitiate. And if a machine be useful in the majority of cases, its inutility in some instances will not vitiate(*s*). If, however, several distinct inventions are comprised in a patent, and one of them is useless, the whole patent is void, for reasons that have been previously given(*t*). If the article that is produced by the machine be old, it must be furnished to the public at a cheaper rate, or in some way rendered a better commodity for trade. The community must receive some benefit from the invention.

77 *Statutory benefits and burthens*.—A person who seeks for and accepts some statutory benefit to which a burthen is attached, cannot take the benefit and reject the burthen. Where, therefore, the king, for the benefit of the public, has made a grant of any property, benefit, right, or privilege, imposing at the same time certain public duties or obligations, and the grant has been accepted, the public may enforce the performance of the duty by indictment, and individuals peculiarly injured by action(*u*). When statutory powers and authorities are granted by permissive words, they are permissive only so long as the benefits they confer are not taken under them, for as soon as the grantee takes the advantage of the statute, and acts on their powers, he takes all the burdens attached by those acts to the benefits, and is liable to an action at the suit of any person who has sustained special damage by the non-performance of the statutory duty(*x*).

Where a duty is imposed by statute upon a public officer, and no provision is made for the payment of any renunciation, an action is not maintainable upon the statute for the recovery of any remuneration(*y*).

(*q*) *Morgan v. Seaward*, 2 M. & W. 562, per Parke, B.

(*r*) *Marton v. Parker*, Dav. P. Ca. 327. In the United States it is sufficient, it seems, if the invention be not injurious, and may be useful. *Bedford v. Hunt*, 1 Mason, 302.

(*s*) *Haworth v. Hardcastle*, 1 B. N. C. 189.

(*t*) And see *Hill v. Thompson*, 8 Taunt. 401, Dallas, J.

(*u*) *Lyme Regis (Mayor of) v. Henley*, 1 B. N. C. 222; 2 Cl. & Fin. 331.

(*x*) *Nicholl v. Allen*, 1 B. & S. 916; 31 Law J., Q. B. 283. See *ante*, p. 49.

(*y*) *Jones v. Carmarthen (Mayor of, etc.)*, 8 M. & W. 605.

CHAPTER II.

OF INFRINGEMENTS UPON RIGHTS NATURALLY INCIDENT TO THE POSSESSION AND OWNERSHIP OF LAND.

SECTION I.—*Of the right and burthen of natural servitude.*—Torts arising from disturbance of rights of servitude—Natural and necessary servitudes—Dominant and servient tenements—Prædial and urban servitudes—Servitudes accessorial to the drainage of lands—Of the natural servitude of support from adjoining lands—Mutual rights and duties of separate owners of the surface and subsoil—Abridgement of the right and servitude of support by express contract—Transfer of natural servitudes—Torts arising from the diversion of running water—Diversion of water for purposes of irrigation and drainage—Effect of acquiescence in the unlawful diversion of water—Of the right to pen back water—Injuries from the defilement of streams—Disturbance of the permissive use and enjoyment of water—Right to well water—Statutory interest of navigation companies in the water of navigable rivers.

SECTION II.—*Of the remedy by action and by injunction for infringements of rights incident to the possession and ownership of land.*—Direct and consequential injuries—Parties to be made plaintiffs—Tenant and reversioner—Parties to be defendants—Declaration of the cause of action—Pleadings—Defences—Evidence—Damages—Apportionment of damages as between tenant and reversioner—Injunction to prevent the disturbance of rights incident to the possession and ownership of land—Jurisdiction of the Court of Chancery to prevent infringements of legal rights—Injunction to restrain the diversion of water—Injunction to prevent obstruction to the repair of a watercourse *in alieno solo*.

SECTION I.

OF THE RIGHT AND BURTHEN OF NATURAL SERVITUDE.

78 *Torts arising from the Disturbance of rights of servitude.*—We have already seen that every invasion of a man's legal right constitutes a tort or civil wrong, in respect of which compensation in damages is

recoverable (*ante*, p. 8); and one of the most interesting and important branches of the law of torts is the law regulating the rights, duties, and responsibilities of neighboring landowners, in respect of the use and enjoyment of their respective properties.

79 *Natural and necessary servitudes*.—The unrestricted ownership of property naturally carries with it a right to do whatever the owner pleases with his property, without regard to the question whether what he does tends to the injury of another or not; but the common interests of mankind require certain restrictions to be placed upon this freedom of ownership, to prevent one proprietor from so using and managing his property as to render it a source of injury and annoyance to another. Thus, it is impossible for landed property to be beneficially occupied and enjoyed unless one landowner, or occupier, is prevented from damming up or diverting the natural streams and watercourses on his land, and thereby depriving his neighbor of water, which would otherwise naturally flow to him. Neither could land be usefully and beneficially cultivated or enjoyed if one man was allowed to dig pits, mines, or quarries, so near to the boundary of his estate, that his neighbor's land, being deprived of its natural support, would slide down and sink into the hollow(*a*).

Every landed estate, therefore, is burthened with a certain duty or service, which it is bound by law to render to the adjoining property. In the Roman law this service was denominated a servitude—a term used to denote both the right and the obligation(*b*). The Roman servitude was either affirmative or negative. The affirmative servitude bound the proprietor to suffer something to be done on his own land for the benefit of the adjoining estate. The passive servitude merely required him to refrain from doing something, which, if done, would be injurious to his neighbor.

80 *Dominant and servient tenements*.—The land on which the burthen was imposed was called the servient tenement, and the estate, or property which had the right to the servitude was called the dominant tenement. The existence of the benefit in favor of one property, and the burthen thereby imposed upon another, depended upon the lands being so situate as to render it a necessary adjunct to the beneficial use and enjoyment of the dominant tenement; and the exercise of the

(a) *Bonomi v. Backhouse*, Ell. Bl. & Ell. 659. See *Lasala v. Holbrook*, 4 Paige 169.

(b) Item a jure imponitur servitus prædiorum vicinorum: scilicet ne quis stagnum suum altius tollat, per quod tenementum vicini submergatur; item ne faciat fossam in suo per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte. Bracton, lib. 4. fol. 221.

right of servitude was confined to what was reasonable and necessary for such enjoyment, and merely accessorial thereto.

81 *Prædial and urban servitudes*.—Servitudes among the Romans were further divided into prædial and urban servitudes. The term “prædial servitude” was used to denote the burthen imposed upon one field, or parcel of cultivated ground, in favor of the use and enjoyment of another adjoining piece of cultivated land; whilst the term “urban servitude” was applied to the burthens imposed upon houses and buildings, whether situate in town or country. In the Roman law, through the operation of urban servitudes, one neighbor might be permitted to place a beam upon the wall of another; or might be compelled to receive the droppings and currents from the gutter-pipes of another man’s house upon his own house, area, or sewer; or might be exempted from receiving them; or restrained from raising his house in height, lest he should darken the habitation of his neighbor(c). But our own law does not impose any such burthen, *ex jure naturæ*, upon adjoining proprietors; but the servitude may be established by contract, grant, or prescription (*post*, ch. 3).

There are, therefore, two principal classes of servitudes in our law, viz., natural servitudes, which are derived from the situation of places, and are a necessary and natural adjunct to the properties to which they are annexed; and conventional servitudes, which are founded on contract, and are established by grant or prescription (*post*, ch. 3).

The right and burthen of natural servitude are contemporaneous with the right of property itself(d).

82 *Natural and necessary servitudes accessorial to the drainage of land*.—

Land cannot be cultivated or enjoyed unless the springs which rise on the surface and the rains that fall thereon be allowed to make their escape through the adjoining and neighboring lands. All lands, therefore, are of necessity burthened with the servitude of receiving and discharging all waters which naturally flow down to them from lands on a higher level; and if the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the higher lands to be flooded, he is responsible in damages for infringing the natural right of the possessor of such higher lands to the natural outfall and drainage of the soil, unless he has gained a right to pen back water by contract, grant, or prescription, in the manner presently

(c) Instit. lib. 2, tit. 3, s. 1.

(d) Pardessus, Tr. des. Serv. Introduction, 1.

pointed out (*post*, p. 80)(*e*). So if the proprietor of the higher lands alters the natural condition of his property, and collects the surface and rain-water together at the boundary of his estate, and pours it in a concentrated form, and in unnatural quantities upon the land below, he will be responsible for all damage thereby caused to the possessor of the lower lands(*f*).

Every land proprietor has, *ex jure naturæ*, a right to the continued flow of natural streams and rivulets running through his land, and a right to the reasonable use of the water of such streams. Lands, therefore, through which a natural stream flows, are burthened with the servitude of receiving and transmitting the waters of the stream to the lower land; and the possessor of the land, through which the stream runs, is clothed with the duty of keeping the channel and bed thereof free from artificial and unnatural obstructions.

In the Roman law, we find that every proprietor of land is enjoined to refrain from doing anything on his land to impede the natural flow of water from the high land to the land below, whilst the proprietor of the higher land is prohibited from sending, by means of artificial contrivances, larger quantities of water on to the lower land than would naturally flow there, or altering the course of streams and giving a new direction to the surface water, to the prejudice of the proprietor of the lower land(*g*).

In the Code Napoleon, under the head of "*Servitudes derived from the Situation of Places*," we read, that "All lower lands are subjected, as regards those which are higher, to receive the waters which flow naturally therefrom, to which the hand of man has not contributed. The proprietor of the lower ground cannot raise a bank which shall

(*e*) *Shury v. Piggot*, 3 Bulstr. 340. *Chasemore v. Richards*, 7 H. L. C. 349; 29 Law J., Exch. 81, Dig. lib. 39, tit. 3. In a late case decided in Wisconsin, Chief Justice Dixon denies the existence, at common law, of such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow; and declares that at common law the proprietor of the inferior or lower tenement or estate may, if he chooses, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon, or off, on to, or over the lands of other proprietors without liability for injuries ensuing from such obstruction or diversion. *Hoyt v. City of Hudson*, 27 Wis. 656. This is the rule in Maine, Massachusetts, New York, Connecticut, Vermont, New Jersey and New Hampshire. *Sweet v. Cutts*, 50 N. H. 439; *Goodale v. Tuttle*, 29 N. Y. 459; *Wagner v. Long Island R. R. Co.*, 5 Sup. Ct. (N. Y.) 163; Trustees of the village of Delhi v. Youmans, 50 Barb. 316; *Waffle v. N. Y. Central R. R.*, 58 id. 413; *Bangor v. Lausil*, 51 Me. 521; *Bowlsby v. Speer*, 31 N. J. Law R. (2 Vroom.) 351; *Dickenson v. Worcester*, 7 Allen, 19; *Parks v. City of Newburyport*, 10 Gray, 29; *Chatfield v. Wilson*, 28 Vt. 49. See *Earl v. De Hart*, 1 Beasley (N. J.), 280.

(*f*) *Sharpe v. Hancock*, 8 Sc. N. R. 46. See *Harrison v. Great Northern R. Co.*, 33 Law J., Exch. 267; *Miller v. Lanback*, 47 Penn. St. 154; *Adams v. Walker*, 34 Conn. 466. See *Pettigrew v. Village of Evansville*, 25 Wis. 223.

(*g*) *Pardessus*, part 2, ch. i. s. 1. Obligations qui concernent les eaux. Dig. lib. 8, De Servitutibus.

prevent such flowing, nor can the superior proprietor of the higher lands do anything to increase the servitude of the lower lands"(h).

83 *Statutory powers for the improvement of the drainage of lands* for agricultural purposes have recently been conceded or extended to various drainage boards, or public bodies facilitating the removal of weirs, dams, and obstructions in streams and rivers, and the granting of compensation to the owners of them; the deepening, cleansing, repairing, and maintaining watercourses or outfalls for water, and walls and defences against the inroads of water, and the making and maintaining of new drains, watercourses and outfalls(i). Power is also given to private owners to procure outfalls(k).

84 *Of the natural servitude of support from adjoining lands.*—Every proprietor of land is entitled of common right to such an amount of lateral support from the adjoining land of his neighbor as is necessary to sustain his own land in its natural state, not weighted by walls or buildings(l). If the land has been weighted by superstructures, the landowner who has thus weighted his land is not entitled, *ex jure naturæ*, to the additional support from his neighbor's soil, necessary for the maintenance of the buildings, for one landowner cannot by altering the natural condition of his land by erecting buildings thereon, deprive his neighbor of the privilege of using his land, as he might have done before(m). But where the houses are ancient, and the additional support required by them has been enjoyed for twenty years, the owner will, in general, have acquired a right to the continued enjoyment of such additional support(n).

(h) Cod. Nap. No. 640, 642. Hoyt v. City of Hudson, 27 Wis. 656. This is the rule in Louisiana (Hooper v. Wilkinson, 15 La. An. 497; Burrow v. Landry, 15 La. An. 681); and it seems to be the rule in Pennsylvania, Iowa, Illinois, and, perhaps, in Missouri and Ohio. Kaufmann v. Griesmer, 26 Penn. St. 407; Martin v. Riddle, id. 415; Livingston v. McDonald, 21 Iowa, 160; Gillham v. Madison Co. R. R. Co., 49 Ill. 484; Laumier v. Francis, 23 Mo. 181; Butler v. Peck, 16 Ohio St. 334.

(i) See 10 & 11 Vict. c. 38, 24 & 25 Vict. c. 133, and 32 & 33 Vict. c. 72; Griffiths v. Langdon and Ellersfield Drainage Board, L. R., 6 Q. B. 738. As to Ireland, 26 & 27 Vict. c. 88; 27 & 28 Vict. c. 72, and 28 and 29 Vict. c. 52.

(k) 24 & 25 Vict. c. 133, s. 72, *et seq.*

(l) Humphries v. Brogden, 12 Q. B. 744. Solomon v. Vintners' Company, 4 H. & N. 585; 25 Law J., Exch. 370. See Murchie v. Black, *post*, p. 76; Farrand v. Marshall, 21 Barb. 409; Lasala v. Holbrook, 4 Paige, 169.

(m) Wyatt v. Harrison, 3 B. & Ad. 875. Partridge v. Scott, 3 M. & W. 220. Lasala v. Holbrook, 4 Paige, 169. Thurston v. Hancock, 12 Mass. 220. Radcliff's Executors v. Mayor, etc., of Brooklyn, 4 N. Y. 195.

(n) Hunt v. Peake, 1 Johns. 710; 29 Law J., Ch. 785. In the Roman law, under the head of legal restrictions upon rights of property, we find that no proprietor of land was permitted to excavate on his own land so as to endanger his neighbor's building; but that every man erecting a new building was bound to place the new structure a certain distance from his neighbor's boundary.

In an old case in Rolle's "Abridgement," it is said, that "if *A* be seised in fee of copyhold land closely adjoining the land of *B*, and *A* erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of *B*, if *B* afterwards dig his land so near to the foundation of the house of *A*, but not in the land of *A*, that by it the foundation of the messuage, and the messuage itself, fall into the pit, still no action lies by *A* against *B*, inasmuch as it was the fault of *A* himself that he built his house so near the land of *B*, for he cannot by his own act prevent *B* from making the best use of his land that he can: but it seems, that a man who has land closely adjoining my land, cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie"(o).

If a man digs a well on his own land so close to the soil of his neighbor as to require the support of a rib of clay or stone in his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone which is his own property, and thereby letting out the water, unless a prescriptive right to the use of the water has been gained by twenty years' uninterrupted enjoyment(p).

85 *Of the natural servitude of support from the subsoil to the surface of land, when the surface and subsoil constitute separate freeholds vested in different proprietors—Mutual rights and duties of separate owners of the surface and subsoil.*—The possession of the surface of land may be in one man and the subsoil in another, by separate grants from the owner of the inheritance; or the owner may grant the surface to another to be cultivated and enjoyed, reserving to himself a right to the subsoil, and to all stones and minerals beneath the surface. When land is so held each proprietor is possessed of a "close," and has a separate and distinct freehold. If the owner of land grants the subsoil, reserving the surface to himself, he impliedly grants reasonable means of access to the subsoil, and the grantee would have a right to go upon and dig through the surface, to enable him to reach the subsoil, if he had no other means of access thereto. But the owner of the subsoil may maintain an action against the owner of the surface if he digs holes in the

(o) *Wilde v. Minsterley*, 2 Roll. Abr. 565. See *Radcliff's Executors v. Mayor, etc., of Brooklyn*, 4 N. Y. 195, 202.

(p) *Tindal, C.J., Acton v. Blundell*, 12 M. & W. 333. *Reg. v. Metrop. Board*, 32 Law J., Q. B. 110. The rule stated in the text might not apply if the excavation was made maliciously and with a view to destroy the neighbor's well. See *Wheatley v. Baugh*, 25 Penn. St. 532; *Sweet v. Cutts*, 50 N. H. 439; *Greenleaf v. Francis*, 18 Pick. 117; *Roath v. Driscoll*, 20 Conn. 533; but see *Chatfield v. Wilson*, 28 Vt. 49; and see *post*, ch. 3.

subsoil to a greater extent than is reasonably necessary for the proper and fair use, cultivation and enjoyment of the surface(*g*); and the owner of the surface may, on the other hand, maintain an action against the owner of the subsoil if the latter carries on his mining and subterranean operations so as to interfere with the fair use and enjoyment of the surface in accordance with the ancient maxims, "prohibetur ne quis faciat in suo quod nocere possit alieno," and, "sic utere tuo ut alienum non lædas"(*r*).

The owner of the surface, therefore, is entitled of common right to the support of the subjacent strata, so that the owner of the subsoil and minerals cannot lawfully remove them without leaving support sufficient to maintain the surface in its natural state(s). This is a rule of law founded on natural justice, and is a restraint on the exercise of dominion over property essential to the beneficial occupation and enjoyment of the soil. If land not granted expressly for building purposes is weighted with buildings, the owner of the surface has no right to the additional support necessary for the maintenance of the buildings, until he has acquired the right by grant or prescription (*post*, ch. 3); so that if the owner of the subsoil in working mines leaves sufficient support for the surface, but the land sinks in consequence of the weight of the buildings that have been placed upon it, the owner of the subsoil is not responsible for the damage done(*t*). But if the weight of the buildings has in no way caused the sinking of the land, and the land would have fallen in whether buildings had been erected on it or not, the building on the land becomes quite immaterial, and the defendant is responsible in damages to the extent of the injury done to both houses and land(*u*).

Upon every demise of mineral or other subjacent strata the lessor impliedly retains his right of support from the subsoil to the surface,

(*g*) *Cox v. Glue*, 5 C. B. 551.

(*r*) *Wilkinson v. Proud*, 11 M. & W. 33. *Rowbotham v. Wilson*, 8 Ell. & Bl. 142; 8 H. L. C. 339; 30 Law J., Q. B. 965. The rule is otherwise in California, where the rights of the settler on mineral lands for the purpose of agriculture are by statute made subject to the rights of the miner. *McClintock v. Bryden*, 5 Cal. 97. As to the rule in Pennsylvania, see *Jones v. Wagner*, 66 Penn. St. 429.

(*s*) *Humphries v. Brogden*, 12 Q. B. 739; 28 Law J., Q. B. 10. *Smart v. Morton*, 5 Ell. & Bl. 47; 24 Law J., Q. B. 260. *Roberts v. Haines*, 27 ib. Exch. 49. As to copyhold allotted under an Inclosure Act, see *Wakefield v. Duke of Buccleugh*, 36 Law J., Ch. 763. L. R. 4 Eq. Ca. 613. 4 Engl. & Ir. App. 377. *Post*, ch. 3, sec. 2.

(*t*) *Backhouse v. Bonomi*, 9 H. L. C. 503; affirming *Bonomi v. Backhouse*, Ell. Bl. & Ell. 622; 28 Law J., Q. B. 378.

(*u*) *Brown v. Robins*, 4 H. & N. 191; 28 Law J., Exch. 250. *Rogers v. Taylor*, 2 H. & N. 828; 27 Law J., Exch. 175. *Hamer v. Knowles*, 6 H. & N. 454; 30 Law J., Exch. 102. *Hunt v. Peake*, 1 Johns. 712; 29 Law J., Ch. 785.

in the absence of express words showing distinctly that he has waived or qualified his right(v).

If the owner of the subsoil excavates it without leaving proper support for the surface, the owner of the surface has no right of action until some actual damage has been sustained by him. "If that were not so, the owner of the subjacent land could not abstract the minerals, nor avail himself of the full benefit of his property, without being liable to an action; though, before any damage had actually occurred he had, by substituting other means of support, removed all danger of injury to the plaintiff's property. This would be wholly inconsistent with the right of the proprietor to use his property as he pleases, provided he does not injure that of his neighbor"(x).

86 *Abridgement of the right and servitude of support by express contract.*—

If the owner of land with subjacent mines grants away the mines, together with the power of raising the minerals, without regard to any injury done thereby to the surface, such a grant would, it seems, be good, and would bind the inheritance, and his estate in the surface would pass to his assigns, abridged to that extent of the right of support from the minerals. Hence it seems to follow, that it is competent for the owner of the surface of land effectually to curtail by grant, in favor of the owner of subjacent mines, the right to support therefrom(y). And similarly where a man sells a portion of his land, or the whole of his land in several lots, he may by the stipulations contained in the conditions of sale deprive himself, or his vendee, as the case may be, of the right to lateral support from the adjoining land(z). However, where a man sold land adjoining his own, and the vendee covenanted by a separate deed that the vendor should not be liable for any subsidence of the land sold, created by the vendor working the mines under his own land adjoining, it was held that the vendor was, nevertheless, liable for such subsidence to persons who had purchased the land from the original vendee without any notice of the deed(a).

87 *Transfer of natural servitudes.*—Natural servitudes derived from the situation of places are regarded as appurtenant to the lands for whose benefit they exist, so that they cannot be alienated from the land, and

(v) *Dugdale v. Robertson*, 5 Kay & J. 700.

(x) *Per Wightman, J.*, *Bonomi v. Backhouse*, Ell. Bl. & Ell. 637; affirmed *ib.* 646; 28 Law J., Q. B. 378.

(y) *Rowbotham v. Wilson*, 8 Ell. & Bl. 123; 27 Law J., Q. B. 64; 8 H. L. C. 359; 30 Law J., Q. B. 965.

(z) *Murchie v. Black*, 34 Law J., C. P. 337.

(a) *Richards v. Harper*, L. R., 1 Exch. 199. In this case the land sold was copyhold, and the deed was not entered on the court rolls, but the court would, it seems, have decided in the same way (*diss. Pollock, C. B.*) had the land been freehold.

cannot be transferred from one person to another as benefits and privileges in gross. Being annexed to the land itself, the right to exercise them passes with the land to every owner and possessor of the dominant tenement.

88 *Torts arising from the diversion of running water.*—Every landed proprietor has a right to use the water of a natural stream flowing along his land for any reasonable purpose of his own, not inconsistent with a similar right in the proprietors of the land above and below; he cannot seriously diminish the quantity nor deteriorate the quality of the water which would otherwise descend, if by so doing he deprives another riparian proprietor of the beneficial use of the water, unless he has gained a title, by grant or prescription, so to use the water(b). But an artificial rivulet created by the drainage and pumping of a colliery may be diverted before it flows into the natural stream, and the proprietor on the banks of the natural stream will have no right of action for the diversion of that water(c). So, conversely, where a canal company has for many years diverted water from a stream, above the plaintiff's land, and has subsequently restored it, the plaintiff cannot complain of damage resulting from a flood caused by such restoration(d).

89 A right to the use and enjoyment of a natural watercourse and water is not affected by reason of the supply of water being uncertain and precarious, and dependent upon the dryness or humidity of the season. The intervention of a single dry season or of a series of dry seasons, cutting off all the water for a shorter or a longer period, cannot deprive a person of his right to the water when it re-appears again in its ancient channel. Where a natural stream, which had its rise in land of the defendant, whence it flowed by an underground channel to a lane dividing the defendant's land from the plaintiff's, meandered a little way down the lane before it entered the plaintiff's land, and the plaintiff slightly varied the ancient channel, by making a straight cut across the lane from the spout under the defendant's hedge to his own premises, it was held that his right to the water was not affected by so slight an alteration of the natural channel(e).

Diversion of water for purposes of irrigation and drainage.—If a man

(b) *Embrey v. Owen*, 6 Exch. 370. *Mason v. Hill*, 5 B. & Ad. 13. *Chasemore v. Richards*, 7 H. of L. Ca. 349; 26 Law J., Exch. 401. *Holsman v. Boiling Spring etc.*, Co. 1 McCarter (N. J.) 335. *McCallum v. Germantown Water Co.* 54 Penn. St. 40. *Cowles v. Kidder*, 4 Foster (N. H.) 364. *Davis v. Fuller*, 12 Vt. 178. *Brown v. Bowen*, 30 N. Y. 519. *Clinton v. Myers*, 46 N. Y. 511.

(c) *Wood v. Wand*, 3 Exch. 779.

(d) *Mason v. Shrewsbury and Hartford Railway, L. R.*, 6 Q. B. 578.

(e) *Hall v. Swift*, 6 Sc. 169. Dig. lib. 8, tit. 3, l. 35.

places a temporary bar or weir across a stream in order to turn it into his own land for purposes of irrigation and by that means seriously diminishes the current to the prejudice of a riparian proprietor lower down the stream, it is no answer to an action by the latter for damages to set up that the water was only temporarily arrested by the defendant for the purpose of enabling him to irrigate his land(*f*). The right of the possessor of land through which a natural stream flows to use the water of the stream for irrigation and for manufacturing purposes, depends upon the particular circumstances of each case, upon the volume of the stream, the extent of the loss of water from evaporation or absorption, and the amount of injury inflicted thereby upon other riparian proprietors. "On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil abutting on one part of the stream should irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water; and, on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden. It is entirely a question of degree, and it is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application"(*g*).

In the case of casual and intermittent surface waters not running in any defined channel, but spreading themselves over the surface of the land, there is nothing to prevent the landowner from dealing with them as he pleases(*h*), but he must not divert the perennial supply of water from a spring-head, or prevent it from flowing by a natural channel to the lands below(*i*). He has no right by any system of arti-

(*f*) *Sampson v. Hoddinott*, 1 C. B., N. S. 612. See *Miller v. Miller*, 9 Barr. 74; *Cook v. Hull*, 3 Pick. 269. The owner of land lying along an ancient watercourse has as a general rule a right to use or divert the stream for the purpose of irrigating his land provided he returns the surplus to its ancient channel. *Weston v. Alden*, 8 Mass. 136. And does not seriously diminish the volume of the stream. *Blanchard v. Baker*, 8 Greenl. 253. *Stern v. Burden*, 29 Ala. 127. *Evans v. Merriweather*, 3 Scam. 492. But he has no right to so divert the stream for the purpose of irrigation as to impede the operation of a mill below, of forty years' standing. *Cook v. Hull*, 3 Pick. 269. Nor can he lawfully detain the surplus. *Anthony v. Lapham*, 5 Pick. 175. *Perkins v. Dow*, 1 Root, 535. And if the stream is not of sufficient volume to supply the natural wants of all the owners of the land lying along its banks, none of the proprietors can lawfully use it for irrigation or for manufacturing purposes. *Evans v. Merriweather*, 3 Scam. 492. And see *Perren v. Knipe*, 28 Cal. 340; *Arnold v. Foot*, 12 Wend. 330.

(*g*) *Embrey v. Owen*, 6 Exch. 372. *Miner v. Gilmour*, 12 Moore, P. C. C. 156. *Norbury (Lord) v. Kitchin*, 9 Jur. N. S. 132. See *Parker v. Hotchkiss*, 25 Conn. 321; *Wadsworth v. Tilletson*, 15 Conn. 366; *Thomas v. Brackney*, 17 Barb. (N. Y.) 654.

(*h*) *Broadbent v. Ramsbotham*, 11 Exch. 617; 25 Law J., Exch. 115; *Luther v. Winnisimmet Co.*, 9 Cush. 174; *Ashley v. Wolcott*, 11 id. 192; *Frazier v. Brown*, 12 Ohio St. 294; *Sweet v. Cutts*, 50 N. H. 439.

(*i*) *Ennor v. Barwell*, 2 Giff. 424. *Brown v. Best*, 1 Wils. 174. *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627; 26 Law J., Exch. 146. Where a spring rises on the land of one

ficial drainage to cut off the natural visible supply of surface-water from ancient water-courses and rivulets; and he ought so to arrange his drains as to restore the water at the boundary of his estate to its ancient channels, that the lands situate on a lower level may not be deprived of their natural supply of the precious element, for a man has no right, as we have seen, to make improvements on his land which produce injury to his neighbor(*j*).

By the French law, the proprietor of a field in which a spring rises or through which it flows, is not entitled to take and appropriate to his own use the whole of the water, or divert it from other proprietors of lower fields through which the water flows. He cannot change the course of the stream, or materially diminish the ancient supply of water; but every proprietor of land bordering on a running stream may use it for the purpose of irrigating his land, and when his estate is intersected by such water, he may divert it for purposes of irrigation, on condition that he restores it at the boundary of his property to its ordinary channel; and in all disputes respecting the right to take water from running streams, the courts are enjoined to reconcile as much as possible the interests of agriculture with the respect due to property and the rights of individuals(*k*).

90 *Effect of acquiescence in the unlawful diversion of water from a running stream.*—If a portion of a natural stream has been unlawfully diverted for the supply of a mill, causing an injurious diminution in the flow of water to the proprietors lower down the stream, such proprietors must interrupt the unlawful enjoyment of the diverted water by taking

person and flows by a natural channel to the land of another, the owner of the land containing the spring has no right to divert the stream although he may need the water for his own use. *Arnold v. Foot*, 12 Wend. 330. *Chatfield v. Willson*, 27 Vt. 670. But a landowner may lawfully prevent water from reaching the spring or open running stream on the lands of another, by intercepting its percolation or underground currents, if the act is for his benefit and not done in malice. *Village of Delhi v. Youmans*, 45 N. Y. 362. *Pixley v. Clark*, 35 N. Y. 520, 527. *Ellis v. Duncan*, 21 Barb. (N. Y.) 230. *Roath v. Driscoll*, 20 Conn. 533. *Goodale v. Tuttle*, 29 N. Y. 459. *Chatfield v. Wilson*, 28 Vt. 358. *Greenleaf v. Francis*, 18 Pick. 117. *Wheatley v. Baugh*, 25 Penn. St. 528. *Haldeman v. Bruckhart*, 45 id. 518. *Parker v. Boston & Maine R. R. Co.* 3 Cush. 107. *Mosier v. Caldwell*, 7 Nev. 363. But the landowner's right to divert or obstruct water percolating through the soil is limited to what is necessary in the reasonable use of his land. *Bassett v. Salisbury Manufacturing Co.*, 43 N. H. 569. *Swett v. Cutts*, 50 N. H. 439. And cannot be exercised maliciously, and without justifiable purpose. *Wheatley v. Baugh*, 25 Penn. St. 528. *Roath v. Driscoll*, 20 Conn. 533. *Greenleaf v. Francis*, 18 Pick. 117. But see *Chatfield v. Wilson*, 28 Vt. 49.

(*j*) *Briscoe v. Drought*, 11 Ir. C. L. R. 250. See *ante*, p. 8. 1 Hilliard on Torts, p. 589, *et seq.*; and *post*, p. 93; *Ennor v. Barwell*. A proprietor has an absolute right to drain the surface water upon his land into a stream which is its natural outlet, through ditches constructed upon his own land, although the quantity of water in the stream is thereby increased in times of high water and diminished at other times. *Waffle v. New York Central R. R. Co.*, 53 N. Y. 11; *Gannon v. Hargadon*, 10 Allen 106; *Miller v. Laubach*, 47 Penn. St. 154.

(*k*) Cod. Nap. liv. 2, No. 640-645.

legal proceedings against the wrong-doer, in order to prevent the injurious act from being eventually converted into a right (*post*, ch. 3). If the wrong-doer is convicted and fined, or a verdict is obtained against him in an action, the conviction and record of the proceedings show conclusively that the enjoyment was interrupted, and that there was no acquiescence in the unlawful use of the water(l).

91 *Of the right to pen back water.*—A landowner may put a pen stock on his own grounds, and pen the water there as he will, until he has done damage to his neighbor. “Until you prejudice your neighbor by penning back the water, you do that which you have a right to do; but where you begin to injure your neighbor, there your right to pen back terminates”(m), unless you have penned back under a title by grant or prescription(*post*, ch. 3). No action will lie for diverting or throwing back the water, except by a person who sustains actual injury therefrom(n). But the person by or over whose land the stream passes, must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities to the prejudice of his neighbor. The just and equitable principle is given in the Roman law: “Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat”(o). If the user by the defendant has been beyond his natural right, and is injurious to the natural rights of the plaintiff, an action is maintainable, unless the user is sanctioned by grant or prescription(p).

92 *Injuries from the defilement of streams.*—Every riparian proprietor has a right to the flow of the stream through his land in its natural purity; and if a riparian proprietor higher up the stream throws dirt and ashes, or gas refuse into it, so as to defile the water and render it unfit for use, to the damage of another riparian proprietor who has

(l) *Eaton v. Swansea Water Co.*, 17 Q. B. 267. No acquiescence in the diversion of a water-course for a less period than that required by law to give a right by prescription will repel the presumption that the diversion was in hostility to the rights of the riparian proprietors, or authorize the presumption either of grant or of license. *Haight v. Price*, 21 N. Y. 241; *Gleason v. Tuttle*, 46 Me. 283. And no prescription runs in favor of the continuance of such diversion or obstruction, until the owner of the land below has been injured by the diversion and thereby gained a right of action. *Norton v. Volentine*, 14 Vermont 239; *Holsman v. Boiling Spring, etc. Co.*, 1 *McCart* (N. J.) 335.

(m) *Lawrence, J.*, *Cooper v. Barber*, 3 Taunt. 108. *Brown v. Bowen*, 30 N. Y. 519; *Dorman v. Ames*, 12 Minn. 451; *Haas v. Chousard*, 17 Texas 588; *McCoy v. Danley*, 20 Penn. (8 Harris) 85; *Hendrick v. Cook*, 4 Geo. 241; *Hill v. Ward*, 2 Gillman, 285.

(n) *Wright v. Howard*, 1 Sim. & Stu. 203. *Williams v. Morland*, 2 B. & C. 910. But see *Harrop v. Hirst*, *post*, p. 90. See also *Bickett v. Morris*, *post*, ch. 6, s. 2; *Hilliard on Torts*, p. 115. But see *Branch v. Doane*, 18 Conn. 233; *Norton v. Volentine*, 14 Vt. 239; *Holsman v. Boiling Spring, etc. Co.*, 1 *McCart* (N. J.) 335.

(o) *Parke, B.*, *Embrey v. Owen*, 6 Exch. 371.

(p) *Sampson v. Hoddinott*, 1 C. B., N. S. 612; *Pixley v. Clark*, 35 N. Y. 520; *Angell on Watercourses*, § 330; *Radcliff's Executors v. Mayor, etc.*, of Brooklyn, 4 N. Y. 195, 199. See *post*, ch. 3.

been in the habit of using the water, an action is maintainable for the injury(*q*), unless an adverse right has become vested in the other by grant or prescription. And it would seem that an action may be maintained without proving damage, for such pollution would, if allowed to continue, become a right(*r*). A right to foul a stream with all sorts of refuse may, as we shall presently see, be established by proof of the continued and uninterrupted use of the stream as a drain and sewer for twenty years(*s*).

93 *Disturbance of the permissive use and enjoyment of water.*—A landowner or occupier of a house who receives permission from an adjoining landowner to draw water from the premises of the latter through a pipe or watercourse, is entitled to an action for damages if the water is fouled by a wrong-doer, and damage is sustained by him from the fouling of the water. Though there may be no right on the part of a plaintiff to have water flow to his premises, yet if the water does come, and the defendant fouls it without having any right so to do, and so causes foul water to flow into the plaintiff's premises, and the plaintiff sustains damage therefrom, and the defendant cannot justify, the plaintiff will be entitled to recover all the damage he has sustained from the wrongful act. The plaintiff in such a case relies upon no title to the water as a riparian proprietor, but merely alleges that he was lawfully in the enjoyment and use of water flowing through his premises in a pure and unpolluted state, and that the defendant wrongfully fouled it(*t*).

It seems doubtful whether a riparian proprietor can grant his right to the flow of water to a person who is not a riparian proprietor, so as to give such grantee a right of action against a proprietor higher up the stream for the diversion or fouling of the water(*u*). But two adjoining riparian proprietors may clearly agree to divide the stream into two channels in the land of the higher owner by making an artificial cut, by which the water reaches a mill situate on the land

(*q*) *Murgatroyd v. Robinson*, 7 Ell. & Bl. 391; 26 Law J., Q. B. 233. *Holsman v. Boiling Spring, etc., Co.*, 1 McCarter (N. J.) 335. *Carhart v. Auburn Gas Light Co.*, 22 Barb. (N. Y.) 237. *Wheatley v. Chrisman*, 24 Penn. St. 298. *Lewis v. Stein*, 16 Ala. 214. *Davis v. Lambertson*, 56 Barb. (N. Y.) 480. See *Snow v. Parsons*, 28 Vt. 459; *Jacobs v. Allard*, 42 Vt. 303; *Merrifield v. Lombard*, 13 Allen (Mass.) 16. See *post*, ch. 4, s. 1. NUISANCES.

(*r*) See *Crossley v. Lightowler*, L. R., 3 Eq. Ca. 296; 2 Ch. App. 478.

(*s*) See *post*, chs. 3, 4.

(*t*) *Laing v. Whaley*, 3 H. & N. 635, affirming *Whaley v. Laing*, 2 H. & N. 476. It has been held in Illinois, that one who has only a parol license to use a well, cannot maintain an action against one who has rendered the water unfit for use. *Ottawa Gas Light Co. v. Thompson*, 39 Ill. 598.

(*u*) *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300.

of the lower owner, and after turning the mill is then returned into the original channel(v).

94 *Of the right of landowners to well-water.*—The right to the enjoyment of the water of a stream flowing in its natural course over the surface of land, and the right to underground water and springs beneath the surface, are not governed by the same rules of law. It has been held that a landowner has a right to sink a well in his own land, and get as much water as he pleases, although he thereby seriously diminishes the supply of water to the springs and wells in his vicinity, or even drains them dry. The only remedy for the adjoining landowner consists in sinking deeper wells, and using pumps and mechanical appliances on his own land, to enable him to get back the water(w). A landowner who has sunk a well in his own land, and thereby enjoyed the benefit of underground water, has no right of action against a neighboring proprietor who, in sinking for and getting coals from his soil in the usual and proper manner, causes the well to become dry(x).

The use and consumption of the water from wells is not confined to the reasonable wants of the occupiers of the lands in which the well is sunk, nor restrained by any consideration for the wants and necessities of others. Where the defendant sunk a well seventy-four feet in depth in his own land, adjoining the source of an important river, which supplied water to various mills and manufactories, and pumped water from this well for the supply of a neighboring town, at the rate of half-a-million of gallons a-day and upwards, and by this means obviously interrupted a great deal of water which would have otherwise found its way into the river, and so diminished the volume of water in the river, and prevented the millowners from working their mills full time, it was held that the landowner had not exceeded his natural rights, and that the millowners had no remedy for the injury they had sustained(y). But a landowner will be restrained from

(v) *Nuttall v. Bracewell*, L. R. 2 Exch. 1.

(w) *Chasemore v. Richards*, 7 H. L. C. 349; 26 Law J., Exch. 401. *Reg. v. Metrop. Board*, etc., 32 Law J., Q. B. 105. *Village of Delhi v. Youmans*, 45 N. Y. 362. *Frazier v. Brown*, 12 Ohio (N. S.) 294. *New Albany & C. R. R. Co. v. Peterson*, 14 Ind. 112. *Roath v. Driscoll*, 20 Conn. 533. *Chatfield v. Wilson*, 28 Vt. 358. *Greenleaf v. Francis*, 18 Pick. 117. *Wheatley v. Baugh*, 25 Penn. St. 528. *Mozier v. Caldwell*, 7 Nev. 363. *Swett v. Cutts*, 50 N. H. 439. As to the limitations on that right, see *ante*, p. 78, note i.

(x) *Acton v. Blundell*, 12 M. & W. 324. So by the Pandects, "Cum eo qui, in suo fodiens, vicini fontem avertit, nihil posse agi; nec de dolo actionem et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi id fecit."—Lib. 39, tit. 3, l. 12. *Domat. Liv. 2, tit. 8, s. 1*. See *Ellis v. Duncan*, 21 Barb. (N. Y.) 230.

(y) *Chasemore v. Richards*, 7 H. L. C. 349; 26 Law J., Exch. 401. But see *Bassett v. Salisbury Manufacturing Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439.

drawing off the subterranean water in the adjoining land, if in so doing he draws off water which has once flowed in a defined surface channel through such land(z). "If you cannot get at the underground water without touching the water in a defined surface channel, you cannot get at it at all"(a).

95 *Of the flooding of lands from artificial collections of water.*—Where the owner of a coal-field excavated his coal, and in so doing left large hollows, which filled with water, and then, when the adjoining land-owner proceeded to work his coal, the subterranean water from the hollows flowed into his workings and flooded them, it was held that he had no right of action for the damage(b). But where the owner of a mine on a higher level pumped up into it water from a lower level (for the purpose of working a lower seam), so that more water flowed into the adjoining mine, which was on a lower level, than would have resulted from the natural gravitation of the water from the higher to the lower level, an action will lie against the owner of the higher mine(c); for a person who *for his own purposes* brings upon his land, and collects and keeps there, anything likely to do mischief if it escapes, such as water or cattle, is *primâ facie* answerable for all the damage which is the natural consequence of its escape, although he has not been guilty of any negligence(d). The owner of one story of a house, however, is not liable, without negligence, to the owner of the story below for the damage caused by a rat eating into a cistern on the upper floor, and so causing the water to flow into the lower story, the cistern being for the mutual benefit of both stories, and the action of the rat being in the nature of *vis major*. Nor is the occupier of an upper floor liable, without negligence, to the occupier of a lower for the leakage of water from a water-closet of which he has the exclusive use(e). Nor is the owner of a tree in a boundary fence, the leaves of which are poisonous to cattle, etc., answerable for the clippings being on his neighbor's land, and poisoning his cattle, unless, it seems, he himself put them there(f).

(z) *Grand Junction Canal Co. v. Shugar*, L. R., 6 Ch. App. 453. *Village of Delhi v. Youmans*, 45 N. Y. 362; *Pixley v. Clark*, 35 N. Y. 520, 528.

(a) Per Lord Hatherley, C. S. C.

(b) *Smith v. Kenrick*, 7 C. B. 565.

(c) *Baird v. Williamson*, 33 Law J., C. P. 101.

(d) *Fletcher v. Rylands*, L. R., 1 Exch. 265 (Exch. Ch.); 3 Engl. & Ir. App. 330. *Smith v. Fletcher*, L. R., 7 Exch. 305. As to the liability of mill owners and others for damage occasioned by the bursting of dams and reservoirs, see *Gray v. Harris*, 107 Mass. 492; *Lapham v. Curtiss*, 5 Vt. 371; *Mayor of New York v. Bailey*, 2 Denio, 433; *Inhabitants of China v. Southwick*, 12 Me. 238; *Everett v. Hydraulic etc. Co.*, 23 Cal. 225.

(e) *Carstairs v. Taylor*, L. R., 6 Exch. 217. *Ross v. Felden*, L. R., 7 Q. B. 661. *Moore v. Goedel*, 34 N. Y. 527.

(f) *Wilson v. Newberry*, L. R., 7 Q. B. 31.

96 *Statutory property and interest of navigation companies in the water of a navigable river.*—Acts of Parliament incorporating companies for the purpose of rendering rivers navigable, and purporting to vest in the company the river or stream to be made navigable, vest in the company much more extensive rights over the water of the stream than those which the common law gives to riparian proprietors. They create a new species of statutory property and interest in the water, which renders any abstraction of it unlawful, except it be by a riparian proprietor for his necessary purposes, although no actual damage may be done to the navigation(*g*). But navigation companies and canal companies have no power of granting any exclusive right of sailing upon or navigating a river or canal beyond what is expressly given to them by statute. And, therefore, where a canal company, by deed, granted to the plaintiff “the sole and exclusive right or liberty to put pleasure-boats on the canal, and let them out for hire, for purposes of pleasure only,” it was held that the canal company had no power to grant any such exclusive privilege(*h*).

SECTION II.

OF THE REMEDY BY ACTION AND BY INJUNCTION FOR INFRINGEMENTS OF RIGHTS INCIDENT TO THE POSSESSION AND OWNERSHIP OF LAND.

- 97 *Direct and consequential injuries.*—If the injury of which the plaintiff complains has been committed by the defendant upon land in the actual possession and occupation of the plaintiff, and is consequently the result of a direct act of trespass, the plaintiff should bring his action and frame his proceedings for a trespass upon his land (*post*, ch. 6). If the injury results from something done by the defendant on his own land, which is unlawful only in respect of the consequential injury thereby occasioned to the plaintiff, the action must be brought for the consequential injury, and not for a trespass, and proof of actual substantial damage is, in general, essential to the cause of action(*hh*).
- 98 *Parties to be made plaintiffs—Tenant and reversioner.*—The actual occupier of the land is, in general, the proper person to maintain an

(*g*) *The Medway Co. v. Earl of Romney*, 9 C. B., N. S. 575; 30 L. J., C. P. 236.

(*h*) *Hill v. Tupper*, 2 H. & C. 121.

(*hh*) See note (*n*), p. 80. *Crossley v. Lightowler*, *ante*, p. 81.

action for wrongful acts of a temporary character interfering with the beneficial use and enjoyment of the property, and diminishing the value of his possessory interest. If the injury is of a permanent nature, causing damage to the inheritance, then the reversioner is also entitled to maintain an action in respect thereof, for although the evil might be remedied before the end of the term, yet in the meantime, if the reversioner wished to sell his interest, it would be less valuable(i). It is necessary, therefore, in an action by a reversioner, to show a permanent injury to the property, lessening its value in the market(j), or an infringement upon the plaintiff's rights as landlord. If *A* is seised in fee of the reversion of a close, expectant upon a term for years, and *B* is possessed of another close adjoining thereto, through which close there runs a rivulet, and *B* stops it, *per quod* the close of *A* is surrounded, so that the timber-trees, etc., become rotten, *A*, in respect of the prejudice to the reversion, and the termor, in respect of the injury to the possession, and the loss of the shade, shelter, etc., of the trees, may each have an action, and satisfaction given to one is no bar to the other(k).

The person who sues in respect of an injury to the reversion, must be the person in whom the legal estate is vested, and not a person having a mere equitable interest as *cesti qui trust*(l). If several persons are entitled to the reversion as joint tenants, or tenants in common, they should all be joined as plaintiffs in an action for an injury to the reversion(m).

99 *Of the parties to be made defendants.*—Every person who orders or authorizes an obstruction to the enjoyment of the natural rights incident to the ownership of real property, is responsible for the injury, and for all consequential damages, and so are his servants and agents, who carry into effect the orders he has given; and when several persons have been jointly concerned in the commission of the wrongful act, they may all be made defendants and charged as principals, or the plaintiff may sue one or more of them at his election(n).

100 *Of the plaintiff's declaration of his cause of action—Venue.*—The venue or statement in the margin of the declaration of the name of the county

(i) *Jesser v. Gifford*, 4 Burr. 2141. As to the right of the reversioner to maintain trespass, see *Cutting v. Cox*, 19 Vt. 517; *Curtiss v. Hoyt*, 19 Conn. 154; *Davis v. Nash*, 32 Me. 411.

(j) *Jackson v. Pesked*, 1 M. & S. 234. See *Tobias v. Cohn*, 36 N. Y. 363; *Wood v. Williamsburgh*, 46 Barb. 601.

(k) *Beddingfield v. Onslow*, 3 Lev. 209. And see *post*, ch. 3, s. 2, and ch. 5.

(l) *Vallance v. Savage*, 7 Bing. 599.

(m) *Bac. Abr. JOINT TENANTS, K.* *De Puy v. Strong*, 37 N. Y. 372. *Gent v. Lynch*, 23 Md. 58. And see further, *post*, ch. 19, as to the joinder of parties to actions *ex delicto*.

(n) See *post*, ch. 19.

from whence the jury are to be summoned, and where the cause of action is to be tried, is local in all actions for infringements of territorial rights annexed to lands or tenements, so that the cause of action must be laid and tried in the county in which it arose, unless a judge's order is obtained for changing the venue and place of trial. The nature of the territorial right must be set forth on the face of the declaration, and the plaintiff must claim it by reason of his possession of a messuage, tenement, or land. If the plaintiff complains of the diversion or fouling of water from a natural watercourse, he must declare upon his own possession of the place through which the water used to run, and set out the course thereof, and show the mode in which the water has been diverted, or fouled(o). The usual course is to set forth the plaintiff's possession of a messuage, tenement, or land, and aver that by reason of such possession, he had a right to the enjoyment of an uninterrupted flow of water of a natural stream running in its natural bed, or flowing in its natural purity (as the case may be), into the messuage, tenement, or land of the plaintiff, and that the defendant wrongfully diverted large quantities of the water of the stream, or wrongfully polluted and defiled the water thereof (showing the nature of the diversion or pollution), and alleging that the defendant thereby prevented the plaintiff from having his accustomed and proper supply of water, or deprived him of the beneficial use and enjoyment of the water (as the case may be), claiming damages(p).

If the plaintiff complains of an obstruction to the natural flow of the water, he should show the nature of the obstruction and the consequential damage in the flooding of the plaintiff's land, the destruction of the grass and produce of the soil, and the deposit of stone, sand, and rubbish upon the land, as the case may be, claiming damages(q), or, if need be, a writ of injunction against the repetition or continuance of the injury.

A declaration which alleges that the plaintiff was lawfully in the enjoyment and use of water flowing through his house and premises in a pure and unpolluted state, and that the defendant wrongfully fouled and defiled the water by pouring into it the refuse of certain

(o) *Brown v. Best*, 1 Wils. 174. *Parke B.*, *Chasemore v. Richards*, 7 H. L. C. 349.

(p) *Frankum v. Falmouth* (Earl of), 2 A. & E. 452. It is not necessary, in an action for damages to a mill privilege by a diversion of the water, to allege the manner or the means of the diversion. An allegation of injury to the privilege is sufficient without alleging the existence of the mill. *Stein v. Ashby*, 24 Ala. 521. It is, however, important that the plaintiff's right be accurately stated. *Wilbur v. Brown*, 3 Denio, 356.

(q) *Carlyon v. Lovering*, 1 H. & N. 784; 26 Law J., Exch. 251.

chemical works, whereby the plaintiff was deprived of the use of the water, and his property was deteriorated in value, seems to disclose a good cause of action(r).

- 101 *Declarations for infringements of the natural right to support from adjoining land.*—If injury has been done to the foundations and walls of a dwelling-house, or of buildings occupied by the plaintiff, by excavations in the soil amounting to direct acts of trespass upon the land in the plaintiff's occupation, the ordinary declaration for a trespass upon realty (*post*, ch. 6, s. 2), properly describes the true cause of action. If the injury has been done by a tenant in the possession and occupation of the buildings and land under a demise from the plaintiff, the proper form of declaration is a declaration for waste (*post*, ch. 5, s. 2). If the surface and subsoil are held by different persons, and constitute separate freeholds, and the declaration is founded on an injury to the owner of the surface by excavations made by the owners of the subsoil, depriving the surface of its natural support (*ante*, p. 61), it is sufficient to allege that the plaintiff was possessed of the surface of certain land, and the defendant was possessed of the subsoil, mines, and minerals, or of certain beds and strata of stone beneath such surface, and that the defendants excavated the subsoil, or dug out the minerals or stone, without leaving sufficient support for the surface, and by reason thereof the surface of the land gave way, and sank into deep holes and hollows, and became useless to the plaintiff, and certain crops growing upon the land were injured or destroyed(s).

A good cause of action is disclosed on the face of a declaration which alleges, that at the time of the committing of the grievance of which the plaintiff complains, the plaintiff was possessed of certain messuages, belonging to and supporting which messuages were certain foundations which the plaintiff, by reason of his possession of his messuages, ought of right to have enjoyed for the support of such messuages, and that the defendant wrongfully dug out and destroyed the foundations of the messuages, and by reason thereof they gave way and fell to the ground, and the plaintiff was deprived of the use of them(t). A declaration, also, by a reversioner, setting forth, that a messuage and land, with the appurtenances, were in the respective occupations of certain persons as

(r) *Laing v. Whaley*, *Whaley v. Laing*, *ante*, p. 81.

(s) *Bibbey v. Carter*, 4 H. & N., 153. 28 Law J., Exch. 182. *Jeffries v. Williams*, 5 Exch. 792.

(t) *Rogers v. Taylor*, 2 H. & N. 829; 27 Law J., Exch. 173.

tenants thereof to the plaintiff, the reversion of the said messuage, land, etc., then and still belonging to the plaintiff, and that the defendant wrongfully made divers excavations in the said land, under or near to the said messuage, without sufficiently shoring and propping up the said messuage from the effects thereof, whereby the land sank, and the foundations of the messuage, etc., gave way, and the plaintiff was injured in his reversionary estate, discloses a good cause of action(*u*).

102 *Pleas by the defendant—Not guilty(x).*—The plea of not guilty operates as a denial only of the wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement(*y*). If, therefore, the plaintiff's possession of the property alleged to have been injured by the wrongful act of the defendant, or his title thereto, or his estate or interest therein, is intended to be denied, it must be specially traversed. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration, and all matters in justification, and in confession and avoidance of the cause of action, must be specially pleaded(*z*). If, therefore, the plaintiff claims as riparian proprietor a right to the flow of the water of a stream through his land (*ante*, p. 63), and complains that the defendant wrongfully diverted or wrongfully obstructed the flow of water, the fact that the defendant as another riparian proprietor on the same stream had a right to use or divert a certain portion of the water for reasonable purposes of his own, and that the diversion or obstruction complained of was an exercise by him of such right, must be made the subject of a plea, and cannot be given in evidence under the plea of not guilty(*a*). So, if the defendant claims a prescriptive right to divert the water, such prescriptive right must be specially pleaded. So, if the defendant intends to dispute the existence of the right asserted in the declaration, he must expressly deny the right by a plea traversing the allegation or assertion of it, in the very words in which it is put forward. Thus, where the declaration states, that the plaintiff was possessed of a close, and by reason thereof was entitled to have the use and benefit of a certain stream of water, etc., and the defendant intends to dispute the right, he must by his plea assert that

(*u*) *Bibbey v. Carter*, *ut sup.*

(*x*) As to not guilty "by statute," see Reg. Gen. Hil. Term, 1853. 1 Ell. & Bl. App. lxxxii. R. 21.

(*y*) Reg. Gen. Hil. T. 1853. 1 E. & B. App. lxxxi. R. 16.

(*z*) Reg. Gen. (*ut supra*), R. 17.

(*a*) *Frankum v. Falmouth* (Earl of), 2 Ad. & E. 452.

the plaintiff was not, by reason of the possession of the said close, entitled to have the use and benefit of the said water, etc.

103 *Of the plea of leave and license.*—If the obstruction to the enjoyment of the right has been authorized by the plaintiff, or if the act complained of has been done by his permission, the defendant must plead, that he did what is complained of by the plaintiff's leave(b). This plea will be supported by proof, that the plaintiff gave the defendant permission to alter the condition of his property in such a way as to interfere with the enjoyment of the right. Under this plea it may be shown, that the plaintiff, having a right to the use of a stream of water which flowed through the land of the defendant, gave the defendant permission to lower the banks of the stream, and erect a weir, and divert a portion of the water which had previously flowed to the plaintiff's mill, and that the banks were cut down, and the weir erected, pursuant to the permission so given(c). Having consented to the act, the plaintiff, and those claiming title through him, are precluded from treating the act as a wrong or injury.

104 *Pleas of a prescriptive right* to divert, or obstruct, or foul the water of a stream, must, as we have seen, be placed on the record, when the defendant relies on a prescriptive right in excess of his natural right as riparian proprietor (ante, p. 66).

105 *Evidence at the trial—Proof on the part of the plaintiff.*—If the defendant pleads that he is not guilty of the act of which the plaintiff complains, it must, of course, be proved either that it was done by his own hand, or by his orders or authority, or by his servants or agents in the course of their employment, or in following out his orders and directions(d). If the plaintiff's possession and incidental rights are traversed, the plaintiff must prove the fact of his possession of the lands or tenements to which the right claimed was incident, at the time of the commission by the defendant of the grievance of which the plaintiff complains. This may be established by the plaintiff's own testimony upon the point, or by proof of the exercise of acts of dominion, or by general user and enjoyment, or actual occupation(e).

106 *Proof of seizin of lands and tenements.*—An allegation in pleading that a party is seised of a messuage or land, does not necessarily import that such land is in his own occupation. If, therefore, a landlord pleads seizin in fee, and the seizin is traversed, the traverse is

(b) 15 & 16 Vict. c. 76, Sched. B., No. 44.

(c) *Liggins v. Inge*, 7 Bing. 682.

(d) See *post*, ch. 20, s. 2.

(e) *Page v. Hatchett*, 8 Q. B. 593.

not supported by proof that the land is in the occupation of a tenant to whom the landlord has demised it(*f*).

Damages recoverable.—Wherever the exercise and enjoyment of a right naturally incident to the possession of land has been obstructed, substantial damages are recoverable, though no actual perceptible damage has been sustained or proved, whenever the repetition of the wrongful act, if uninterrupted and undisturbed, would lay the foundation of a legal right. A wrongful defilement of a stream is an injury to a right, in respect of which damages are recoverable, although no actual specific damage can be proved. Thus, where certain manufacturers erected works on the bank of a stream, and fouled the water with soap-suds, but no actual damage was proved to have been sustained by the plaintiff, it was held that he was nevertheless entitled to recover damages, as a continuance of the practice without interruption would eventually establish a right on the part of the defendants to the easement of discharging their foul water into the stream(*g*). So, where the defendant, a riparian owner on the banks of a stream which fed a spout, the water of which the plaintiff, in common with the other inhabitants of a certain district, was entitled by custom to use for domestic purposes, abstracted the water to such a degree as to render what remained insufficient for the inhabitants, it was held that the plaintiff might maintain an action, although he had not himself suffered any personal inconvenience(*h*).

107 But when the act of which the plaintiff complains has been done by the defendant on his own land, and the constant repetition of it, however long continued, would establish no prescriptive right against the plaintiff, there is no cause of action until some substantial, perceptible damage has been sustained by the plaintiff. Proof of such damage in such a case is essential to the establishment of a cause of action. Thus, where a landowner digs in his own land, or the owner

(*f*) *Stott v. Stott*, 16 East, 350.

(*g*) *Wood v. Waud*, 3 Exch. 772. *Rochdale Co. v. King*, 14 Q. B. 135, 138. See *post*, ch. 3, s. 1; and *ante*, p. 8. For some of the American cases sustaining the principle stated in the text, see *Johns v. Stevens*, 3 Vt. 308; *Chatfield v. Wilson*, 27 Vt. 670; *Parker v. Grisvold*, 17 Conn. 288; *Welton v. Martin*, 7 Mo. 307; *Hulme v. Shreve*, 3 Green. Ch. 116; *Thomas v. Brackney*, 17 Barb. (N. Y.) 654; *Parker v. Foote*, 19 Wend. 309, 313; *Hastings v. Livermore*, 7 Gray 194; *Elliott v. Fitchburgh R. R. Co.* 10 Cush, 191; *Bolivar Manufacturing Co. v. Neponset Manufacturing Co.* 16 Pick. 241; *Butman v. Hussey*, 12 Maine, 407; *Munroe v. Stickney*, 48 Me. 462; *Hendrick v. Cook*, 4 Ga. 241; *Plumleigh v. Dawson*, 1 Gilm. 544, 552; *Stein v. Burden*, 24 Ala. 130, 148; *Roundtree v. Brantley*, 34 Ala. 553; *Graver v. Sholl*, 42 Penn. 67; *Delaware Canal Co. v. Torrey*, 33 Penn. 143; *Woodman v. Tufts*, 9 N. H. 88; *Tillotson v. Smith*, 32 N. H. 90.

(*h*) *Harrop v. Hirst*, L. R., 4 Exch. 43.

of the subsoil and minerals excavates his own freehold, there is no wrongful act, and no cause of action until it is proved that the surface of the adjoining land has sunk down, or that the walls of a neighboring house have cracked, or the foundations thereof have been displaced, or have given way, or that some actual perceptible damage has been done to the adjoining land or tenement(*i*).

- 108 *By tenant and reversioner*.—Whenever the enjoyment of a privilege or right annexed to the ownership or occupation of land has been obstructed by the wrongful act of the defendant, and the land to which the right or privilege is annexed is in the occupation of a lessee, damages are recoverable in respect of the injury to the residential or possessory interest of the latter, and by the landlord or reversioner in respect of the permanent injury to the inheritance(*k*). Thus, where the freehold premises are let on lease, and the owners and reversioners stand in the relative positions of tenant for life, remainderman in tail, and reversioner in fee, and a permanent injury has been done to the beneficial occupation and enjoyment of the property, the damages recoverable by the immediate reversioner the tenant for life, are confined to the injury done to his life-interest(*l*). But a mere temporary impediment to a drain which is remediable, and does not cause any permanent injury to the property, does not give the reversioner any right of action for damages.

If the constant repetition of the unlawful act would form the foundation for the establishment of a prescriptive right which, when once established, would operate to the lasting injury of the inheritance, and permanently diminish the value of the property, the reversioner is, as we have seen, entitled to an action for the recovery of damages.

- 109 *Injunction to prevent the disturbance of rights naturally incident to the possession and ownership of land*.—The Court of Chancery has, from the earliest period, interfered by injunction to restrain the owner of land from so dealing with his property as to prejudice or destroy the rights of his neighbor, thereby enforcing the maxim, "*Sic utere tuo ut alienum non lædas*." The foundation of this jurisdiction is that head of mischief, alluded to by Lord Hardwicke—that sort of material injury to the comfort and enjoyment of property which requires the application of a power to prevent, as well as remedy—an evil for

(*i*) *Bonomi v. Backhouse*; *Backhouse v. Bonomi*, *ante*, p. 75. *Fisher v. Beard*, 32 Iowa, 357.

(*k*) As to the apportionment of damages between tenants and reversioners, see *post*, ch. 22, s. 1.

(*l*) *Evelyn v. Raddish*, Holt. N. P. C. 543. See *Wood v. Williamsburgh*, 46 Barb. (N. Y.) 601; *Tobias v. Cohn*, 36 N. Y. 363.

which damages, more or less, would be given in an action at law(*m*). But before the plaintiff can ask for any injunction restraining the defendant from using his own land or property in a way in which he would be clearly entitled to use it, but for some dominant right on the part of the plaintiff, the latter must establish such last-named right, and show to the satisfaction of the court that it has been infringed, and that he has sustained such injury therefrom as would entitle him to a verdict for substantial damages in an action at law(*n*). The court will not interfere to protect a dry, strict, legal title, merely because the legal right has been infringed. It must be shown that some actual damage has been done or threatened, in order to lay a ground for equitable relief(*o*).

The jurisdiction of the Court of Chancery to prevent the infringement of a legal right by the issue of an injunction is not an original jurisdiction; it existed, not for the purpose of trying the fact of the existence of the right, but for the purpose of giving effect to the legal title after its existence had been established in a court of law. A person, therefore, who came before the court in the first instance for an injunction, instead of going before the ordinary legal tribunal, was bound to show some pressing necessity for summary interference, for the court would not try upon conflicting affidavits the fact of the existence or non-existence of the legal title(*p*); nor would it interfere where the legal right was doubtful, and the nature of the alleged injury was such as not to require immediate prevention(*q*). But the practice of the court in these respects has been materially modified by the chancery amendment acts, which impose upon the Court of Chancery the obligation of adjudicating upon the legal rights of the parties before them, as well as upon their title to equitable relief(*r*).

(*m*) *Att.-Gen. v. Nichol*, 16 Ves, 342.

(*n*) *Elmhirst v. Spencer*, 2 Mac. & G. 51. *Dent v. Auction Mart Co.*, L. R., 2 Eq. Ca. 236; *post*, ch. 3, s. 2; ch. 4, s. 3; and ch. 23.

(*o*) *Wandsworth Board of Works v. Lond. and S. W. Rail. Co.*, 31 Law J., Ch. 855. See *Lingwood v. Stowmarket Paper Co.*, L. R., 1 Eq. Ca. 77; *Crossley v. Lightowler*, *ante*, p. 81; *Bassett v. Salisbury etc. Co.*, 47 N. H. 426. See *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191, 220; *Clinton v. Myers*, 46 N. Y. 511; *Hahn v. Thornberry*, 7 Bush. 406.

(*p*) *Semple v. Lond. & Birm. Rail. Co.*, 1 Rail. Cas. 134. *White v. Cohen*, 1 Drew. 318. *Broadbent v. Imp. Gas Co.*, 26 Law J., Ch. 276; 29 ib. 377. See *Washb. on Easem. & Serv.* (third ed.), 698.

(*q*) *Wynstanley v. Lee*, 2 Swanst. 335. *Ripon (Earl of) v. Hobart* 3 Myl. & K. 179. *Att.-Gen. v. United King. Elec. Tel. Co.*, 31 Law J., Ch. 329. See *Jordan v. Woodward*, 38 Me. 432; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; *Reid v. Gifford*, 6 Johns. Ch. 19; *Ingraham v. Dunnell*, 5 Mete. 118; *Dana v. Valentine*, *id.* 8.

(*r*) *Post*, ch. 23, s. 1. *Beardmore v. Tredwell*, 31 Law J., Ch. 893. In New York and other States where both legal and equitable jurisdiction have been vested in the same courts, it is no longer necessary that the existence of a right must be established by the judgment of a

- 110 *Injunction to restrain the diversion of water.*—Wherever a spring rises from the ground in one man's land, and flows therefrom into another's land, and the supply of water from the spring is constant, the court will by injunction prevent a landowner through whose land the water flows, from cutting off the supply of water to the land lower down, although the spring may flow through boggy land, and not follow any defined channel or watercourse; but if the supply is casual and intermittent, and dependent upon the rainfall, and is mere common surface-water, the court will not interfere(s). When a millowner or riparian proprietor is entitled to the benefit of the natural flow of water through a mill-stream, or through a natural watercourse, the Court of Chancery will by injunction restrain the owner of the subsoil or minerals from excavating or mining beneath the stream so as to endanger the existence of the watercourse or the loss of the water; but the person seeking relief must show that some injury has actually happened, or that it will inevitably result from the prosecution of the mining operations(t).
- 111 *Injunction to restrain a disturbance of the right to support.*—Where there are separate owners of surface and subsoil, and the owner of the subsoil begins to excavate so as to deprive the owner of the surface of his natural right to the support of the subsoil (*ante*, p. 74), the court

court of law before an injunction can issue to restrain its violation. *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191.

(s) *Ennor v. Barwell*, 2 Giff. 424. *Robinson v. Ld. Byron*, 1 Bro. Ch. C. 588. See *Arnold v. Foot*, 12 Wend. 330. Nor as a general rule will the court interfere to restrain a land owner from digging on his own land for a justifiable purpose, although he thereby prevents water from reaching a spring or open running stream on the land of another by intercepting its percolation or underground currents. *Village of Delhi v. Youmans*, 45 N. Y. 362. And see *ante*, p. 77, note.

(t) *Ellwell v. Crowther*, 31 Law J., Ch. 763. That past injuries are no ground for equitable interference for the protection of the rights of a riparian proprietor in the enjoyment of a stream, see *Potiers, Exr. v. Burden*, 38 Ala. 651.

An injury to the purity or quality of running water, to the injury of other riparian proprietors may be prevented by injunction. *Merrifield v. Lombard*, 13 Allen 16. *Holsman v. Boiling Spring Co.* 1 McCart. 342. See *Lewis v. Stein*, 16 Ala. 214.

When the right to the use of water is clear, and the stream has been wrongfully diverted, the party injured may have a mandatory injunction to compel the restoration of the stream to its proper channel. *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191.

Where a riparian proprietor so constructs an embankment along the margin of a stream as to throw the water upon the land of the opposite proprietor, the latter may have his remedy by injunction. *Burwell v. Hobson*, 12 Gratt. 322, 332.

A millowner may restrain another from unlawfully obstructing his mill-privilege. *Critenden v. Field*, 8 Gray 621. *Bemis v. Upham*, 13 Pick. 169. *Ballou v. Hopkinton*, 4 Gray, 324. *Hill v. Sayles*, 12 Cush. 454. See *Hall v. Augsbury*, 46 N. Y. 622; *Wright v. Moore*, 33 Ala. 593. Where the application for an injunction is made to a court not having concurrent jurisdiction in law and in equity and the rights of the parties are doubtful, the court may refuse to grant the prayer for an injunction until the question of right has been settled by a court of law. *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272. *Burden v. Stein*, 27 Ala. 104. *Bliss v. Kennedy*, 43 Ill. 74. See *Simpson v. Justice*, 8 Ired. Eq. 115.

will interfere by injunction to prevent any further excavation of the subsoil interfering with the use and enjoyment of the surface(u).

- 112 *Injunction to prevent obstruction to the repair of a watercourse in alieno solo*.—Where a mill-stream running through the defendant's land to the plaintiff's mill, broke through its banks and made a new channel for itself through the defendant's land, and the defendant would not allow the plaintiff to come on his land to repair the river-bank without the payment of a large sum of money, and the mill came to a standstill for want of water, it was held that the plaintiff, being entitled to the use of the watercourse, was entitled to come on the defendant's land to repair the watercourse and preserve it (*post*, ch. 3, s. 1), and the defendant was restrained by injunction from preventing the plaintiff, his servants and workmen, from coming on his land and repairing the river-bank, and doing what was necessary to be done to restore the water to its ancient channel(x).

(u) *Hunt v. Peake*, 1 Johns. 708.

(x) *M'Swiny v. Haynes*, 1 Ir. Eq. Rep. 322. See *Roberts v. Rose*, *post*, ch. 4, s. 2; *Roberts v. Roberts*, 55 N. Y. 275.

CHAPTER III.

OF CONVENTIONAL AND PRESCRIPTIVE SERVITUDES—EASEMENTS AND PROFITS A PRENDRE.

SECTION I.—*Of easements and profits à pendre.*—Grants of rights of servitude—Licenses—Reservation of privileges amounting to an express grant—Implied grants of easements—Privileges and services accessorial to a principal thing granted—Ways of necessity—Necessary incidents to a right of way or watercourse—Rights of towing—Easement of support from adjoining land—Right to search for minerals under lands weighted with railways and canals—Servitude of support when houses are built together, so as to require mutual support—Separate floors vested in several proprietors—Grants of the free passage of light and air to newly-opened windows—Easements accessorial to the grant of a dwelling-house—Transfer of easements and profits—Easements and profits in gross—Licenses to search for, and carry away, minerals—Exclusive licenses—Rights claimable by custom—Manorial customs—Common appendant, appurtenant, and in gross—Cow-grasses and cattle-gates—Rights of tinbounders—Inconsistent rights of common—Servitude of maintaining and repairing sea-walls, ditches, and sluices—Customary rights of fishing—Sea-bathing—Title by prescription—Prescriptive rights founded on the presumption of a grant—The Prescription Act—Profits and easements claimable under it—What sort of enjoyment is essential to the gaining of a prescriptive right—Enjoyment as of right—Enjoyment over land held on lease—Prescriptive rights of way, watercourse, and use of water and streams—Prescriptive right to have fences kept up *in alieno solo*—Prescriptive right to light—Effect of unity of ownership—Interruption of enjoyment—Continuity of enjoyment—Computation of the periods of enjoyment—Rights of reversioners—Waiver, extinguishment, and revival of easements—Repair of ways and watercourses.

SECTION II.—*Remedies for the infringement of incorporeal rights.*—Abatement of obstructions to the enjoyment of easements—Right to distrain beasts trespassing on commons—Actions for infringements of incorporeal rights—Parties, pleadings, defences, and evidence—Damages recoverable—Remedy by injunction—Easements granted by parol—Injunction to prevent obstructions to windows and infringements of the right to support from adjoining land—Bill of Peace.

SECTION I.

OF CONVENTIONAL AND PRESCRIPTIVE SERVITUDES—EASEMENTS AND PROFITS À PRENDRE.

113 *Easements*.—The servitudes naturally incident to the ownership and occupation of land, and the legal restrictions upon the proprietary rights of landowners (*ante*, ch. 2, s. 1), may, within certain limits, be enlarged and extended by express and implied contract, by grant, and in certain cases by custom and prescription(*a*). Thus, one proprietor may acquire by grant, or from long-continued and uninterrupted enjoyment, a right to take water from his neighbor's well, or to wash and water cattle at a neighbor's farm(*b*); to hang and dry clothes on lines on a neighbor's land(*c*); to hang and dry nets thereon(*d*); to turn the plough thereon in ploughing(*e*); to discharge water thereon from the roofs and eaves of houses(*f*); or to have the benefit of a neighbor's fence or hedge maintained and repaired at the expense of such(*g*). A privilege or benefit of this description, unaccompanied by any profit or interest in the soil itself, is called in our law an easement, and is claimable by custom, grant, or prescription(*gg*).

114 *Profits à Prendre*.—A profit à prendre is a right vested in one man of entering upon the land of another, and taking therefrom a profit of the soil. It is an incorporeal right, clothing the possessor of it with an interest in land, and is claimable only by grant or by prescription(*h*). Such is the right of depasturing cattle on another's land; the right to cut therefrom and carry away turf or wood for burning

(*a*) *Fitch v. Rawlings*, 2 H. Bl. 393. See Gale on Easements; *Stearns v. Janes*, 12 Allen, (Mass.) 582; *White v. Chapin*, id. 516; *Hill v. Lord*, 48 Me. 83.

(*b*) *Race v. Ward*, 4 Ell. & Bl. 702; 24 Law J., Q. B. 153. *Manning v. Wasdale*, 5 Ad. & E. 758.

(*c*) *Drewell v. Towler*, 3 B. & Ad. 735.

(*d*) 7 Vin. Abr. p. 183. CUSTOM, F. pl. 2.

(*e*) 7 Vin. Abr. p. 174. CUSTOM, P. pl. 4 F. pl. 1. *Jones v. Percival*, 5 Pick. 485.

(*f*) *Thomas v. Thomas*, 2 C. M. & R. *Ashley v. Ashley*, 6 Cush. 70. *Neal v. Salye*, 47 Barb. 316. *Carbrey v. Willis*, 7 Allen, 370. *Swett v. Cutts*, 50 N. H. 439. *Bloch v. Pfaff*, 101 Mass. 539.

(*g*) *Boyle v. Tamlin*, 6 B. & C. 338; 9 D. & R. 437. *Barber v. Whiteley*, 34 L. J., Q. B. 212. *Rust v. Dow*, 6 Mass. 90. *Heath v. Ricker*, 2 Me. 72. *Binney v. Hull*, 5 Pick. 503, 505. *Thayer v. Arnold*, 4 Metc. 589. *Adams v. Van Alstyne*, 25 N. Y. 232. And see Washb. on Easem. & Servt. (3d ed.) 634.

(*gg*) *Big Mountain Improvement Co.'s Appeal*, 54 Penn. St. 361. *Mumford v. Whitacy*, 15 Wend. 380.

(*h*) *Huff v. McCauley*, 53 Penn. St. 209. *Clark v. Way*, 11 Rich. Law, 621. *Hill v. Lord*, 48 Me. 83.

within the dwelling-house; the right to dig for and carry away stone, slate, coal, and minerals; the right to shoot and sport over another's land, and carry away and consume the game killed; or the right to fish in the waters of an estate or of a manor, and carry away and consume the fish taken.

Bracton, in his books of the laws and customs of England, enumerates the different servitudes with which the estate of one proprietor may be burthened for the benefit and convenience of another, such as rights of depasturing cattle, rights of common, of cutting and carrying away turf, or digging for and gathering minerals, stones, or sand, rights of way, right of drawing water from a neighboring well, rights of watercourse, or of a passage for water through another's land, rights of hunting thereon, rights of estover, or of cutting wood for burning in a dwelling-house, or for building, or repairs; all of which servitudes, he tells us, were originally imposed upon land by the will, or ordering, or consent of the lord, or have grown up, and have become appurtenant to property, without having been expressly constituted, through long-continued, peaceable and uninterrupted enjoyment.

The long-continued exercise of the privilege on the one side, and the sufferance and endurance of it on the other, must not, he observes, be due to force or intimidation. If it has been exercised and enjoyed by stealth, or if the privilege has been sought for, and has been conceded, as a kindness and matter of favor, to be enjoyed during the pleasure of the grantor, it will fail to create a servitude(*hh*).

115 *Unlimited claims in the nature of easements, profits and servitudes.*—

There can be no prescriptive right in the nature of an easement or servitude so large as to preclude the ordinary uses of property by the owner of the lands affected by the privilege, and to extinguish or destroy all the profits or produce ordinarily derivable from the soil. Therefore an unlimited claim of a right to go at all times and in all directions over every portion of a close for purposes of recreation and amusement is bad. Such an easement is claimable only by the inhabitants of particular villages over open and uninclosed village-greens and village play-grounds, which have been immemorially dedicated to the recreation and amusement of the inhabitants of the village(*i*). Claims of a right of profit à prendre *in alieno solo* must in like manner, in order to be valid, be made with some limitation and restriction.

(*hh*) Bract, lib. 4, fol. 220-222.

(*i*) Dyce v. Hay, 1 Macq. 305. See Jones v. Perceval, 5 Pick 485; Brice v. Randall, 7 Gill. & J. 349; Holmes v. Seeley, 19 Wend. 507; Washb. on Easem. & Serv. (3d ed.) 128.

Where, therefore, a defendant claimed a prescriptive right as the occupier of a brick-kiln to dig and carry away from an adjoining close of the plaintiff as much clay as was required for the making of bricks in the brick-kiln, it was held that an unlimited claim and demand of this nature upon the soil of the plaintiff could not be sustained, for it would, as claimed, enable the defendant "to take all the clay, or in other words, to take from the plaintiff the whole close"(k). So, a privilege claimed of taking sand without limit is bad(l); and so is a claim by the customary tenants of a manor having gardens, parcels of their customary tenements, to dig and carry away turf from the waste within the manor, for the improvement of their garden-walks, or for making and repairing banks and mounds of grass on their customary tenements(m). But a custom to dig sand and gravel in the waste for the repair of a dwelling-house, when out of repair, may be supported(n).

- 116 *Grants of rights of servitude—Licenses.*—A parol license or permission to go upon another man's land will, so long as it has not been countermanded, justify an entry upon the land; but it confers no indefeasible right at law, and may be recalled at the pleasure of the grantor, unless the license or permission be under seal. A mere parol agreement or license for the enjoyment of a right of way over the land of the licensor or promisor may at any time be put an end to by the latter. The locking of a gate across the way is a manifest revocation of the license, and a plain statement to everybody that the way is no longer to be used. And if the license has been granted by agreement for good consideration, there will be a breach of the agreement and a claim for damages; but no right to the enjoyment of the way, unless relief can be obtained in equity(o).

(k) *Clayton v. Corby*, 5 Q. B. 419, 422. *Wilkes v. Broadbent*, 1 Wils. 63.

(l) *Blewitt v. Tregoning*, 3 Ad. & E. 554.

(m) *Willson v. Willes*, 7 East, 121.

(n) *Peppin v. Shakspear*, 6 T. R. 748.

(o) *Hyde v. Graham*, 32 Law J., Exch. 27. The doctrine of the common law that a permanent interest in land, even by way of easement, cannot be created by or under a parol license, has been adopted in most but not all the States, as will be seen by reference to the following cases: *Selden v. Delaware and Hudson Canal Co.*, 29 N. Y. 634; *Mumford v. Whitney*, 15 Wend. 380; *Eggleston v. New York & Harlem R. R. Co.*, 35 Barb. 162; *Foot v. New Haven & Northampton Co.*, 23 Conn. 214; *Drake v. Wells*, 11 Allen 141; *Bridges v. Purcell*, 1 Dev. & Bat. (Law), 491; *Trammell v. Trammell*, 11 Rich. (Law), 471; *Clinton v. McKenzie*, 5 Strobb 36; *Poster v. Browning*, 4 R. I. 47; *Hazleton v. Putnam*, 3 Chand. (Wis.) 117; *French v. Owen*, 2 Wis. 250; *Woodward v. Sully*, 11 Ill. 157; *Carlton v. Redington*, 1 Foster (N. H.) 303; 2 Am. Lead Cases, 682-706. These cases hold that the licensee holds the privilege of using or occupying the land of the licensor at the will of the latter, and that it may be revoked by him at pleasure. A license is not rendered irrevocable by an agreement to pay a consideration for it. *Huff v. McAuley*, 53 Penn. St. 206. *Dark v. Johnson*, 55 Penn. St. 164.

That expenditures by the licensee, made upon the faith of a parol license, may, in some States, operate as an estoppel to prevent the licensor from revoking the license. See note s. post.

"A right of passage for waste water through an artificial drain or watercourse in another man's land, where the party claiming the right has no interest in the land through which the water flows, or ought to flow, is an incorporeal right lying in grant, and is claimable only by deed or by prescription"(p). Therefore a mere parol permission to cut a drain, or make a watercourse, and use it for the passage of water, may be revoked at law, and the drain or watercourse stopped up by the proprietor who has given the permission, and through whose land the water runs(q). "In the case of a parol license," observes Alderson B., "to come on my land, and there to make a watercourse for water to flow through my land, there is no valid grant of the watercourse. The license remains a mere license, capable of being revoked; but if the license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable"(r). But in equity, if a landowner has granted to his neighbor by parol an easement to be enjoyed over his land, and the neighbor incurs expense, with the sanction of the landowner, in constructing permanent works for the enjoyment of the privilege, the landowner will not be allowed to withdraw his consent and prevent the enjoyment of the privilege, without making compensation to the licensee(s). Thus, where persons desirous of supplying a town with water, applied to the defendant for permission to make a watercourse through his land, and permission was granted by word of mouth, and the watercourse was made at considerable expense, and was enjoyed for nine years, when disputes arose, and the defendant cut off the water, the Court of Chancery restrained the defendant by injunction from obstructing the flow of water, on compensation being made to him for the use of his land(t).

A license to put goods on the licensor's land cannot be revoked with-

(p) *Hewlins v. Shippam*, 5 B. & C. 229. *Mumford v. Whitney*, 15 Wend. 380. *Cook v. Stearns*, 11 Mass. 533. *Sampson v. Burnside*, 13 N. H. 264.

(q) *Cocker v. Cowper*, 1 Cr. M. & R. 421. *Fentiman v. Smith*, 4 East, 108.

(r) *Wood v. Leadbitter*, 13 M. & W. 845. *Lee v. Stevenson*, E. B. & E. 512; 27 Law J., Q. B. 263. *Dark v. Johnston*, 55 Penn. St. 164.

(s) *Beaufort (Duke of) v. Patrick*, 17 Beav. 60. *Moreland v. Richardson*, 22 Beav. 596. *Snowden v. Wilas*, 19 Ind. 10. *Stephens v. Benson*, id. 367. *Bartlett v. Prescott*, 41 N. H. 493. *Fuhr v. Dean*, 26 Mo. 116. *Lane v. Miller*, 27 Ind. 534. *Dark v. Johnston*, 55 Penn. St. 164. *Rerick v. Kern*, 14 Serg. & R. 267. *Lacey v. Arnett*, 33 Penn. St. 169. *Wickersham v. Orr*, 9 Iowa 260. *Beatty v. Gregory*, 17 Iowa 114. *Hulme v. Shreve*, 3 Green C. R. 116. *Veghte v. Raritan Water Power Co.*, 4 C. E. Green 153. See *Hall v. Choffer*, 13 Vt. 150, 157. To the contrary, see *Collins v. Marcy*, 25 Conn. 239; *Babcock v. Utter*, 1 Keyes (N. Y.) 397, and cases collected under note o, ante. And see post, ch. 23, INJUNCTION.

(t) *Devonshire (Duke of) v. Eglin*, 14 Beav. 530.

out allowing the licensee a reasonable time for the removal of his goods(*u*).

"A dispensation or license," observes Vaughan, C.J., "properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful. Thus a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the act of hunting and cutting down the tree; but as to the carrying away of the deer killed and tree cut down, they are grants"(*v*).

A mere license of pleasure, such as a license to hunt over a man's land, whether made by deed or simple contract, is revocable; but a license to hunt and carry away the game killed amounts, if under seal, to a grant, and cannot be revoked(*w*). Care, however, must be taken to distinguish between a license amounting to a grant of an easement to be exercised and enjoyed by the grantee of such license upon the grantor's land, and a license to the grantee to use his own land in a way which, but for an easement claimed thereon by the grantor, he would have an undoubted right to use it(*x*).

Rights which are part of the ownership of the soil, unless expressly reserved under Inclosure Acts, pass with the soil to the persons to whom allotments are made(*y*). Where, therefore, by an Act for the inclosure and allotment of waste lands in a manor, it was provided that nothing in the Act should defeat the right of the lord of the manor to the seigniories and royalties incident to the manor, but that he should hold and enjoy all courts, fairs, markets, etc., with free warren and liberty of hunting, hawking, fishing, and fowling "to the said manor, or to the lord thereof, incident, belonging, or appertaining," in as ample a manner as before the Act, it was held that, as his right to sport over the waste before the Act was not a license or liberty "incident to him as lord," but a method of direct enjoyment of his own soil and freehold, the Act did not reserve any such right of sport-

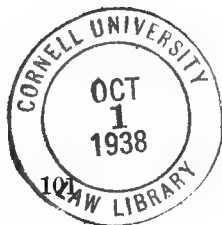
(*u*) *Cornish v. Stubbs*, L. R., 5 C. P. 334. See *Druse v. Wheeler*, 22 Mich. 439; *Heermance v. Vernoy*, 6 Johns. 5; *Blake v. Jerome*, 14 Johns. 406; *Newkirk v. Sabler*, 9 Barb. 652.

(*v*) *Thomas v. Sorrell*, Vaughan, 351.

(*w*) Bro. Abr. LICENSES. As to a license to fish, see *Mills v. Mayor of Colchester*, L. R., 2 C. P. 476; 3 ib. 575.

(*x*) *Winter v. Brockwell*, *Liggins v. Inge*, *post*. PAROL ABANDONMENT OF INCORPOREAL RIGHTS. See *Veghte v. Raritan Water Power Co.*, 4 C. E. Green, 153; *Morse v. Copeland*, 2 Gray, 302; *Elliott v. Rhett*, 5 Rich. 405; *Dyer v. Sanford* 9 Met. 395; *Curtis v. Noonan*, 10 Allen, 406.

(*y*) *Townley v. Gibson*, 2 T. R. 701. *Doe v. Davidson*, 2 M. & S. 175.



ing to him, and that his right thereto was gone(z). A fortiori, therefore, where the Act provided that a certain portion of the waste should be allotted to the lord of the manor in satisfaction for his right and interest as such lord (a). The Enclosure Commissioners, however, have power under the 11 & 12 Vict. c. 99, s. 1, to sever the right to take game from the ownership of the soil, if the lord of the manor makes that a condition of his assent to the enclosure (b). Where, therefore, in the reservation of the manorial rights of sporting in the Act other rights not manorial, such as the right of taking coals, minerals, etc., were joined in the reservation, it was held that the right of sporting was not lost, but that the terms of the clause, though nominally one of reservation only, were sufficient expressly to create or confer such a right(c).

117 *Reservation of privileges amounting to an express grant.*—Where a conveyance of lands contains words excepting and reserving to the grantors, their heirs and assigns, liberty to come upon the land and hunt, hawk, fish, and fowl, the clause will operate as a grant of the privilege by the person to whom the land is conveyed(d). Where the owner of a manor and of the demesne lands thereof, granted away the manor and all his estate and interest therein, “except and always reserved” to the grantor, his heirs and assigns, *all* the coal in any of the said lands, it was held that this reservation gave to the grantor an absolute and perpetual right in fee simple to the coals(e). If a lessor reserve out of a demise “the free running of water and soil coming from any other buildings and lands contiguous to the premises hereby demised,” the reservation extends only to water in its natural condition, but it includes all water that comes lawfully from the adjoining premises, whether it arose there or not(f).

118 *Implied reservation or grants of easements.*—It does not follow that because the necessity of an easement is apparent upon the face of property which has been sold or granted away, there is an implied

(z) *Greathead v. Morley*, 3 M. & G. 139. *Bruce v. Helliwell*, 5 H. & N. 609, *acc.*

(a) *Robinson v. Wray*, L. R., 1 C. P. 490.

(b) *Musgrave v. Forster*, L. R., 6 Q. B. 590.

(c) *Ewart v. Graham*, 7 H. of L. Ca. 331. *Musgrave v. Forster*, *supra*. *Leconfield (Lord) v. Dixon*, L. R., 2 Exch. 202; 3 ib. 32, *acc.*

(d) *Addison on Contracts*, 6th ed. pp. 117, 118. But the grant is of a privilege or easement in gross, and is not assignable over. *Post*, p. 116.

(e) *Cardigan (Earl of) v. Armitage*, 2 B. & C. 197. *Whitaker v. Brown*, 46 Penn. St. 197. So where a grant of lands is qualified by the words “grass, herbage, feeding and pasturage only excepted,” the qualification, if not good as an exception or reservation, is effectual to create an easement in the grantor to enter and depasture the lands. *Rose v. Bunn*, 21 N. Y. 275. As to the rights of the grantor’s licensees, see *Metcalf v. Westaway*, 34 Law J., C. P. 113.

(f) *Chadwick v. Marsden*, L. R., 2 Exch. 285.

reservation of such easement in favor of the vendor or grantor. "If I purchase from the owner of two adjoining freehold tenements the fee simple of one of those tenements, and have it conveyed to me, I am not bound to take notice of the manner in which the adjoining tenement is used or enjoyed by the vendor, and to permit all such constant or occasional invasions of the property conveyed, as may be requisite for the enjoyment of the remaining tenement in the manner it was used and enjoyed by the vendor at the time of such sale and conveyance." (g).

But on the grant by the owner of an entire heritage of part of that heritage as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements, which have been and are, at the time of the grant, used by the owners of the entirety, for the benefit of the parcel granted. If, therefore, a landed proprietor has annexed peculiar qualities and incidents to different parts of his estates, so that one portion of his land becomes visibly dependent upon another for the supply or escape of water, or for means of access, or for beneficial use and occupation, the qualities or incidents thus manifestly imprinted upon the property pass with the lands to which they are annexed to the grantees, as accessorial to the beneficial use and enjoyment of such lands (h). If one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances without the land, or sell the land without the house to another, the conduit and pipes pass with the house, because they are necessary and appendant thereto; and the purchaser of the house shall have liberty by law to dig in the land for amending the pipes or making them new, as the case may require. So it is if a lessee for years of a house and land erect a conduit upon the land, and, after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them. "But" by Popham, C.J., "if the lessee erect such a conduit,

(g) *The Lord Chancellor, Sufield v. Brown*, 33 Law J., Ch. 258.

(h) *Sufield v. Brown*, *ut sup.* *Lampman v. Milks*, 21 N. Y. 505. *Janes v. Jenkins*, 34 Md. 1-11. *Thompson v. Miner*, 30 Iowa 386. *New Ipswich Factory v. Batchelder*, 3 N. H. 190. *Thayer v. Payne*, 2 Cush. 327. *Simmons v. Cloonan*, 47 N. Y. 3. *Lasala v. Holbrook*, 4 Paige 169. But the rule of law which creates an easement on the severance of two tenements or heritages by the sale of one of them is confined to cases where an apparent sign of servitude exists on the part of one of them in favor of the other, or as it is expressed by some of the authorities, where the marks of the burden are open and visible. *Butterworth v. Crawford*, 46 N. Y. 349. See *Tabor v. Bradley*, 18 N. Y. 109.

and afterwards the lessor during the lease sell the house to one and the land wherein the conduit is to another, and after that the lease determines, he who hath the land wherein the conduit is may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation or usage of them together by him who had the inheritance. So it is if a disseisor of a house and land erect such a conduit, and the disseisee re-enter, not taking conusance of any such erection, nor using it; but presently after his re-entry sells it, the house to one and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit"(i).

When two properties are possessed by the same owner, and there has been a severance made of one part from the other, anything which was used and was necessary for the enjoyment of that part of the property which is granted will be considered to follow from the grant, if there are the usual words of conveyance(k). Where, therefore, the owner of two or more adjoining houses sells or conveys one of the houses, the purchaser of the house is entitled to the benefit of all the drains from his house, and is subject to all the drains necessarily to be used for the enjoyment of the adjoining house(l), and that without any express reservation or grant; if that were not so, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole(m). If a man is possessed of a house, and there is a way necessary for the useful and convenient occupation of the house(n) manifestly used by the occupiers of the house, a grant or lease of the house with its appurtenances will carry with it the right to use the way(o). But if the way is not neces-

(i) *Nicholls v. Chamberlain*, Cro. Jac. 121. *Brown v. Nicholls*, Moore, 682. *Archer v. Bennett*, 1 Lev. 131. *Hinchliffe v. Earl Kinnoul*, 5 Bing. N. C. 23. *Canham v. Fisk*, 2 Cr. & J. 126. *Wardle v. Brocklehurst*, 29 Law J., Q. B. 145; 1 E. & E. 1058. *Watts v. Kelson*, L. R., 6 Ch. App. 166.

(k) *Ewart v. Cochrane*, 4 Macq. 122; 7 Jur. N. S. 925. *Hall v. Lund*, 32 Law J., Exch. 113. *Suffield v. Brown*, *ut sup.*

(l) See, as to this position, *Gale on Easements*, 4th ed. p. 113; *Thayer v. Payne*, 2 Cush. 327; *Johnson v. Jordan*, 2 Met. 234; *Randall v. McLaughlin*, 10 Allen, 366. But this rule applies only to drains absolutely necessary to the enjoyment of the property conveyed. If the party claiming the right to drain his own premises across the land of another can construct an equally beneficial drain on his own land, with reasonable labor and expense, the rule has no application. *Id.*

(m) *Pyer v. Carter*, 1 H. & N. 91-6; 26 Law J., Exch. 258. *Hall v. Lund*, and *Chadwick v. Marsden*, *supra*. See *Hilliard on Torts*, p. 111 n.

(n) *Mansfield, C.J.*, *Morris v. Edgington*, 3 Taunt. 28. *Pearson v. Spencer*, 1 B. & S. 571.

(o) *Pollock, C.B.*, *Glave v. Harding*, 27 Law J., Exch. 292. *Simmons v. Sines*, 4 Keyes (N. Y.) 153. *Smyles v. Hastings*, 22 N. Y. 217. *Thomas v. Bertram*, 4 Bush. (Ky.) 317. *Pettingill v. Porter*, 8 Allen 1. *Bartlett v. Prescott*, 41 N. H. 493. *McTavish v. Carroll*, 7 Md. 352. *Collins v. Prentice*, 15 Conn. 39. *Marshall v. Trumbull*, 28 Conn. 183. *Brice v. Randall*, 7 Gill & J. 349. *Kimball v. Cocheco R. R.*, 7 Fost. 449.

sary for the beneficial use and occupation of a tenement, and there are other convenient means of access, a right of way will not pass under the word "appurtenances"(p). And if adjoining houses, held under the same landlord, are sold subject to all subsisting *rights* of way and water, a mere permissive user of a way or of water from a well will not thereby be converted into a legal right(q).

By the French law, if the proprietor of two heritages between which there exists an apparent sign of servitude disposes of one of the heritages, without making any stipulation in the conveyance respecting the servitude, it continues to exist, actively or passively, in favor of the heritage alienated or upon it(r). And by apparent signs of an easement or servitude must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject(s).

- 119 *Privileges and servitudes which pass as accessory to the use and enjoyment of the principal thing granted*—*Omne accessorium sequitur suum principale*.—In accordance with the maxim, "Quando aliquis aliquid concedit, concedere videtur et id, sine quo res concessa uti non potest," it has been held that by the grant of the use of a pump the grantee has a right to enter upon the grantor's land to repair the pump, although neither the soil itself nor the pump on which it stands be granted to him; and that if a man gives me a license under seal to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another, and not to me(t). If one grants his trees, the grantee may enter upon his land for the cutting down and carrying them away. And if a growing crop of grass is sold to be cut down and made into hay when it arrives at maturity, the purchaser has a right by implication of law to make the grass into hay on the land(u). If a landowner has granted to another a right to dig coal-pits in his

(p) *Pheysey v. Vicary*, 16 M. & W. 484. *Dodd v. Burchall*, 1 H. & C. 113. 31 Law J., Exch. 364. *Wardle v. Brocklehurst, ut sup.* *McDonald v. Lindall*, 3 Rawle 492. *Viall v. Carpenter*, 14 Gray (Mass.) 126. *Leonard v. Leonard*, 2 Allen (Mass.) 543. *Ogden v. Grove*, 38 Penn St. 487. *Seabrook v. King*, 1 Nott & McC. 140. *Trask v. Patterson*, 29 Me. 499. *Hall v. McLeod*, 2 Met. (Ky.) 98. *Gazetty v. Bethune*, 14 Mass. 49. *Grant v. Chase*, 17 Mass. 443. *Hyde v. Jamaica*, 27 Vermont, 443.

(q) *Daniel v. Anderson*, 31 Law J., Ch. 610. *Russell v. Harford*, L. R., 2 Eq. Ca. 507. See *French v. Morris*, 101 Mass. 68.

(r) Cod. Civ. art. 694.

(s) *Pyer v. Carter*, 1 H. & N. 922. As to this case see 33 Law J., Ch. 259; L. R., 6 Eq. Ca. 253. As to the rule in New York see *Butterworth v. Crawford*, 46 N. Y. 349.

(t) *Pomfret v. Ricroft*, 1 Saund. 322e, 323. *Liford's case*, 11 Co. 52a. See *Prescott v. White*, 21 Pick. 341; *Prescott v. Williams*, 5 Met. 429; *Doane v. Badger*, 12 Mass. 65, 70; *Williams v. Safford*, 7 Barb. (N. Y.) 309; *Gillis v. Nelson*, 16 La. An. 279; *Frailey v. Waters*, 7 Penn. St. 221.

(u) 1 Roll. Abr.; DISMES X., pl. 23.

land, and to take and carry away coals, all things necessary for the exercise and enjoyment of the right pass therewith to the grantee. He has a right, therefore, to erect sheds and steam-engines, and fix such machinery as may be necessary to drain the coal-pits, draw up the coals and iron, and work the coal-field, although the grant of the incorporeal right may be silent as to any such erections(x).

By the French law, "he to whom a servitude is due has a right to form all the works necessary to make use of and preserve the servitude. These works are at his own expense, and not at that of the proprietor of the estate subjected to the servitude, unless the deed establishing the servitude declare the contrary"(y).

120 *Ways of necessity*.—Whenever one man grants land to another to which there is no access but over the land of the grantor, or the land of a stranger, which cannot lawfully be traversed, the grantee has a right of way over the grantor's land, as a way by necessity, and the grantor shall assign the way where he can best spare it(yy). And if the owner of two closes, having no way to one of them but over the other, parts with the latter without reserving the way, it will be reserved to him by law as a way of necessity(z.) Where one sold land, and afterwards the vendee, by reason thereof, claimed a way to it over part of the plaintiff's land, there being no convenient way adjoining, it was held that he might well justify the using thereof, for otherwise he could not have any profit of his land: and if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto, but through one of those which he sold, although he reserved not any way, yet he shall have

(x) *Dond v. Kingscote*, 6 M. & W. 196.

(y) Cod. Civ. liv. 2, tit. 4, art. 697, 698.

(yy) *Kimball v. Cocheo R. R. Co.*, 7 Foster (N. H.) 448. *Wessler v. Hershey*, 23 Penn. St. 333. *Leonard v. Leonard*, 2 Allen (Mass.) 543. *Snyder v. Warford*, 11 Mo. 513. *New York Life Ins. and Trust Co. v. Miller*, 1 Barb. Ch. (N. Y.) 353. *Collins v. Prentice*, 15 Conn. 39. *Holmes v. Seeley*, 19 Wend. 507. If the grantor fails to locate the way, the grantee may locate it for himself. *Holmes v. Seeley*, 19 Wend. 507.

(z) 2 Roll. Abr.; GRAUNT, Z., pl. 17, 18. *Staple v. Heydop*, 6 Mod. 4. *Howton v. Frearson*, 8 T. R. 50. *Morris v. Edgington*, 3 Taunt. 30. *Pinnington v. Galland*, 9 Exch. 12; 22 Law J., Exch. 349. *East. Co. Rail. Co. v. Dorling*, 5 C. B., N. S. 821; 22 Law J., C. P. 202. *Gayford v. Moffatt*, L. R., 4 Ch. App. 133. *Collins v. Prentice*, 15 Conn. 39. *Pierce v. Selleck*, 18 Conn. 321. *Brigham v. Smith*, 4 Gray, 297. *Lawton v. Rivers*, 2 McCord, 445. *Cooper v. Maupin*, 6 Mo. 624. *Smith v. Kinard*, 2 Hill. (S. C.) 624. *Alley v. Carleton*, 29 Texas, 78. But where land is sold for a specific purpose and conveyed without reservation, the law will not imply a right of way of necessity over such land in favor of the vendor, if the purposes for which the land is granted are inconsistent with the object of the purchase. *Seeley v. Bishop*, 19 Conn. 128.

And if the owner of land bounded on one side by a highway and on the other side by the lands of other owners, sells that portion of lands which is next to the highway, he will have no right of way by necessity, over the land sold if he has a prescriptive right of way over either of the adjoining lots. *Leonard v. Leonard*, 2 Allen (Mass.) 543.

it as reserved unto him by the law(a). A way of necessity, when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant; for there seems to be no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant. In both cases the grant is the foundation of the title, and it is as necessary to set forth the title to a way of necessity as it is to a way by grant(b).

121 *Necessary incidents to a grant of a right of way or watercourse.*—Every grantee of a right of way, or of the right of passage for waste water through an artificial drain or watercourse, extending from the land of the grantee through the land of the grantor, is bound to maintain and repair the way and the watercourse, if he wishes to use them, unless the grantor himself has expressly undertaken the performance of that duty. The grantee, therefore, has a right to go upon the land over which the easement is enjoyed to do the necessary repairs(c).

Under a general grant of a right of way, with liberty to make and lay causeways, and use the same with wagons and carriages, and carry coals, it was held that the grantee had a right to construct and use framed wagon-ways, if they were reasonably necessary for the profitable conveyance of coals, but that he was not entitled to make a transverse road across the land, for purposes foreign to the conveyance of coals(d). And where there was a grant of a right of way as a foot or carriage way, with all liberties, powers, and authorities necessary to the enjoyment thereof, it was held that the grantee of the way might lay down a flagstone upon the land in front of his house, over which the way passed, if the flagstone was reasonably necessary for his enjoyment of the way, and the laying of it down did not in any wise obstruct the carriage-road, or cause any injury or inconvenience to the grantor(e).

By the civil law, every owner who was entitled to a way, or the free passage of running water from his dominant tenement through

(a) *Clarke v. Cogge*, Cro. Jac. 170. See *Davies v. Stear*, L. R., 7 Eq. C. 427; 38 L. J., Ch. 545, *nom.* *Davies v. Sear*, S. C.; *Cooper v. Maupin*, 6 Mo. 624.

(b) 1 Wms. Saund. 323a, 323b. *Proctor v. Hodgson*, 10 Exch. 824; *Law J.*, Exch. 195. *Nichols v. Luce*, 24 Pick. 102. *Collins v. Prentice*, 15 Conn. 39. *Atkins v. Boardman*, 2 Metc. 457. *Huff v. McAuley*, 53 Penn. St. 209. *American Co. v. Bradford*, 27 Cal. 366. Washb. on Easem. & Serv. (3d ed.) 44.

(c) *Taylor v. Whitehead*, 2 Doug. 745. *M'Swiney v. Haynes*, 1 Ir. Eq. R. 322. *Prescott v. White*, 21 Pick. 341. *Holmes v. Seeley*, 19 Wend. 507. *Wynkoop v. Burger*, 12 Johns. 222. *Doane v. Badger*, 12 Mass. 65. *Atkins v. Bordman*, 2 Metc. 457. *Prescott v. Williams*, 5 Metc. 429. *Jones v. Percival*, 5 Pick. 485. *Miller v. Bristol*, 12 Pick. 550; *post*. ch. 4.

(d) *Senhouse v. Christian*, 1 T. R. 569.

(e) *Gerrard v. Cooke*, 2 B. & P. N. R. 115

an adjoining servient tenement, was entitled to enter upon the servient lands to repair the way or watercourse when necessary, and bring thereon the materials necessary for the purpose, making compensation to the owner of the servient tenement for all damage done in the progress of the repairs(*f*).

122 *Right of towing on the banks of a navigable river.*—There is no general common law right of towing along the banks of a navigable river(*g*); but such a right may be acquired by grant, custom, or prescription(*h*).

123 *When an easement of support from the adjoining land of the grantor passes as accessorial to a grant of land or of a tenement.*—If the landowner sell a portion of his land avowedly and expressly for building, or for the construction of a road or railway, he impliedly grants to the purchaser in the absence of statutory provisions to the contrary, an easement of lateral support from his adjoining land; and if the vendor reserves to himself the right to the minerals underneath the surface, he nevertheless impliedly grants all such adjacent and subjacent support as is reasonably necessary to enable the purchaser to erect and maintain his buildings, road, or railway; and neither the vendor, nor those who claim under him, can afterwards excavate so as to endanger the support and derogate from the grant(*i*).

How far this adjacent and subjacent support must extend is a question which in each particular case will depend on its own special circumstances. If the surface of the land granted is merely a common meadow, or a ploughed field, the necessity for support will be much less than if it were covered with buildings. All which a grantor of the surface can be reasonably considered to grant or warrant, by implication of law, is such a measure of support, subjacent and adjacent, as is necessary for the land in its condition at the time of the grant, or to enable the grantee to use it for purposes for which it was known to be required.

“Thus, if I grant a meadow to another, retaining the minerals under it, and also the adjoining land, I am bound so to work my

(*f*) Gale on Easements, 4th ed. 496.

(*g*) Ball v. Herbert, 3 T. R. 253. Treat v. Lord, 42 Me. 552. Hooper v. Holson, 57 Me. 273. The doctrine of the civil law that the privilege of towing on the banks of navigable rivers is embraced in the public right of navigation has been partially adopted in certain decisions in Illinois and Tennessee, but this doctrine has not been generally accepted as the law of the United States. Reimold v. Moore, 2 Mich. N. P. 15.

(*h*) As to the right to the soil of towing paths, see *post*, ch. 6, s. 2.

(*i*) North-East Rail Co. v. Crosland, 32 Law J., Ch. 358. This rule, however, does not necessarily apply where lands are taken under the provisions of an act of parliament, e.g. for constructing a sewer. Met. Board of Works v. Met. Rail. Co., L. R., 3 C. P. 612; 4 *ibid.* 192; 38 L. J., C. P. 172.

mines and to dig my adjoining lands as not to cause the meadow to sink or fall over. But if I do this, and the grantee thinks fit to build a house on the edge of the land he has acquired, he cannot complain of my workings and diggings if by reason of the additional weight he has put on the land they cause his house to fall. If, indeed, the grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied grant and warranty of support, subjacent and adjacent, as if the house had already existed(*j*). And if the additional weight of the building has in nowise caused the surface to sink, and the land would have sunk if no building had been put upon it, the excavator or miner is responsible for the damage done both to the land and buildings”(ante, p. 75). In reserving mines and minerals, therefore, the grantor must be understood to have reserved them so far only as he can work them consistently with the preservation of the grant of the surface(*k*).

- 124 *Of the right to search for minerals under lands weighted by railways and canals.*—By the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), it is enacted (s. 77) in the case of the purchase of lands by any company constituted under that Act, that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except such part thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased, and that all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby. And by s. 78 it is enacted, that if the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, etc., shall give notice in writing to the company of his intention; and if it appear to the company that the working of the mines is likely to damage the works of the railway, the company may, by giving compensation in the mode provided by the statute(*l*), prevent the working of the mines. But if, within thirty days after the

(*j*) *Caled. Rail. Co. v. Sprot*, 2 Macq. 452. *North-East Rail. Co. v. Elliott*, 1 Johns. & Hem. 145; 29 Law J., Ch. 812; 30 Law J., Ch. 164; 32 Law J., Ch. 402. *North-East. Rail. Co. v. Crosland*, 2 Johns. & Hem. 565. *Harris v. Ryding*, 5 M. & W. 60. *Haines v. Roberts*, 7 Ell. & Bl. 625; 6 *ibid.* 643.

(*k*) See *Bell v. Wilson*, L. R., 1 Ch. App. 303.

(*l*) *Post.* ch. 16.

receipt of the notice, the company do not state their willingness to treat for the payment of compensation, the owner of the mines may work them in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working mines in the district, making good damage done to the railway or works by improper working.

Similar provisions have been inserted in various acts of parliament incorporating canal companies, and enabling them to purchase lands, for the formation of a canal, and the effect of them is to deprive the company of the right to support for the railway or canal from coal, ironstone, slate, or minerals lying beneath the surface of the adjoining land, within the purchasing distance, or beneath the land over which the railway or canal is carried, unless they have purchased the slate or minerals, or compensation has been given in the manner prescribed by the statute(m).

Under statutory provisions of this sort, the company do not in the first instance pay to the landowner more than the value of the surface in the shape of purchase-money, or for the injury to the surface, if compensation only is made for damage; the minerals remain the property of the owner of the soil; but where he is desirous of getting them, the company have the option of purchasing them at a fair price, to be settled, in case of dispute, in the usual way. These provisions, it has been observed, are for the benefit of the company, who are relieved from the great expense of buying the minerals along the whole line of an intended railway or canal in the first instance, before it is constructed; and are enabled to postpone the purchase of them until the time when, from the state of the market in the neighborhood, the owners really want to get them. When this happens, the company have an option either to buy, in which case the landowner cannot get the mineral, but is fully compensated for the loss of that right, or not to buy, in which case he receives no compensation at all, but his right to get them remains as complete as if no railway had been made(n).

(m) *Great West. Rail. Co. v. Bennett*, L. R., 2 H. of L. Ca. 27. *Midland Rail. Co. v. Checkley*, L. R., 4 Eq. Ca. 19.

(n) *Dudley Canal Nav. Co. v. Grazebrook*, 1 B. & Ad. 72. *Stourbridge Canal Co. v. Dudley (Earl of)*, 30 Law J., Q. B. 198. *London & North-west Rail. Co. v. Ackroyd*, 31 Law J., Ch. 588. It has been recently held, however, that in case a canal company refuse after notice from the mine owner, to purchase the mines, and the latter works his mines, not negligently, but with full knowledge that the canal water will probably flood his mines, which accordingly happens, the mine owner is not entitled to sue the canal company for a tort, although he may be entitled to compensation under the statute. *Dunn v. Birm. Canal Co.*, L. E., 7 Q. B. 244, *diss.* Hannen, J.

These statutory provisions do not exclude the ordinary right of a purchaser to support from adjacent land situate beyond the purchasing limits; and, therefore, where a vendor has sold land to a railway company for the erection of a bridge or a viaduct, he cannot excavate his own adjoining land, situate beyond the purchasing limits, so as to deprive the bridge or viaduct of the necessary adjacent support.(o).

The 81st section of the 8 Vict. c. 80, enacts "that a railway company shall from time to time pay to the owner, lessee, or occupier of mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner, etc.," by reason of the severance of the surface land, or of the continuous working of the mines being interrupted, or by reason of the same being worked so as not to prejudice the railway, and in case of dispute as to the amount "of such losses and expenses," the same shall be settled by arbitration. An arbitrator may, under this section, include damage not actually incurred, but which will be necessarily incurred by the mine-owner, by reason of the severance, and the interruption in the working of his mines, if it be reasonably ascertainable(p).

It has been held that clauses in Canal Acts, requiring coal owners to give notice to canal companies of their intention to work their mines within a certain distance of the canal, and giving liberty to the company to inspect the works, and to prohibit the owners, upon compensation being made, from working within that distance, were framed for the purpose of enabling the company to purchase out the rights of the coal owners, if they thought their canal works likely to be endangered by the nearer approach of the miners; that if the company declined the purchase, the coal owners were left to their common law rights, as if no canal had been made, and they might take every part of their coal in the same manner as they might have done before the Act passed, their former rights in that respect not having been taken away by the Act, which has only appropriated the surface of the land, and so much of the soil as was necessary for the cutting and making of the canal, leaving the coal, etc., to the owners, to be enjoyed in the same manner as before(q).

"The difficulty which arose upon the Dudley Canal Act was this, that the wording of the clause there, 'doing no damage,' was coupled

(o) *Elliot v. North-east Rail. Co.*, 32 Law J., Ch. 402. *N. E. R. Co. v. Crosland*, 32 Law J., Ch. 353.

(p) *Whitehouse v. Wolverhampton Rail.*, L. R., 5 Exch. 6.

(q) *Wryley Canal Co. v. Bradley*, 7 East, 371.

with the power of the company to purchase, and it seemed, in the judgment of the court, to be a useless and frivolous clause, unless they gave a wider interpretation to the words 'working without doing damage,' because, they said, if it is to be a simple and absolute clause that no damage shall be done, it is a very idle thing to put the company upon the terms of purchasing"(r). But where there is no clause in the Act requiring the railroad or canal proprietors to procure immunity from damage by purchasing the minerals, and authorizing them to make the purchase, the mine-owner cannot work his mine so as to destroy or injure the railroad or canal(s). And the same principle applies if the works and excavations of the mine-owner, endangering a railway structure, are situate beyond the purchasing limits, so that the clause does not apply(t). If a mine-owner, having worked up to the purchasing limits, gives notice to the company, and the company decline to purchase the minerals, and the mine-owner proceeds with the working of the mine under the railway, and the soil sinks, and the railway drains and drainage works become choked up or destroyed, and the surface-water from the railway percolates through the earth, and floods the mine, the railway company is in general bound by statute to make good the damage and rebuild the drains, and this from time to time, as the earth subsides through the working of the mine(u).

125 *Servitude of support from one house to another, where several houses have been built together, so as to require mutual support.*—Where a number of houses have been built together by one owner, so as to require and receive mutual support, there is, either by a presumed grant, or by a presumed reservation, a right to such mutual support for their common protection or security, so that if the houses are afterwards sold and conveyed to different individuals, this mutual dependence of one house upon another, and right to mutual support, continues(v); and if several adjoining landowners, by common consent and agreement, build their houses together, so that the house of one of them rests upon and requires the support of the adjoining house, there would be an implied grant of a right to mutual support; and this right would continue, notwithstanding alterations in the ownership of

(r) Wood, V.-C., *North-East. Rail. Co. v. Elliott*, 29 Law J., Ch. 811.

(s) *Reg. v. Aire & Calder Nav. Co.*, 30 Law J., Q. B. 337.

(t) *North-East. Rail. Co. v. Elliott*, 2 De G. F. & J. 423; 30 Law J., Ch. 160; 22 Law J., Ch. 402.

(u) *Bagnall v. Lond. & North-West. Rail. Co.*, 7 H. & N. 423; 31 Law J., Exch. 121.

(v) See *Rogers v. Sinsheimer* 50 N. Y. 646; *Partridge v. Gilbert*, 15 N. Y. 601.

the houses by sale, mortgage, devise, etc.(x). But if two houses are built against each other, with separate and independent walls, resting upon separate and independent foundations, so as to stand independently of each other, one house has no right to an easement of support from the other(y).

126 *Accessorial servitude of support where the separate floors of a building are granted to several different proprietors.*—If the owner of a house conveys the upper story to a purchaser, there is an implied grant of support from the lower stories, so that the owner of the latter cannot interfere with the walls and beams upon which the upper story rests, and prevent them from affording proper support(z). And if a man builds a house, and forms each story or flat into a separate dwelling, and sells or lets the different stories of the house to different individuals, there is an implied grant to every purchaser or hirer of the rooms of all such adjacent and subjacent support as may be necessary for the maintenance and enjoyment of each respective dwelling. And when the different floors and flats of the same house are held as separate freeholds by different individuals, the owner of the lower rooms and foundations is in general bound to uphold and maintain the main walls and necessary supports of the rooms above(a).

“Where I have a chamber below, and another has a chamber above mine, as they have here in London, in this case I may compel him who has the chamber above to cover his chamber for the salvation of the timber of my chamber below; and in the same manner he may compel me to sustain my chamber below, by the reparation of the principal timber, for the salvation of his chamber above”(b). There is a writ in *NATURA BREVIUM* to a mayor, to command him that has the lower rooms to repair the foundation, and him that has a garret to repair the roof; and that is grounded upon a custom(c).

If the owner of a house grants the upper rooms to be holden and enjoyed for life or in fee, reserving to himself the lower rooms, he

(x) *Richards v. Rose*, 9 Exch. 221. See *Brooks v. Curtis*, 50 N. Y. 639. As to the rights and liabilities of the several owners of adjoining buildings in respect to party walls under the statutes of Pennsylvania, see *Dunlop Laws of Penn.* (ed. 1847) ch. 31, p. 39; act of 1721; *Roberts v. Bye*, 30 Penn. St. 375.

(y) *Solomon v. Vintners Co.*, 4 H. & N. 598. *Peyton v. Mayor of London*, 9 B. & C. 736. *Kempston v. Butler*, 12 Ir. C. L. R. 516.

(z) *Caledon. Rail. Co. v. Sprot*, 2 Macq. 450.

(a) *Richards v. Rose*, 9 Exch. 221; 23 Law J., Exch. 3. *Humphries v. Brogden*, 12 Q. B. 747. *McConnel v. Kibbe*, 33 Ill. 175. See *Rhodes v. McCormick*, 4 Iowa, 376.

(b) *Anon. Keilw.* 98, pl. 4. *Anon.* 11 Mod. 8. *Graves v. Berdan*, 26 N. Y. 498, 501. But see *Loring v. Bacon*, 4 Mass. 575; *Cheesebrough v. Green*, 10 Conn. 318; *Ottumwa Lodge v. Lewis*, 34 Iowa 67.

(c) *Tenant v. Goldwin*, 6 Mod. 314; 2 Ld. Rayn. 1093; *Fitz. Nat. Brev.* 127.

impliedly undertakes not to do anything which will derogate from his own grant. If, therefore, he were to remove the supports of the upper room he would be liable to an action(*d*). And if he conveys the house to another by deed, reserving a lower story to himself, with powers of enlarging and altering such lower story, those powers must be exercised so as not to interfere with or endanger the necessary support to the rooms above, unless the right of support is expressly renounced by the grantee of the upper stories(*e*).

By the French law, "when the different stories of a house belong to different proprietors, and the titles to the property do not regulate the mode of reparations and reconstructions, they must be made in the following manner:—The main walls and the roof are at the charge of all the proprietors, each in proportion to the value of the story belonging to him. The proprietor of each story makes the floor belonging thereto; the proprietor of the first story erects the staircase which conducts to it; the proprietor of the second story carries the stairs from where the former ends to his apartments; and so of the rest"(*f*).

127 *Grants of the privilege of a free passage of light and air to newly-opened windows across the adjoining land of the grantor must be authenticated by deed, or established by implied grant, or by prescription. If a parol license or permission is granted to a neighbor to open a window overlooking the adjoining ground of the defendant, the parol license will not prevent the defendant from building a wall on his own land, and thereby shutting out the light and air from the newly-opened window. If, therefore, permission not under seal is given to a defendant, to open a window in his house overlooking the plaintiff's garden, and the plaintiff, after the window has been opened, finding that his privacy has been invaded, builds a wall on his own ground which blocks up the offending window, and the defendant then enters upon the plaintiff's land, and knocks the wall down, he will be responsible in damages for a trespass, and cannot justify his entry upon the plaintiff's land under color of the parol license to open the window(g).*

128 *When the privilege of free passage for light and air across adjoining land passes as accessorial to a grant or conveyance.*—If the owner of a house and the surrounding land sells the house without the land,

(*d*) Parke, B., 5 M. & W. 71.

(*e*) Smart v. Morton, 5 Ell. & Bl. 47.

(*f*) Cod. Civ. liv. 2, tit. 4, art. 664.

(*g*) Bridges v. Blanchard, 1 Ad. & E. 549. Wood v. Leadbitter. Lee v. Stevenson, *ante*, p. 99.

free passage for so much light and air as may be reasonably necessary for the beneficial occupation and enjoyment of the house is impliedly granted by the vendor across his own adjoining unsold land, unless the privilege is excluded by the express terms of the conveyance. The vendor, therefore, cannot build on his own adjoining land so as to obstruct the access of light and air to the windows of the house. Having granted the house, he can do no act in derogation of his own grant. And if he sells and conveys the house to one man, and the adjoining land to another, the purchaser of the adjoining land cannot build so as to darken or obstruct the windows of the house, although such adjoining land may have been described as building-land, and the intention to build thereon may have been known to the purchaser at the time he purchased it^(h). But where the owner in fee of an ancient house, and of the land surrounding the house, sold such surrounding land without the house, and the purchaser built thereon, so as to obstruct the access of light and air to the windows of the ancient house, it was held that the owner had no remedy for the injury, and that there was no implied restriction on the right of the purchaser to build as he pleased on his own land⁽ⁱ⁾.

Where the shell of an unfinished house was sold, with openings in the walls for the insertion of windows and doors, it was held that the vendor could not, after the sale and conveyance of the unfinished structure, build on his own adjoining land, so as to obstruct the access of light and air to the spaces left for windows, or place obstacles in the way of the exercise of a right of way to the apertures intended for doors. And when two separate purchasers buy two unfinished houses from the same vendor, and at the time of the purchase the spaces for windows and doors are marked out, this is a sufficient indication to the purchasers of the rights they are respectively to enjoy; so that they cannot subsequently interfere with each other's enjoyment of the windows and doors as marked out and impliedly agreed upon at the time of the sale^(k). So if two lessees of houses derive title from the same lessor, the one cannot, by buildings or erections, encroach upon

(h) *Palmer v. Fletcher*, 1 Lev. 122. *Bayley, B., Canham v. Fisk*, 2 Cr. & J. 123. *Swansborough v. Coventry*, 9 Bing. 305. *Janes v. Jenkins*, 34 Md. 1. *Story v. Odin*, 12 Mass. 157. *Hubbard v. Town*, 33 Vt. 295. *Lampman v. Milks*, 21 N. Y. 505. *Gerber v. Grubell*, 16 Ill. 217. *Simmons v. Cloonan*, 2 Lans. (N. Y.) 346, 351. *Oregon Iron Co. v. Trullinger*, 3 Oregon, 1, 6. *United States v. Appleton*, 1 Sumn. 492, 502. *Maynard v. Esher*, 17 Penn. St. 222, 226. To the contrary see *Mullin v. Stricken*, 19 Ohio St. 523; *Haverstick v. Sipe*, 33 Penn. St. 368; *Morrison v. Marquardt*, 24 Iowa, 35.

(i) *White v. Bass*, 7 H. & N. 722; 31 Law J., Exch. 283.

(k) *Compton v. Richards*, 1 Price, 27. *Glave v. Harding*, 27 Law J., Exch. 286.

the light and air coming to the windows of the house occupied by the other(*l*).

In these cases the right to the free passage of a reasonable quantity of light and air across the adjoining land becomes appurtenant to the house, and passes therewith to all successive owners of the property.

Upon the same principle, it has been held that a landlord, after he has demised his house, cannot obstruct the lights existing at the time of the demise(*m*); nor can a lessee darken or obstruct windows of his own landlord which existed at the time of the demise, whether such windows were ancient or of recent construction(*n*). But the right of uninterrupted enjoyment is confined to the windows existing at the time of the conveyance, grant, or demise, and does not extend to windows subsequently opened, or to new windows varying in size, elevation or position(*o*).

The rule is the same where a man sells land on the banks of a stream; he cannot, in derogation of his own grant, continue to foul the water in front of the land sold, unless he expressly reserve such right(*p*).

129 *Of the rule or maxim of law that no man shall derogate from his own grant.*—It is, as we have seen, a principle of law that no man shall derogate from his own grant(*q*); if, therefore, a man has granted to another estovers, or a right to cut and carry away wood for burning, or a right to fish for his own use and consumption, and he destroys all the wood out of which the estovers were to be taken, or draws all the water away from the pond or stream, and destroys the fish, the party grieved shall have his remedy by action; for these are wilful acts of the grantor, and it is a misfeasance in him to annul or avoid his own grant(*r*). If a man grants lands, reserving to himself the right to the coals and minerals beneath the surface, he cannot excavate them to the injury of the surface, and thereby derogate from his own grant. And if one man grants to another the privilege or easement of making and maintaining a covered sewer or watercourse, of certain specified dimensions, through the land of the grantor, for the purpose of carry-

(*l*) *Coutts v. Gorham*, 1 M. & M. 396. *Jacomb v. Knight*, 32 Law J., Ch. 601.

(*m*) *Cox v. Matthews*, 1 Vent. 237. *Rosewell v. Fryor*, 6 Mod. 116. See *Royce v. Gugenheim*, 106 Mass. 201, 205; *Thurston v. Mink*, 32 Md. 487.

(*n*) *Riviere v. Bower*, R. & M. 24.

(*o*) *Blanchard v. Bridges*, 4 Ad. & E. 190.

(*p*) *Crossley v. Lightowler*, L. R., 3 Eq. Ca. 279.

(*q*) *Ellis v. Mayor, etc. of Bridgnorth*, 32 Law J., C. P. 273. See *ante*, pp. 101, 113, 114; *Story v. Odin*, 12 Mass. 157; and see cases cited under note *h, ante*.

(*r*) *Twysden, J., Pomfret v. Ricroft*, 1 Saund. 322.

ing off waste and refuse water from the land of the grantee, the grantor has no right to use the sewer, and pour water into it, without the license and permission of the grantee(s). If a millowner sells a watermill which is supplied by water from an open sluice on the land of the vendor, the vendor cannot, after he has sold the mill, lawfully close the sluice, as he would, by so doing, derogate from his own grant. Both the vendor, and all persons claiming under him, are bound to keep the sluice open for the benefit of the grantee of the mill(*t*).

130 *Of the transfer from one person to another of easements and profits à prendre.*—*Easements and profits à prendre in gross*, not appendant or appurtenant to land, cannot be transferred from hand to hand, and kept alive, so as to burthen the land for all time in the hands of subsequent purchasers and proprietors; and no easement, privilege, or profit to be enjoyed over, or taken from, land can be made appendant or appurtenant to land, unless it is accessorial to the use and enjoyment of landed property(*u*). There must be a dominant tenement, for whose benefit the right exists, as well as a servient tenement(*x*). Thus, a right of way unconnected with the enjoyment or occupation of land cannot be annexed as an incident to an estate, nor can a way appendant to a house or land be granted away or made a way in gross, for no one can have such a way but he who has the land to which it is appendant. It is not in the power of an owner of land to create rights not connected with the use or enjoyment of land, and annex them to it, nor can he subject the land to a new species of burthen, so as to bind it in the hands of an assignee. "It would be a novel incident annexed to land, that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of way over other land; and a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter"(*y*).

(*s*) *Lee v. Stevenson*, E. B. & E. 512; 27 Law J., Q. B. 266. See *Bliss v. Greeley*, 45 N. Y. 671.

(*t*) *Miner v. Gilmour*, 12 Moore's P. C. C. 131.

(*u*) *Ellis v. Mayor, etc. of Bridgnorth*, 32 Law J., C. P. 273. See *Post v. Pearsall*, 22 Wend. 425; *Perley v. Langley*, 7 N. H. 233; *Wagner v. Hanna*, 38 Cal. 111; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 38; *Garrison v. Rudd*, 19 Ill. 558. But see *Goodrich v. Burbank*, 12 Allen, 459; *Owen v. Field*, 102 Mass. 100. As to when a right of shooting is an incorporeal right in gross, see *Overseers of Hilton v. Overseers of Bowes*, L. R., 1 Q. B. 359.

(*x*) *Dark v. Johnston*, 55 Penn. St. 164. *Mabie v. Matteson*, 17 Wis. 1. *Nemo potest servitutem acquirere, urbani vel rustici prædii, nisi qui habet prædium; nec quisquam debere nisi qui prædium habet.*—*Instit. lib. 2, tit. 4, s 3. De Servitutibus.*

(*y*) *Ackroyd v. Smith*, 10 C. B. 188. *Bailey v. Stevens*, 12 C. B., N. S. 91. *Hill v. Tupper*, 2 H. & C. 121.

"Private ways over another man's grounds," observes Blackstone, "may be grounded on a special permission, as when the owner of the land grants to another a liberty of passing over his grounds to go to church, to market, or the like: in which case the gift of grant is particular, and confined to the grantee alone; it dies with the person, and the grantee cannot assign over his right to any other"(z). Thus a license to a man to hunt in my park, or to walk in my orchard, extends but to himself. And a way granted to church over any land extends not to any other but the grantee himself(a), and therefore he may not give or grant this to another(b). But if the incorporeal right is appendant or appurtenant to a house or land, and accessorial to the use and enjoyment thereof, it passes with the tenement to which it is annexed to the successive assignees and owners thereof by a grant of the tenement, so that the benefit and the burthen of the exercise and enjoyment of the incorporeal right will accompany the dominant and servient tenements into the hands of the several successive assignees and owners thereof, so long as such dominant and servient tenements remain vested in the hands of separate proprietors(c).

A claim by one landowner to enter upon his neighbor's land and cut down trees and sell them, is a claim of a profit à prendre in gross, and cannot be made appurtenant to land, as it is in nowise accessorial to the use and enjoyment of an estate, but a claim to cut down thorns and firewood to burn in the dwelling-house of the claimant, is a profit à prendre, accessorial to the use and enjoyment of the dwelling-house, and may be made appendant or appurtenant thereto, so as to give the owners and occupiers thereof for the time being a right to the privilege(d).

By the French civil code, it is declared to be lawful for proprietors to establish over their estates, or in favor of their estates, such servitudes as seem good to them, provided the services established be not imposed either on a person, or in favor of a person, but only on an estate, and for the benefit of an estate(e).

(z) 2 Bl. Comm. 35. *Garrison v. Rudd*, 19 Ill. 553.

(a) *Wingate's Maxims*, 379.

(b) *Sheph. Touch.* 239. See *Wagner v. Hanna*, 38 Cal. 111.

(c) *Lansing v. Wiswall*, 5 Denio, 213. *Case of a Private Road*, 1 Ashm. 417. *Watson v. Bioren*, 1 Serg. & R. 227. *Orleans Navigation Co. v. Mayor of New Orleans*, 2 Mart. 233. *Lewis v. Carstairs*, 6 Whart. 193. *Garrison v. Rudd*, 19 Ill. 553. *Brozzart v. Corlett*, 27 Iowa, 297. See *post*, ch. 3, s. 1, as to the merger and extinguishment of easements and profits a prendre by unity of ownership of the dominant and servient tenements.

(d) *Dowglass v. Kendall*, Cro. Jac. 256.

(e) Cod. Civ. No. 686.

"By the grant of trees by tenant in fee simple, they are absolutely passed from the grantor and his heirs, and vested in the grantee, and go to his executors or administrators, being, in understanding of law, divided as chattels from the freehold, and the grantee hath power incident and implied from the grant to fell them when he will, without any other special license(*f*); and the law gives him power, as incident to the grant, to enter upon the land, and show the trees to those who would have them, for without sight none would buy, and without entry none could see them(*g*); and he may assign over the property in the trees, and his assigns* may enter upon the land, so long as it remains the property of the grantor, and fell the trees and carry them away"(*h*).

A grant to a man and his heirs of woods, underwoods, corn, and produce which may hereafter grow on the land of the grantor(*i*), conveys to the grantee and his heirs a profit a prendre, exerciseable against the grantor and his heirs, so long as the ownership of the soil remains in them(*k*); but no specific property in anything vests in the grantee until it has been severed from the inheritance, and reduced into possession(*l*). A grant of this description amounts to a mere personal contract, operative only between the immediate parties to it, and their heirs, and does not bind the land in the hands of persons to whom the land may be subsequently conveyed, and who were no parties to the deed of grant(*m*).

"Incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is their assets, real and personal, to answer in damages for breach of their obligations; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every

(*f*) *Stukely v. Butler*, Hob. 168. *Cardigan (Earl of) v. Armitage*, 2 B. & C. 210. See *Warren v. Leland*, 2 Barb. 613; *Brock v. Smith*, 14 Ark. 431; *Haskin v. Record*, 32 Vt. 575; *Wright v. Barrett*, 13 Pick. 44; *Clap v. Draper*, 4 Mass. 266; *Sawyer v. Hammott*, 3 Shepl. 40; *Putney v. Day*, 6 N. H. 430.

(*g*) *Liford's case*, 11 Co. 51b, 52a.

(*h*) *Palmer's case*, 5 Co. 24b. *Basset v. Maynard*, Cro. Eliz. 819.

(*i*) Described as "a fee simple in a profit a prendre,"—"an odd sort of estate." *Erle, C. J.*, 12 C. B., N. S. 103.

(*k*) *Barrington's case*, 8 Co. 136b.

(*l*) *Holroyd v. Marshall*, 30 Law J., Ch. 387. *Lunn v. Thornton*, 1 C. B. 379.

(*m*) *Keppel v. Bailey*, 2 Myl. & K. 535. *Ld. Wensleydale, Rowbotham v. Wilson*, 8 H. L. C 369. *Malone v. Harris*, 11 Ir. Ch. R. 39. See *Drake v. Wells*, 11 Allen (Mass.) 141.

message, might thus be held in a several fashion, and it would hardly be possible to know what right the acquisition of any parcel of land conferred, or what obligation it imposed"(n).

There are cases, indeed, where the right to the future produce and profits of the soil exists as an assignable and inheritable interest, burthening the land in the hands of subsequent purchasers and proprietors: but these are cases where the relationship of landlord and tenant existed between grantor and grantee of the right, and the grant constitutes, or is accompanied by, a covenant which runs with the land, binding upon both the assignee of the reversion and the assignee of the term(o). Thus, where a lessor granted, and covenanted in a lease, that the lessee, his executors and assigns, should take and carry away such corn as should be growing upon the ground at the end of the term, and the lessor sold and conveyed away his reversion, and the executor of the lessee, having sown the corn, sold it, it was held that the property in the growing crop vested in the purchaser, who might enter upon the land and take it, for there was both a covenant and a grant, and the covenant ran with the land, and bound both the assignee of the reversion and the assignee of the term(p). And such an interest running with the land, and binding the assignee of the reversion and the assignee of the term, will pass under a general assignment of a lessee's "tenant right"(q).

There are also, as we shall presently see, certain rights of common in gross, and certain customary rights of sole and several pasturage, which exist in various manors as inheritable and transferable estates; but these are rights vested in the customary tenants of the manor, of depasturing cattle upon open uninclosed downs and moors and waste places belonging to the lord of the manor, and depend upon the custom of the manor, and cannot be relied upon as authorities for ascertaining the rights of persons in ordinary cases.

- 131 *Where the grant is of a liberty, license, power or authority to dig, work, mine and search for, raise and carry away, metals and minerals in certain land, and dispose of the ore that should be there found to the use of the grantee and his heirs, and is not a grant or demise of all the ores, metals, or minerals then existing on the land, or existing within certain limits, so as to exclude the grantor himself from searching for minerals in his own land, or within the limits specified, it is nothing*

(n) *Ld. Brougham, Keppel v. Bailey, ut sup.*

(o) *Addison on Contracts*, ch. 22, s. 1, 6th ed.

(p) *Grantham v. Hawley*, 11 C. C. 132. *Martyn v. Williams*, 1 H. & N. 827; 26 Law J., Exch. 121.

(q) *Petch v. Tutin*, 17 M. & W. 116.

more than a grant of a license (irrevocable on account of its carrying an interest), to search and get ore, with a grant of such of the ore only as can be found and got, the grantor parting with no estate or interest in the rest. In this case the grantee has no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals, or minerals ungot therein; but he has a right of property only in such part thereof as, upon the liberty granted to him, should be dug and got; *i.e.*, no more than a mere right to a personal chattel when obtained in pursuance of incorporeal privileges, granted for the purpose of obtaining it(*r*). A license of this^a description, however, granted to a man and his heirs, conveys an inheritable and assignable interest(s), so that the grantee may sell and assign the right, and his assignee would have a right to enter and search for, raise and carry away, minerals as against the grantor and his heirs. But whenever a profit à prendre merely is granted, there is only a license or covenant so long as no specific chattel has been severed from the inheritance, and taken possession of under it (*ante*, ¶ 119); and such license or covenant will not bind the land in the hands of subsequent purchasers without notice(*t*); for, "if a man grants a license, and then parts with the property over which the privilege is to be exercised, the license is gone(*u*), for it is an authority only with respect to the soil of the grantor, and if the close ceases to be his soil, the authority is instantly at an end"(*x*).

If, however, the grant is not merely of a profit à prendre *in alieno solo*, but a conveyance of the land itself, such as a grant to a man, his heirs and assigns, of *all* the existing minerals(*y*), or a right to search for, raise and carry away, *all* the minerals to be found within certain prescribed limits, the property in the minerals would then pass to the grantee, and the latter would be the sole owner of them, the grantor continuing the owner of the surface.

132 *Exclusive licenses* must be framed with words of an exclusive character, otherwise the grantor is not precluded from granting the same .

(*r*) Doe v. Wood, 2 B. & Ald. 738. Chetham v. Williamson, 4 East, 475. Mountjoy's case, 4 Leon, 147; Godb. 18. Newby v. Harrison, 1 Johns. & Hem. 398. Carr v. Benson, L. R., 3 Ch. App. 524. Carnahan v. Brown, 60 Penn. St. 23. Gloninger v. Franklin Coal Co., 55 Penn. St. 9. Johnstown Co. v. Cambria Co., 32 Penn. St. 241. Grover v. Hodges, 55 Penn. St. 504.

(*s*) Mushett v. Hill, 5 B. N. C. 694.

(*t*) Ld. Wensleydale, Rowbotham v. Wilson, 8 H. L. C. 359; 30 Law J., Q. B. 965.

(*u*) Pollock, C. B., Coleman v. Foster, 1 H. & N. 40. Brown v. Metrop. Co., etc., Ell. & Ell. 382. Drake v. Wells, 11 Allen (Mass.), 141. Houx v. Seat, 26 Mo. (5 Jones), 178. Miller v. Auburn & Syracuse R. R., 6 Hill (N. Y.), 61.

(*x*) Parke, B., Wallis v. Harrison, 4 M. & W. 544. Malone v. Harris, *ante*, p. 118.

(*y*) Cardigan (Earl of) v. Armitage, 2 B. & C. 197. See Caldwell v. Fulton, 31 Penn. 475; Zinc Co. v. Franklinite, 13 N. J. 341; Grubb v. Bayard, 2 Wallace, jr. 81; and see American cases cited in note *r*, *ante*.

privilege to other persons(z). A mere licensee of a right of way, or of a right of passage with boats on a canal, who has no interest in the soil over which the privilege is exercised, has no right of action against a wrong-doer who exercises the same privilege, but does not obstruct the licensee in the enjoyment of his right(a).

The Roman law discourages the division or dilution, amongst a number of separate proprietors, of the rights of ownership of an estate. The Romans framed their laws with the view of preserving the freedom of the right of property for all times and all future persons. They provided that an estate shall have, at one and the same time, only one dominus over it, and that his dominion should constantly remain as little circumscribed as possible, and not be diminished by dividing his powers and prerogatives amongst several persons. "The only true restrictions on property recognized by the Roman lawyers were the servitudes"(b).

133 *Rights over another's land claimable by custom.*—To give validity to a custom—which has been well described to be a usage obtaining the force of law within a particular district or at a particular place, over the persons or thing to which it relates—it must be certain and reasonable in itself. It is presumed to have commenced from time immemorial(c), and must be proved to have continued without interruption for the time mentioned in the Prescription Act, and in analogy to that Act it must further be shown to have been as of right(cc). A custom, therefore, to demand a license to fish, although upon payment of an ancient and reasonable fee, cannot be supported(d). The question whether it is reasonable or not belongs to the judges of the land to determine; and a custom is not unreasonable merely because it is contrary to a rule or maxim of the common law, nor because it is prejudicial to the interests of a particular individual; but if it is highly inconvenient in its enjoyment, and the inconvenience is real, general and extensive, it will be bad, though it has prevailed from time immemorial(e).

A custom claimed by the inhabitants of a particular district to go upon the soil of another, to take or to use water from a spring, or well,

(z) *Newby v. Harrison*, 1 Johns. & Hem. 396. *Carr v. Benson*, *supra*.

(a) *Hill v. Tupper*, 2 H. & C. 121.

(b) *Mackeldy's Civil Law*, by Kaufman, book 1, ch. 4, s. 298.

(c) See, as to this presumption, *Bryant v. Foot*, L. R., 2 Q. B. 161; 3 *ibid.* 497; *Mills v. Mayor of Colchester*, *infra*; *Commonwealth v. Maylor*, 57 Penn. St. 291.

(cc) *Smith v. Floyd*, 18 Barb. (N. Y.) 523.

(d) *Mills v. Mayor of Colchester*, L. R., 2 C. P. 476.

(e) *Tanistry's case*, Davys, 31, 32. *Co. Litt.* 113a. *Tyson v. Smith*, 9 Ad. & E. 406. 6 *lb.* 745. *Rogers v. Brenton*, 10 Q. B. 26.

or to wash and water cattle in a pond, is a good custom(*f*), and so is a custom claimed by victuallers, coming to a fair holden at stated periods, to enter upon that part of the common or waste of a manor where the fair is held, and there erect booths and stalls, and put down posts, and place tables on the land, making a certain customary payment to the lord of the manor, when demanded(*g*). A custom for the inhabitants of a village to resort to village greens, or uninclosed waste land or commons, the property of the lord of the manor, for village sports, and for the purpose of recreation and amusement, is a good custom(*h*); but a claim by an inhabitant of a town of a right to go at all times over every portion of inclosed cultivated ground, cannot be supported, as it is inconsistent with any beneficial use and enjoyment of the inclosure by the owner or occupier(*i*); à fortiori if the claim be upon a place beyond the limits of the parish(*j*).

The inhabitants of a vill or parish cannot as such claim by custom to have a profit à prendre from the soil of another. Therefore, a custom for all the inhabitants occupying lands in a particular district to take drift sand or stones from a close contiguous to the sea-shore(*k*), for the mending of their roads, cannot be supported, as the sand, when it drifts on the close from the beach, becomes part of the soil of the close(*l*). Neither can the inhabitants of a parish claim a right by custom to angle and catch fish in another's pond, although the claim be confined to a right to catch them, setting up no right to take them away, for such a right, vested in a multitude of persons, would be

(*f*) *Race v. Ward*, 4 Ell. & Bl. 702.

(*g*) *Tyson v. Smith*, 6 Ad. & E. 745; 9 ib. 406. As to unlawful fairs within the metropolitan police district, see 31 & 32 Vic. c. 106. Fairs may, on a representation by magistrates, or of the owner, and with his consent, be abolished by the Home Secretary; 34 & 35 Vict. c. 12.

(*h*) *Abbot v. Weekly*, 1 Lev. 176. *Fitch v. Rawling*, 2 H. Bl. 393. *Mounsey v. Ismay*, 1 H. & C. 729; 32 Law J., Exch. 94; 34 ib. 52. See *Warrick v. Queen's College*, L. R., 10 Eq. Ca. 105.

(*i*) *Dyce v. Hay*, *ante*, p. 97. *Bell v. Wardell*, Willes, 202. *Jones v. Percival*, 5 Pick. 485.

(*j*) *Sowerby v. Coleman*, L. R., 2 Exch. 96. As to squares in London, see *Tulk v. Metrop. Board of Works*, L. R., 3 Q. B. 94, 682. An immemorial custom to erect stalls upon the highway at a fair for the sale of commodities, is good (*Elwood v. Bullock*, 6 Q. B. 383); but a statute sessions for the hiring of servants is not such a fair. *Simpson v. Wells*, L. R., 7 Q. B. 214.

(*k*) The Board of Trade have power under 54 Geo. 3, c. 159, s. 14, and 25 & 26 Vict. ch. 69, s. 16, to prohibit the taking of shingle from the shores of any port or harbor, where necessary for its protection.

(*l*) *Blewett v. Tregonning*, 3 Ad. & E. 554. *Att.-Gen. v. Mathias*, 4 K. & J. 579. *Constable v. Nicholson*, 14 C. B., N. S. 230. See *Post v. Pearsall*, 22 Wend. 425, 432. It has been held in Massachusetts that the inhabitants of a town may acquire an easement to dig stones from a parcel of land for the use of such persons as belong to the town; and that where the proprietors of a township voted that "one hundred acres be left common for the use of the town for building purposes," this did not pass the fee, but merely the right to take the stones for building purposes, that interest being in the town as a corporation in trust for individual inhabitants. *Worcester v. Green*, 2 Pick. 425. *Green v. Putnam*, 3 Cush. 21.

destructive of all the fish(*m*). But a claim by the inhabitants of a village to take estovers (see *post*, p. 106) in a royal forest, if founded on a grant from the crown, is good, for as the crown has power to create corporations, a grant by the crown to a class of persons is valid, and for the purpose of the validity of the grant, such persons will be considered a corporation quoad the grant, for grants by the crown in derogation of its forestal rights are construed liberally for the subject(*n*).

The general doctrine, that a right to take a profit in the soil of another cannot by law rest on custom, is founded on the notion that such an interest must, for its existence, have some person in whom it is vested, and that a fluctuating body of persons, which has no entirety or permanence, cannot take that interest which by supposition is immemorial and permanent, because such a body, from its nature, cannot prescribe for any thing. Necessity, however, controls this, and creates certain exceptions in the case of rights of common, and the stannary customs of Cornwall, in respect of the right of digging and searching for tin.

- 134 *When a profit à prendre is claimable by custom.—Manorial customs.—Rights of common*, claimable by the copyhold or customary tenants of a manor, in the demesne lands of the lord of the manor(*o*), illustrate both the rule, that a profit à prendre is not claimable by custom, and the exception to that rule. Thus, the right of common of pasture in itself is an interest in land—the taking of a profit of the soil, and properly matter of prescription. If the copyholders of one manor will claim it in the wastes of another manor, they must do so by prescribing in the name of their lord, who, in the eye of the law, by reason of his estate, has such a permanence as enables him to prescribe; but if they claim it in the lord's wastes, they cannot prescribe in their own names and rights, by reason of the want of permanence; nor can they in their lord's name, for he cannot claim common in his own land; they are therefore, from necessity, allowed to claim it by custom(*p*). The necessity grows out of the original compact between the lord and the customary tenants, when they received permission to cultivate for their own benefit, on condition of the render of certain services, certain portions of the lord's land. That compact included the right of

(*m*) *Bland v. Lipscombe*, 4 Ell. & Bl. 713, note (c).

(*n*) *Willingale v. Maitland*, L. R., 3 Eq. Ca. 103.

(*o*) *Gateward's case*, 6 Co. 60a. *Grimstead v. Marlow*, 4 T. R. 719. See *Smith v. Floyd*, 18 Barb. (N. Y.) 523.

(*p*) *Foiston v. Crachroode*, 4 Co. 369. *Heydon & Smith's case*, 13 Co. 67.

common on the lord's waste, and the law will not suffer that right to want a legal character, and so be without the means of legal enforcement, though at the expense of strict legal reasoning(*g*).

A custom in a manor, that the copyholders of inheritance may, without license from the lord of the manor, break the surface of their own copyhold tenements, and dig and get clay therefrom without stint, for the purpose of making and selling bricks, is a good manorial custom. It has been contended that such a custom is bad, as being inconsistent with the right of the lord, who has an interest in the soil, and that the custom extended to taking away the soil itself, which the copyholder could, even by custom, have no right to do. "We are," however, observes the court, "unable to draw any sound distinction between a custom for copyholders to take all the timber, or trees(*r*), or all the minerals in their own copyholds, and a custom to take clay. It appears to us, that the cases of profits à prendre, or easements on the waste of the lord, or *in alieno solo*, have no application to the present question. A copyholder may, by custom, not only have a possessory, but a proprietary, right in the trees and minerals in his own copyhold tenement. In the case of minerals, the taking them is, in effect, a taking of a portion of the *corpus* of the copyhold tenement. There appears to be no doubt but that a copyholder of inheritance may not only, by custom, work old mines already opened, but that he may also, by custom, dig within his tenement for new ones, and, if successful, work them"(*s*). And the right may exist, in its most extensive form, to sell the produce for profit, or in a more restricted form to use the coal, etc., for their own private purposes only(*t*).

But a custom claimed by the lord of a manor, or his tenants, to dig coal-pits in the enclosed freehold lands of the manor, when and as often as they pleased; to lay their coals, when got, on any part of the lands of the customary tenants, near to the coal-pits, at any time of the year they please, and to let them lie on such lands as long as they please, is uncertain and unreasonable, and therefore void, for it might deprive the tenant of the whole benefit of his land(*u*).

(*g*) *Rogers v. Brenton*, 10 Q. B. 26.

(*r*) See *Blewett v. Jenkins*, 12 C. B., N. S. 16.

(*s*) *Salisbury (Marquis of) v. Gladstone*, 6 H. & N. 129; 30 Law J., Exch. 3; 34 *ibid.*, C. P. 222 (*dub.* Lord Wensleydale). See *Lingwood v. Gyde*, L. R., 2 C. P. 72.

(*t*) *Portland (Duke of) v. Hill*, L. R., 2 Eq. Ca. 765.

(*u*) *Broadbent v. Wilks*, Willes, 363. *Hilton v. Earl Granville*, 5 Q. B. 726. *Blackett v. Bradley*, 1 B. & S. 140; 31 Law J., Q. B. 65. But see, per L. C. & Lord Chelmsford, in *Wakefield v. Duke of Buccleugh*, L. R., 4 Eng. & Ir. App. 377. And a grant to that effect would be good; *S. C.* and *Rowbotham v. Wilson*, *ante*, p. 76.

A claim on the part of the lord of a manor, founded on the custom of the manor, of an unlimited and unrestricted right to enclose and confer in severalty upon any person, from time to time, such portions of the waste as he in his discretion may think fit, cannot be supported, as it is utterly inconsistent with the existence of any right of common, for the lord might enclose the whole of the waste, and so annihilate the rights of the commoners. But the lord has concurrent rights with the commoners. He has himself a right, unless excluded by the custom, to stock the common, and to every benefit to be derived from the soil, not inconsistent with the rights of the commoners. And when it is ascertained that there is more common than is necessary for the cattle which the commoners are entitled to turn on, the lord may take it for his own purposes, and he may then enclose, leaving sufficiency of common for the commoners(v).

Where fences are wrongfully erected upon land, subject to a right of common, the commoner in exercising his right is not restricted to pulling down so much of the fence as it may be necessary for him to remove in order to enter upon the common, but he may remove the whole of the fences, so as to restore to himself the full and unrestricted exercise of his right(w). He may also sue a railway company for disturbance, if they have made a railway over the common without making him compensation for his rights under the Lands Clauses Act, although they have compensated the lord of the manor and taken a conveyance of the soil from him(x).

A right of common is either appendant, appurtenant, or in gross. When it is appendant or appurtenant to a messuage or lands, it passes, as we have seen, by a grant of the messuage or land, to the successive owners and occupiers thereof(y).

- 135 *Common appendant* is a right annexed to arable land of depasturing on the lord's waste beasts that serve the plough, such as horses and oxen, or which manure the land, such as kine and sheep. "The reason for common appendant," observes Willes, C. J., "appears to be this, that as the tenant would necessarily have occasion for cattle not only to plough, but likewise to manure his own land, he must have some place to keep such cattle in whilst the corn is growing on his own arable land, and therefore of common right, if the lord had any waste, he might put his cattle there when they could not go on his

(v) The onus of proving this lies on the lord. *Betts v. Thompson*, L. R., 6 Ch. App. 732.

(w) *Arlett v. Ellis*, 7 B. & C. 346.

(x) *Stoneham v. Lond. & Brighton Rwy.*, L. R., 7 Q. B. 1.

(y) *Sacheverell v. Porter*, 2 Roll. Abr. 60, pl. 4.

own arable land. This right is so necessarily incident to the land, that it cannot be severed therefrom; and therefore if the land be divided never so often, every little parcel is entitled to common appendant. But the tenant can only have the right of common for such cattle as are levant and couchant on his estate; that is, for such and so many as he has occasion for to plough and manure his land, in proportion to the quantity thereof. And it is plain that he cannot have the right for cattle which he borrows, unless he make use of them all the year to plough or manure his land"(z). Although this kind of common is regularly appendant only to arable land, yet it may be claimed as appendant to a manor or farm containing pasture, meadow, and wood; for it shall be presumed to have been all originally arable land, though afterwards converted into meadow, pasture, etc.(a).

- 136 *Common appurtenant* is a right, derived from the possession or occupation of land, of depasturing a limited number of beasts upon the lord's waste, or upon the unenclosed land of an adjoining proprietor, and is claimable by grant or by prescription(b).. The right is limited to beasts levant and couchant upon the land to which the right is appurtenant, so that a claim to a right of common appurtenant "*sans* number" is bad. The number of cattle which can be "levant and couchant" upon the estate is the number which the produce of the land is capable of maintaining throughout the winter, if cultivated for that purpose; it is not necessary that they should, in fact, have been actually so maintained, if the land, properly cultivated for that purpose, could have maintained them(c). "If my land to which I claim common belonging can yield me stover to find a hundred cattle in winter, then shall I have common in summer for a hundred cattle in the land out of which I claim common, and so for more or fewer proportionably"(d). If the commoner has turned more cattle upon the common than the winter eatage of his ancient tenement, together with the hay and other produce obtained from it during the summer, is capable of maintaining, he has exceeded his legal rights, and is liable to an action(e).

(z) *Bennett v. Reeve*, Willes, 231; *Bac. Abr. COMMON A. 1.*

(a) *Bac. Abr. COMMON A. 1.*

(b) *Cowlam v. Slack*, 15 East, 107. A *common appurtenant* does not arise from any connection of tenure, and may be created by grant or claimed by prescription; while a *common appendant* can arise only from prescription. *Watts v. Coffin*, 11 Johns. 495.

(c) *Carr v. Lambert*, 34 L. J., Exch. 66. L. R. 1 Exch. 168. If the land had been built upon or turned into a reservoir, *quare. S. C.*

(d) *Smith v. Bonsall*, Golds. 117. *Cole v. Foxman*, Noy's R. 30. *Cheesman v. Hardham*, 1 B. & Ald. 711.

(e) *Whitelock v. Hutchinson*, 2 Mood. & Rob. 205.

137 *Common of shack*, observes Bayley, J., "is a right of persons occupying arable land, uninclosed to turn out their cattle at certain seasons to feed promiscuously over the whole open field. If there were no common right of this sort, every man would be bound to keep his cattle upon his own land, which would be productive of great inconvenience, and in many instances would be impossible. In order to obviate this, every man's cattle are allowed the full range of the whole field; but the number which each man is at liberty to turn out is limited to that which the land of each individual is capable of supporting"(f).

138 *Right of common pur cause de vicinage*.—To establish a right of common *pur cause de vicinage*, it must be proved that the inhabitants have usually inter-communed with one another; the beasts of the one straying into the other's fields without any molestation on either side. There must not only be absence of fence, but mutual acquiescence, and an immemorial allowance of the straying of the cattle(g).

139 *Common of turbary*, or the liberty or privilege of cutting and carrying away turf, is appendant to an ancient dwelling-house, and the right is limited to such a quantity as is sufficient to burn in the ancient chimneys and fire-places of the house(h); consequently a claim to cut and carry away turf for sale(i), or to make grass-plots or paths, cannot be supported(k).

140 *Common of estovers*, or the liberty or privilege of cutting down and carrying away trees, or loppings of trees, shrubs, and underwood, in another man's woods, coppices, or forests, for burning, building, or enclosing, is also appendant to an ancient dwelling-house, and is claimable by grant or by prescription, except in the case of copyholders, who may, it seems, claim by custom (l). Consequently a claim to cut down and carry away trees for sale cannot be claimed as common appendant(m).

The nature and extent of the right, and the periods of the year for the exercise and enjoyment of it, are to a great extent defined and

(f) *Cheesman v. Hardham*, 1 B. & Ald. 711. *Sir Miles Corbet's case*, 7 Rep. 57.

(g) *Clarke v. Tinker*, 10 Q. B. 618. There can be no inter-commonage or common because of vicinage, unless there are contiguous townships, the inhabitants of which, seeking to excuse a trespass for that cause, have common rights of pasturage appendant, appurtenant, or in gross in the towns where they reside. *Smith v. Floyd*, 18 Barb. (N. Y.) 523.

(h) 6 Co. 36b, 37a. *Dean, etc., of Ely v. Warren*, 2 Atk. 189.

(i) *Valentine v. Penny*, Noy's R. 145. See *ante*, pp. 103, 104.

(k) *Wilson v. Willes*, 7 East. 121.

(l) *Bract*, fol. 231. *Selby v. Robinson*, 2 T. R. 758. See *Willingale v. Maitland*, *ante*, p. 102.

(m) *Bailey v. Stevens*, 31 Law J., C. P. 226; 12 C. B., N. S. 113. See *Watts v. Coffin*, 11 Johns. 495.

controlled by manorial or local custom and usage. According to Bracton, the right must be exercised with reason and moderation, according to the size of the wood or waste in which the right is to be exercised, and the size of the tenement to which it is annexed(*n*). The estovers must be expended within or upon the house, and cannot lawfully be sold or exchanged; nor can the right be enlarged or extended. A tenant having a right to estovers for the repair of his dwelling-house and farm-buildings, cannot "enlarge his house with the timber, nor board the sides of a barn which had muddle walls or the like before"(*o*). If a man has estovers belonging to his house, and he builds new chimneys where there were no chimneys before, he cannot use the estovers in the new chimneys(*p*). But if he sets up a new chimney where an old one was before, he shall have his estovers for the new chimney(*q*).

"If a man be seised of a house in right of his wife, and another grants to the husband and his heirs to have sufficient estovers to burn in the same house, in that case the estovers are appurtenant to the house, and shall descend to the issue of the husband and wife. So, if one have a house of the part of his mother, and one grants to him that he and his heirs shall have competent housebote to be burnt in the same house, this is appurtenant to the house; and although it be a new purchase, it shall go with the house to the heir of the part of the mother"(*r*).

"When copyholders for life, according to the custom, have used to have common in the waste of the lord of the manor, or estovers in his woods, or any other profit à prendre in any part of the manor, and afterwards the lord aliens the wastes or woods to another in fee, and afterwards grants certain copyhold houses and lands for lives, such grantees shall have common of pasture, or common of estovers, etc., notwithstanding the severance, for the title of the copyholder is paramount to the severance; and the custom unites the common or estovers, which are but accessaries or incidents, as long as the house and lands, being principal, are maintained by the custom; which customary appurtenances are not appertaining to the estate of the lord, for he is

(*n*) Bract. fol. 231. See *Van Rensselaer v. Brice*, 4 Paige, 174.

(*o*) *Earl of Pembroke's case*, Clayt. 47.

(*p*) *Luttrell's case*, 4 Co. 87 a.

(*q*) *Costard v. Wingfield*, 2 Leon. 44.

(*r*) *Syme's case*, 8 Co. 54a. Common of estovers cannot be apportioned, and if the person entitled thereto convey his land to which it is appurtenant, part to one person and part to another, the right will be extinguished. *Van Rensselaer v. Radcliff*, 10 Wend. 639. *Livingston v. Ketchum*, 1 Barb. 592.

the owner of the freehold and inheritance of all the manor, but they are appertaining to the customary estate of the copyholder, after the grant made unto him; which profit à prendre, being due by custom to the copyhold tenement (notwithstanding the feoffment or fine, etc., of the waste or woods made by the lord), remains, and is preserved by the custom, which is, as hath been said, the title of the copyholder, and is paramount to the severance; but if the copyholder had derived his interest from the estate of the lord, then clearly, by the feoffment, fine, etc., of the lord, all those who after claim by him shall be barred of any profit à prendre in the same waste or woods"(s).

- 141 *Common in gross* is a right of common of pasture not appertaining to any land, and is claimable by grant or prescription(t). In prescribing, therefore, for common in gross, "one does not lay seizin of any land, but says that he and his ancestors, whose heir he is, etc., from time whereof, etc., have had common in the place where, etc., for all their cattle, without relation to any land, and without saying levant and couchant, because there is no land on which they can be levant and couchant, or to which the common can be appurtenant, wherefore a prescription for common in gross without number is good"(u) Common in gross being a personal privilege, and not a right appendant or appurtenant to land, cannot be granted over so as to burthen the land for all time in the hands of subsequent owners and occupiers of the land over which the right has been granted(x).

If a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custom against the law to exclude the owner of the soil, for it is against the nature of this word common. But a man may prescribe or allege a custom to have and enjoy *solam vesturam terræ*, from such a day till such a day, and hereby the owner of the soil shall be excluded for the time to pasture or feed there. So, a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there(y). The customary tenants in whom these exclusive rights, exerciseable during certain portions of the year, are vested, have merely

(s) Swayne's case, 8 Rep. 63b. Brown's case, 4 Co. 21b. Benson v. Chester, 8 T. R. 401.

(t) Co. Litt. 122a.

(u) Mellor v. Spateman, 1 Wms. Saund. 346.

(x) *Ante*, p. 116. Treby, C.J., Weekly v. Wildman, 1 Ld. Raym. 407. The grantee in fee of a right of common in gross and without number may alien it, but not in such way as to give the entire right to several persons, to be enjoyed by them separately. Leyman v. Abeel, 16 Johns. 30.

(y) Co. Litt. 122b, North v. Cox, 1 Lev. 253.

a profit à prendre *in alieno solo*, and no estate in the soil itself^(z), but the interest is capable of transfer by deed of assignment. "Instances of sole pasturage are to be found on the South Downs, in Sussex, and they are frequently transferred in gross; it is the same with the cattle-gates in the north of England"^(a).

142 *Rights of sole and several pasturage.—Cow-grasses and cattle-gates.—*

In some manors, the customary tenants of the customary tenements of the manor have a right to the sole and several pasturage for the whole year over the moors and downs and waste places of the manor, to the entire exclusion of the lord of the manor, and may by deed license strangers to put in their cattle^(b), and sell and convey away their interest to another. These rights of sole and several pasturage are called cattle-gates and cow-grasses, and are customary estates of inheritance, transferable by deed. The owners of them have no right of property in the soil. They are held of the lord of the manor, according to the custom of the manor, as customary estates of inheritance, by payment of fine and customary rents, and under dues, duties, suits and services, regulated by the custom. They are transferred by customary deeds, followed by admittance at the next lord's court, or out of court by the steward of the manor, and a fine is payable on admittance. These cattle-gates, therefore, are copyhold tenements^(c).

143 *Rights of tinbounders to search for tin in Cornwall* are founded on custom. The right seems to have originated in each instance in a virtual contract, as in the case of rights of common. When the lord, or owner of waste uninclosed and uncultivated land, would not search for and work tin himself, or devote his waste exclusively to other purposes by inclosure, he has permitted the tinner to enter on the waste and work for and get tin, on condition of the render to him of a certain portion, fixed by custom, of the produce of the tin mine. Here, as in the instance of a right of common, the thing is in its nature to be claimed by prescription only; but they who have it, and ought to have it, in justice, cannot prescribe for it; from necessity, therefore, that the right may not be defeated, they are allowed to claim it by custom^(d). If the tinbounders abandon the mine, and the owner retakes possession, he will be entitled to any easements, such as a right

(z) *Rex v. Churchill*, 4 B. & C. 750.

(a) *Ld. Abinger, Welcome v. Upton*, 6 M. & W. 536.

(b) *Hoskins v. Robins*, 2 Wms. Saund. 323.

(c) *Rigg v. Earl Lonsdale*, 1 H. & N. 935. And see *Robinson v. Wray*, L. R., 1 C. P. 490.

(d) *Rogers v. Brenton*, 10 Q. B. 28.

to the flow of water, to which the tinbounders had acquired a right by prescription, for although there is no privity of estate between the tinbounders and the owner, yet it must be presumed that the right to the use of the water had been originally acquired by arrangement with the owner as well as the tinbounders(e).

144 *The lord, by his grant of common, gives every thing accessorial to the enjoyment of the right*, such as ingress, egress, etc., and thereby authorizes the commoner to remove every obstruction to his cattle grazing the grass there. But the lord still remains owner of the soil, and a commoner who has a mere right of common of pasture has no power to meddle with the soil, and cannot cut even a trench or a ditch to let the water off the common, without first obtaining the license of the lord(f). And if the lord chooses to encourage the growth of beasts of warren, such as hares and rabbits, upon the common, and to make rabbit-burrows, the commoner has no right to destroy either the hares, the rabbits, or the burrows. If they increase so as to destroy the herbage and deprive the commoners of the pasture, this may be a surcharge of the common by the lord; but the commoner must pursue the appropriate remedy by action, and cannot lawfully kill the conies. for, as long as they are in the lord's own land, the lord hath property in them, but, when they go out, he hath no longer property in them(g).

145 *Inconsistent rights of common*.—Where there are two distinct rights of common claimed by different parties, which encroach on each other in the enjoyment of them, the question is, which of the two rights is subservient to the other? It may be either the lord's right, which is subservient to the commoners', or the commoners', which is subservient to the lord's. In general, one would say that the lord's is the superior right, because the property of the soil is in him; but if the custom established by evidence show that it is subservient to the commoners', then he cannot use the common beyond the extent; otherwise he subjects himself to an action for the excess(h).

146 *Of the servitude of maintaining and repairing sea-walls, ditches, and sluices*.—Every person who accepts a grant of land from the crown, accompanied by a command or direction to keep up, repair, and maintain certain buildings, sea-walls, ditches, and sluices, takes the land

(e) *Ivimey v. Stocker*, L. R., 1 Ch. App. 396.

(f) *Cooper v. Marshall*, 1 Burr. 226; 1 Roll. Abr. 406.

(g) *Hadesden v. Gryssell*, Cro. Jac. 195. *Bellew v. Langdon*, Cro. Eliz. 876. *Carrill v. Pack*, 2 Bulstr. 115. *Hoddesdon v. Gresil*, Yelv. 104.

(h) *Buller, J., Bateson v. Green*, 5 T. R. 416.

subject to the servitude imposed thereon; and if any private individual sustains a private and peculiar injury from the non-repair of the sea-walls, etc., he is entitled to an action against the grantee or his assigns, who have failed to fulfil the duty imposed upon him or them(*i*). All persons enjoying the benefit of a sea-wall are liable at common law to repair and maintain it, in the absence of any custom or contract(*j*). Where, therefore, a man buys land below the level of high water, which but for the wall would be covered by the sea, he is put upon inquiry as to whether he is or is not bound to repair, and cannot be allowed to say he had no notice(*k*).

147 *Of customary rights of fishing, and driving stakes for nets in the sea-shore(l).*—Where the public at large had from time immemorial fished in a private non-navigable river, and the defendant claimed a right to fish there as one of the public, it was held, that no such right could be acquired by user, however long continued(*m*); but in a navigable river, the soil of which belongs to the crown, the public *primâ facie* have as of common right a right of fishing, and it falls upon a person who disputes this right to show that he has a right of several fishery(*n*). There may be a qualified right of fishery in a non-navigable river. Thus, the riparian owners on a stream may grant to one of them to have a weir for the purpose of taking fish, at such times as the whole volume of water is not wanted for the purpose of a mill; and such grant, of which enjoyment is evidence, will be good(*o*). In the case of two proprietors on opposite banks of a stream, each is entitled to fish from his own bank to the centre of the stream(*p*).

The land between ordinary high-water mark and low-water mark belongs to the crown, in the absence of proof of a grant of such land

(*i*) *Henly v. Mayor of Lyme*, 5 Bing. 107.

(*j*) *Rex v. Commissioners of Sewers of Essex*, 1 B. & C. 477.

(*k*) *Morland v. Cook*, L. R., 6 Eq. Ca. 252.

(*l*) As to oyster and mussel fisheries, see 31 & 32 Vict. c. 45, part 3, ss. 27-56; 32 & 33 Vict. c. 31. That the state has power to regulate public fisheries, see *Moulton v. Libbey*, 37 Me. 472. As to the rights of fishery under the Massachusetts Colony Charter and subsequent statutes, see *Commonwealth v. Roxbury*, 9 Gray, 451, note.

(*m*) *Hudson v. M' Rae*, 33 L. J., M. C. 65.

(*n*) *Reg. v. Stimpson*, 32 L. J., M. C. 208. *Hooker v. Cummings*, 20 Johns. 90. *Weston v. Sampson*, 8 Cush. 351. *Lakeman v. Burnham*, 7 Gray (Mass.) 435. *Coolidge v. Williams*, 4 Mass. 140. *Melvin v. Whiting*, 7 Pick. 79. *Moulton v. Libbey*, 37 Me. 485. *Delaware, etc., R. R. Co. v. Stump*, 8 Gill. & J. 510. *Preble v. Brown*, 47 Me. 284. *Parker v. Cutler Mill Dam Co.*, 20 Me. 353. *State v. Glen*, 7 Jones, Law, (N. C.) 321. *Collins v. Benbury*, 5 Ired. 118. *Lay v. King*, 5 Day 72. *Bickel v. Polk*, 5 Harring. 325.

(*o*) *Rolle v. Whyte*, L. R., 3 Q. B. 286.

(*p*) *Zetland (Earl of) v. Glover Incorporation of Perth*, L. R., 2 Sc. App. 70. *Hooker v. Cummings*, 20 Johns. 90. *Beekman v. Kreamer*, 43 Ill. 447. *State v. Glen*, 7 Jones, Law, (N. C.) 321. If an island springs up in the channel of the stream, see *Zetland (Earl of) v. Glover Incorporation of Perth*, L. R., 2 sc. app. 70.

to a lord of a manor or to a private person (*post*, ch. 6, s. 2); but various customary and prescriptive rights and privileges over the sea-shore have grown up and been acquired by the public, and by communities and private individuals, by reason of immemorial usage and enjoyment. Where an action of trespass was brought against a defendant for digging in the plaintiff's land, and the defendant pleaded that the *locus in quo* was four acres of land adjoining the sea, and that all the men of Kent, from time immemorial, have used when they have fished in the sea to dig in the land adjoining, and pitch stakes for hanging their nets to dry, it was held that such a custom, confined to the sea-shore, might be good; for, observes Clarke, C.J., "If I have land adjoining the sea, so that the sea ebbs and flows on my land, when it flows every one may fish in the water which has flowed on my land, for then it is parcel of the sea, and in the sea every one may fish of common right; and when the sea has ebbed, then in this land which was flowed before, peradventure he may justify his digging, for this land is of no great profit"(q).

- 148 *Customary and prescriptive rights of bathing on the sea-shore.*—It has been held that there is no general common law right of bathing in the sea, and passing over every part of the shore for that purpose, independently of usage and custom(r); but such a right may exist by prescription or custom, and may be gained and retained by the owners and occupiers of houses on the sea-coast, or by the inhabitants of any village, parish, or district, so long as it can be exercised without creating any public nuisance(s). The existence and the extent of the right are to be collected in this, as in other instances of customary and prescriptive rights, from the manner in which the particular portions of the sea-shore throughout the kingdom have from time immemorial been used(t). "The right of bathing in the sea," observes Best, J.(u), "is as beneficial to the public as the right of fishing, and unless I felt myself bound by an authority as strong and clear as an Act of Parliament, I would hold, on principles of public policy—I might say public necessity—that the interruption of free access to the sea is a public nuisance. In the first ages of all countries the sea and

—(q) 8 Edw. 4, 19. Bro. Abr. Customs, 46. Any person who enters upon flat lands adjoining the shore of a navigable stream over which the tide ebbs and flows, and uses the same for fishing purposes, driving stakes, mooring his boats, and drawing in seines and nets, is liable to the owner of the soil in an action of trespass. *Whittaker v. Burhans*, 62 Barb. (N. Y.) 237.

(r) *Blundell v. Catterall*, 5 B. & Ald. 268. See Hall on Sea Shores, p. 184, *et. seq.*

(s) See *Rex v. Crunden*, 2 Campb. 89.

(t) See *Mace v. Philcox*, 33 L. J., C. P. 124.

(u) In *Blundell v. Catterall*, differing, however, from the rest of the Court.

its shores were left open to public use. In all countries it has been matter of just complaint, that individuals have encroached on the rights of the people. In England our ancestors put the public rights in rivers under the safeguard of *Magna Charta*. If the principle of exclusive appropriation be extended so far as to touch the right of walking over the barren sands of the sea-shore, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbors"(x).

149 *Title by prescription* is a title acquired by use and time, and allowed by law; as when a man claims to have a thing because he and his ancestors, or they whose estate he hath, have had or used it from time immemorial(y), and immemorial enjoyment is presumed from proof going back to the extent of living memory(z). All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath, which last is called prescribing in a que estate. If a man prescribes in a que estate (that is, in himself and those whose estate he holds), nothing is claimable by this prescription but such things as are incident, appendant, or appurtenant to lands; but if he prescribes in himself and his ancestors, he may prescribe for things in gross.

A prescription must always be laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the insufficiency of his estate; for as prescription is usage beyond time of memory, those whose estates commenced within the remembrance of man cannot prescribe; and therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee simple(zz).

Estates gained by prescription are not descendible to the heirs-general, but only to the blood of that line of ancestors in whom the party prescribes. But if he prescribes in a que estate, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase(a).

Nothing but incorporeal hereditaments can be claimed by prescription, such as rights of way, rights of common, etc. No prescription can give a title to lands, and other corporeal substances, of which more

(x) *Blundell v. Catterall*, 5 B. & Ald. 287. *Ante*, pp. 47, 48.

(y) *Præscriptio est titulus ex usu et tempore substantiam capiens ab autoritate legis*, Co. Litt. 113a, 113b. *Ellis v. Mayor*, etc., of Bridgnorth, *ante*, p. 17.

(z) *Patterson, J.*, 3 Q. B. 588. See *Miller v. Garlock*, 8 Barb. 153.

(zz) *Smith v. Kinard*, 2 Hill (S. C.) 642.

(a) 2 Bl. Comm. 64. Roll. Abr. PRESCRIPTION B.

certain evidence may be had(*aa*). Thus a grant of a license to get coal or minerals, which does not oust the grantor of his right to dig for coals and minerals in the same land, is, as we have seen, a mere profit à prendre, or incorporeal right lying in grant(*b*), and may consequently be claimed by prescription; but a claim to take *all* the coal, to the exclusion of any right in the owner of the soil to get it, is a claim to a part of the soil itself, and cannot be claimed by prescription(*c*)

A prescription by immemorial usage can in general only be for things which may be created by grant, for the law allows prescriptions only to supply the loss of a grant. Ancient grants must often be lost; and it would be hard that no title could be made to things lying in grant, but by showing the grant. Upon immemorial usage, therefore, the law will presume a grant, and allow such usage as evidence of a good title. Therefore, for such things as cannot be created at this day by any manner of grant, or reservation, or deed, a prescription is not good(*d*).

150 *A prescriptive right to a pew in a church*, as appurtenant to an ancient messuage, may be established by immemorial use and enjoyment, from which a faculty is presumed, and there is no necessity that the house should be within the parish(*e*). If, therefore, the plaintiff claims a prescriptive right, and shows the commencement of it in very modern times, his claim will fail(*f*). Where a pew in a chancel belonged to a person in respect to the ownership of an ancient house, it was held that the tenant of the owner obtained a sufficient title by occupation to justify an action in the ecclesiastical court for perturbation of a pew(*g*).

151 *Prescriptive rights founded on the presumption of a grant—Presumption of a grant from long-continued uninterrupted user and enjoyment as of right*.—To raise a presumption of a grant of an easement or profit from long-continued uninterrupted enjoyment of the privilege, the enjoyment

(*aa*) *Ferris v. Brown*, 3 Barb. 105. *Caldwell v. Copeland*, 37 Penn. 431. *Strickler v. Todd*, 10 Serg. & R. 69. *Davis v. Brigham*, 29 Me. 391. *Gayety v. Bethune*, 14 Mass. 53. *Thomas v. Marshfield*, 13 Pick. 240. *Pearsall v. Post*, 20 Wend. 111. *Cortelyou v. Van Brundt*, 2 Johns. 357. *Hill v. Lord*, 48 Me. 96.

(*b*) *Chetham v. Williamson*, *Doe v. Wood*, *ante*, p. 120.

(*c*) *Wilkinson v. Proud*, 11 M. & W. 33. *Clayton v. Corby*, *ante*, p. 98. *Caldwell v. Copeland*, 37 Penn. 431. *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 322.

(*d*) *Potter v. North*, 1 Ventr. 387; 3 Cruise's Digest, tit. 31, ch. 1. *Att.-Gen. v. Matthias*, 4 K. & J. 592; 27 Law J., Ch. 761. As a prescription supposes a grant, it cannot exist where there can be no grantee. *Munson v. Hungerford*, 6 Barb. (N. Y.) 265. *Curtis v. Keesler*, 14 id. 511. *Perley v. Langley*, 7 N. H. 233.

(*e*) *Lousley v. Hayward*, 1 Y. & J. 683.

(*f*) *Griffith v. Matthews*, 5 T. R. 296.

(*g*) *Parker v. Leach*, L. R., 1 P. C. Ca. 312. See *post*, ch. 6, s. 2.

must have been open and notorious, and exercised as a matter of right, and not of grace and favor (*ante*, pp. 96, 97). Where, therefore, the enjoyment can be satisfactorily accounted for, and is consistent with there having been no grant or conveyance, there is no ground for presuming one. In the case of the continued enjoyment by one man of a right of common, or profit à prendre in the land of another, and in every user of a way, the original enjoyment must have been unlawful, unless the privilege had been exercised with the sanction and authority of the owner of the soil, and can only be accounted for on the supposition that a grant had been made; and when the enjoyment had been long continued, without interruption, a grant was presumed; but when the enjoyment of the privilege is accounted for, and is consistent with the fact of there having been no grant, the presumption does not arise(*h*).

When the property is of such a nature that it cannot be easily protected against intrusion, and, if it could, it would not be worth the trouble, proof must be given of constant uninterrupted user and enjoyment of the privilege, with the knowledge and acquiescence of the party interested in resisting intruders, in order to raise a presumption of a grant(*i*). According to the ancient law of prescription, the enjoyment was not uninterrupted, wherever it was had and exercised in spite of the remonstrance or prohibition of the owner of the fee(*k*). And whenever there was evidence to show that the user and enjoyment were had and exercised by permission, and grace and favor, there was no user and enjoyment as of right, and no prescriptive title could be gained thereby, however notorious and long continued might have been the user and enjoyment(*l*).

The general principle with regard to prescriptive rights founded on the presumption of a grant is, that a grant will not be presumed

(h) *Doe v. Reed*, 5 B. & Ald. 236. *Livett v. Wilson*, 3 Bing. 118. *Boyle v. Tamlyn*, 6 B. & C. 337.

(i) *Att.-Gen. v. Chambers*, 5 Jur. N. S. Ch. 145; 4 De G. Mc. & G. 206. *Att.-Gen. v. Jones*, 33 L. J., Exch. 249. See *American Co. v. Bradford*, 27 Cal. 366; *Ingraham v. Hough*, 1 Jones (N. C.), 42; *School District v. Lynch*, 33 Conn. 334; *Pollard v. Barnes*, 2 Cush. 191.

(k) *Smith v. Miller*, 11 Gray, 148. *Powell v. Bagg*, 8 Gray, 441. *Nichols v. Aylor*, 7 Leigh, 546. "Interrumpi, poterit per denuntiationem et impetrationem diligentem et per talem interruptionem nunquam acquirit possidens ex tempore liberum tenementum."—*Bract. lib. 4*, fol. 51, cap. 22.

(l) "Si autem precaria fuerit et de gratiâ, quæ tempestive revocari possit vel intempestive, ex longo tempore non acquiritur jus."—*Bract. lib. 4*, fol. 221. *Ante*, pp. 80, 81. See *Bachelor v. Wakefield*, 8 Cush. 243; *Pue v. Pue*, 4 Md. Ch. Dec. 386; *Delahoussaye v. Judice*, 13 La. An. 587; *Hall v. McLeod*, 2 Metc. (Ky.) 98; *Ingraham v. Hough*, 1 Jones (N. C.), 39; *Howard v. O'Neill*, 2 Allen, 210; *Medford v. Pratt*, 4 Pick. 222; *Gayetty v. Bethune*, 14 Mass. 50; *Kilburn v. Adams*, 7 Metc. 33; *Polly v. M'Call*, 37 Ala. 20; *Dodge v. McClintock*, 47 N. H. 387; *Crounse v. Wemple*, 29 N. Y. 542; *Pierce v. Cloud*, 42 Penn. 113.

against an ignorant man, and, therefore, if an easement or profit à prendre has been enjoyed on land let on lease, the landlord is not to be prejudiced in his rights, and the inheritance burthened through the *laches* or acquiescence of the tenants in matters affecting the inheritance, without the knowledge, and privity, and sanction of the landlord(*m*). "The foundation," observes Lord Ellenborough, "of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant, and that cannot be presumed against him, unless there were some probable means of his knowing what was done against him"(*n*). But when the user and enjoyment are had and exercised under circumstances of notoriety, a jury may infer the landlord's knowledge and acquiescence in such user and enjoyment. Thus, where the lessees of a fishery had for sixty-four years been in the constant habit of landing their nets openly on a river-bank in the occupation of a tenant, and had from time to time sloped and pared the bank, and exercised various other acts of ownership upon the land, it was held that a jury was justified in inferring that the landlord knew of and acquiesced in the enjoyment of the easement(*o*). And where there had been uninterrupted enjoyment for thirty-eight years of the free access of light and air to windows over and across land held on lease, it was held that the landlord's knowledge of and acquiescence in the enjoyment of the visible and apparent easement was fairly to be presumed, in the absence of evidence to the contrary(*p*).

If the user and enjoyment have been had and exercised with the sufferance and permission of the tenant, but in spite of the remonstrance, protest, or objection of the owner of the fee, no right can be

(*m*) *Pierre v. Fernald*, 26 Me. 436. *Reimer v. Stuber*, 20 Penn. St. 458. *Schenley v. Commonwealth*, etc., 36 Penn. St. 29. See the observations of Lord Wynford, *Benest v. Pipon*, 1 Knapp, P. C. 70; *Davies v. Stephens*, 7 C. & P. 570; *Deeble v. Lineham*, 12 Ir. C. L. R. 16, "Si autem fuerit seisinā clandestina, scilicet in absentia dominorum vel illis ignorantibus, et, si scirent, essent prohibitori, licet hoc fiat de consensu vel dissimulatione ballivorum, valere non debet."—Bract. lib. 4, fol. 221; lib. 2, fol. 52. But see per Hatherley, C., *Ladyman v. Grave*, L. R., 6 Ch. App. 763. Acquiescence is not presumed against a party who had no choice but to acquiesce; and where private property is taken for public use by the authority of the State, no right by prescription will be acquired. *Jessup v. Loucks*, 55 Penn. St. 350. No prescriptive rights can be acquired by adverse enjoyment against a *feme covert* or a minor. *Watkins v. Peck*, 13 N. H. 360. *Melvin v. Whiting*, 13 Pick, 184. *Reimer v. Stuber*, 20 Penn. St. 458. Nor against any insane person. *Edson v. Munsell*, 10 Allen, 557.

(*n*) *Daniel v. North*, 11 East, 374. *Runcorn v. Cooper*, 5 B. & C. 701.

(*o*) *Gray v. Bond*, 5 Moore, 534. The maintenance of a mill-dam near the residence of the land owner is such an act of notoriety as to raise a legal presumption of knowledge on the part of the land owner. *Perrin v. Garfield*, 37 Vt. 311.

(*p*) *Cross v. Lewis*, 2 B. & C. 686.

gained by such an enjoyment, for there can be no presumption of a grant under such circumstances.

Proof of immemorial enjoyment of the privilege claimed was, in ancient times, essential to the legal presumption of a grant; but for a long series of years before the passing of the Prescription Act, judges were in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume an ancient grant of an easement or profit à prendre from an interrupted enjoyment of the privilege as of right for twenty years, adopting that period by analogy to the Statute of Limitations. (*pp*).

- 152 *Of the Prescription Act.*—The uninterrupted enjoyment for twenty years of an incorporeal right, from which juries were allowed to presume an ancient grant, was not a bar or title in itself; for if the commencement of the enjoyment within what was called the period of legal memory could be shown, the presumption of an ancient grant in times long since passed away was rebutted, and the right defeated. To remedy this inconvenience, and make that period of enjoyment of an incorporeal right a bar or title of itself, which was so before only by the intervention and inference of a jury, the statute 2 & 3 Wm. 4, c. 71, was passed in the year 1832, for shortening the time of prescription in certain cases.

(*pp*) In the United States the lapse of time or period of user or enjoyment necessary to create a prescription or presumptive grant is analogous to the period of limitation fixed by the laws of the several States for quieting titles to land. *Ricard v. Williams*, 7 Wheat. 107. *American Co. v. Bradford*, 27 Cal. 367. *Williams v. Nelson*, 23 Pick. 144. *Serwood v. Burr*, 4 Day, 244. *Polly v. McCall*, 37 Ala. 29.

As between individuals, the length of continuous adverse use or enjoyment necessary to raise the presumption of a grant and give a prescriptive right to a continuance of the enjoyment is fixed at twenty years in the States of New York (*Miller v. Garlock*, 8 Barb. 153; *Parker v. Foote*, 19 Wend. 369), Massachusetts (*Morrison v. Chapin*, 97 Mass. 72; *Sargent v. Ballard*, 9 Pick. 251), Rhode Island (*Evans v. Dana*, 7 R. I. 306), New Hampshire (*Webber v. Chapman*, 42 N. H. 326), Maine (*Pierre v. Fernald*, 26 Me. 436), Kentucky (*Manier v. Myers*, 4 B. Mon. 514), New Jersey (*Campbell v. Smith*, 3 Halst. 140), North Carolina (*Felton v. Simpson*, 11 Ired. 84. *Griffin v. Foster*, 8 Jones, Law, 339), South Carolina, (*Cuthbert v. Lawton*, 3 McCord 194), Maryland (*Pue v. Pue*, 4 Md. Ch. Decis. 336), Michigan (*Riopelle v. Gillmour*, 23 Mich. 33), Virginia (*Stokes v. Appomattox Co.* 3 Leigh, 313), Tennessee (*Gilchrist v. McGee*, 9 Yerg. 455) Indiana (*Mitchell v. Parks*, 26 Ind. 354).

Fifteen years of adverse enjoyment will establish a prescriptive right in the States of Vermont (*Tracy v. Atherton*, 36 Vt. 515) and Connecticut (*Sherwood v. Burr*, 4 Day, 244). Ten years' absolute and uninterrupted adverse enjoyment will give a right to a continuous and apparent servitude by prescription in Louisiana (*Delahousaye v. Judice*, 13 La. An. 587), Iowa (*Burdick v. Heivly*, 23 Iowa, 511), Alabama (*Wright v. Moore*, 38 Ala. 593), and Texas (*Haas v. Choussard*, 17 Texas, 588). In Georgia a right by prescription may be acquired in seven years (*Harrison v. Young*, 9 Geo. 359), and in California in five (*Davis v. Gale*, 32 Cal. 26). In Pennsylvania and Ohio an adverse enjoyment may ripen into a right by prescription in twenty-one years. *Oke-on v. Patterson*, 29 Penn. St. 22. See Angell on Limit. (4 ed.). Appendix of Statutes.

As against the United States, no right of easement in public lands can be acquired by user, and the grantee of such lands takes them free from all prescriptive claims. *Union Mill v. Ferris*, 2 Sawyer, Circ. C. Rep. (Nevada).

This statute, commonly called "The Prescription Act," recites (s. 1) that the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," was, by the law of England, in many cases considered to include and denote the whole period of time from the reign of King Richard I., whereby the title to matters that had been long enjoyed was sometimes defeated by showing the commencement of such enjoyment, which was productive of injustice; it is therefore enacted that no claim which may be lawfully made at the common law by custom, prescription, or grant to any RIGHT OF COMMON, or other PROFIT or BENEFIT, to be taken or enjoyed from or upon any land, except such matters and things as are therein specially provided for; and except tithes, rent and services, shall, where such right, profit or benefit has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of *thirty* years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken and enjoyed within the time of legal memory, but that such claim may be defeated in any other way by which the same was then liable to be defeated; and when such right, profit, or benefit has been so taken and enjoyed for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By the same statute (s. 2), it is enacted that no claim which may be lawfully made at common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse(g), or the use of any water, to be enjoyed upon, over, or from any land or water, when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of TWENTY years, shall be defeated or destroyed by showing only that such way, water, or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same was then liable to be defeated; and when such way or other matter shall have been so enjoyed, as aforesaid, for the full period of *forty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement by deed or writing.

Also (s. 3), that when the *access and use of light* to and for any

(g) A claim to have water kept diverted is a claim to a watercourse within the section. *Mason v. Shrewsbury and Hereford Railway*, ante, p. 77.

dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of *twenty* years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding^(r), unless it shall appear that the same was enjoyed by some covenant or agreement expressly made or given for that purpose by *deed or writing*.

Each of the respective periods named in the Act is to be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall be brought in question(s), and no act or other matter is to be deemed to be an interruption (s. 4), unless the same shall be submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof, and of the person making or authorizing the same to be made.

And (s. 5) that in all actions upon the case and other pleadings, wherein the party might then by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all and every the matters in the Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings wherein, before the passing of the Act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right, by the occupiers of the tenements, in respect whereof the same is claimed, for and during such of the periods mentioned in the Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee. In the several cases mentioned in and provided for by the Act, no presumption is to be allowed or made (s. 6) in support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number mentioned in the Act as may be applicable to the case and the nature of the claim.

The period during which a party capable of resisting the claim is an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party thereto, is to be excluded (s. 7) in the computation of the

(r) *Salters' Co. v. Jay*, 3 Q. B. 109. *Truscott v. Mercht, Taylors' Co.*, 11 Exch. 855.

(s) *Cooper v. Hubbuck*, 12 C. B. N. S. 456.

periods mentioned, except only in cases where the claim is thereby declared to be absolute and indefeasible.

It is enacted also (s. 8), that when any land or water upon, over, or from which any right of way, or convenient watercourse or use of water, shall have been enjoyed or derived, hath been or shall be held under any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way, watercourse, or water, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the determination of such term, be resisted by the reversioner.

153 *What profits or benefits may be claimed by user and enjoyment under the Prescription Act.*—Easements and profits à prendre cannot be claimed by user and enjoyment under the Prescription Act unless the benefit or profit has been used, exercised, and taken for the more beneficial use and enjoyment of some neighboring tenement. Easements and profits in gross (*ante*, pp. 116, 117), therefore, cannot be claimed by an occupier as such under the Act, because the claim must be “by custom, prescription, or grant,” and it must be of such a nature as to be capable of being annexed to land, as being accessorial to the beneficial use, occupation, and enjoyment of landed property(*t*). A right, therefore, which can be of no benefit to any tenement, such as a right to cut down, and carry away, and sell trees or underwood growing on a neighbor's land, or to search for and raise minerals, and carry them away and dispose of them, or a right to go upon land for recreation and amusement, cannot be prescribed for under the statute(*u*).

To bring the right within the term easement in the second section of the statute, it must be a right analogous to that of a right of way, or a right of watercourse, and must be a right of utility and benefit, and not of mere amusement(*v*). The second section of the statute has been held to include only such easements upon or over the surface of the servient tenement as are capable of being interrupted by the owner thereof, so as to prevent the enjoyment from ripening into a right. An enjoyment, therefore, for twenty years of the free and

(*t*) *Shuttleworth v. Le Fleming*, 34 L. J., C. P. 309.

(*u*) *Bailey v. Stephens*, 12 C. B., N. S. 113; 31 Law J., C. P. 228. *Mounsey v. Ismay*, 1 H. & C. 729; 34 Law J., Exch. 52. See *Caldwell v. Copeland*, 37 Penn. St. 431; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 322; *Phillips v. Rhodes*, 7 Metc. 322; *Hill v. Lord*, 48 Me. 96; *Morse v. Marshall*, 97 Mass. 72.

(*v*) *Mounsey v. Ismay*, *ut sup*.

uninterrupted passage of wind to a windmill, does not impose upon the owners of the adjoining land the servitude of keeping their land open and free from buildings, in order that the wind may not be taken out of the miller's sails(x).

154 *In order to gain a prescriptive title from uninterrupted user and enjoyment under the first and second sections of the Prescriptive Act, it must be proved that the enjoyment has been "as of right,"* for that is the form in which, by section 5 of the statute (*ante*, p. 140), the claim must be pleaded. It must be such an enjoyment as of right, and without interruption, as would under the old law of prescription have raised a presumption of a grant(y). "The whole purview of the Prescription Act," observes Lord Abinger, "shows that it applies only to such rights as would before the Act have been acquired by the presumption of a grant from long user. The Act expressly requires enjoyment for different periods without interruption, and therefore necessarily imports such an user as could be interrupted by some one capable of resisting the claim. It also requires it to be of right"(z). All circumstances, therefore, tending to rebut the presumption of a grant, and to prove that no grant could ever have existed, or have lawfully been made, are admissible in evidence to show that there was no enjoyment as of right within the meaning of the statute(a). Therefore, when lands are out on lease, an enjoyment by the acquiescence of the tenant, without the knowledge and acquiescence of the landlord or reversioner, cannot be made the foundation of a prescriptive right or title under the statute(b).

155 *Enjoyment by consent or agreement.*—The proviso in s. 1 of the Prescription Act, that the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing, supposes that there may be an enjoyment as of right, though by consent or agreement; but that applies to cases where the title to the dominant and servient tenement is such that the enjoyment could be as of right within the statute, not where from unity of possession or otherwise it necessarily cannot be. The enjoyment must be of right against the land, not against the individual(c).

(x) *Webb v. Bird*, 10 C. B., N. S. 206; 13 ib. 841; 30 Law J., C. P. 384; 31 ib. C. P. 335.

(y) "Longus usus nec per vim, nec clam nec precario."—Bract. lib. 4, fol. 222; Co. Lit 114. *Bright v. Walker*, 1 C. M. & R. 219. *Ante*, p. 14.

(z) *Arkwright v. Gell*, 5 M. & W. 234. *Rigg v. Lonsdale*, 1 H. & N. 923; 23 Law J., Exch. 81.

(a) *Mill v. New Forest Co.*, 18 C. B. 60; 23 Law J., C. P. 215.

(b) *Ante*, p. 115. *Deeble v. Lineham*, 12 Ir. C. L. R. 16.

(c) *Warburton v. Parker*, 2 H. & N. 64; 26 Law J., Exch. 299.

- 156 *User and enjoyment as of right against all persons having an estate or interest in the land.*—A user and enjoyment which does not give a valid title as against the owner of the inheritance cannot give a title as against the lessee and the persons claiming under him, for no title at all can be gained by a user and enjoyment which do not give a valid title against all persons having estates in the land over or upon which the easement has been enjoyed(*d*).
- 157 *What sort of enjoyment is essential to the gaining of a prescriptive right of way.*—If there be a ten years' enjoyment of a right of way, and then a cessation for ten years under a temporary agreement for a different and substituted way, there may be a sufficient enjoyment of the original right for twenty years to make it indefeasible under the statute(*e*).
- 158 *Enjoyment of a way over land out on lease* does not give any right of way as against the reversioner, unless the enjoyment has been had with his knowledge and acquiescence, so as to be an enjoyment "as of right." Thus, where a stranger entered on the land of the reversioner in the occupation of his lessee, and traversed the land with carts and horses in the exercise of an alleged right of way, it was contended that the trespass, being accompanied with a claim of right, would, if it continued unopposed by the reversioner, be evidence of a right of way as against him at some future period. "But acts of this sort," observes Taunton, J., "cannot operate as evidence of right as against the reversioner of land demised to tenants, because the reversioner, during the demise, has no present remedy by which he could obtain redress for such an act. He could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permanent injury as would be necessarily prejudicial to it; as, therefore, he had no remedy by law for the wrongful act done by the defendant, the act done by him, or any other stranger, would be no evidence of right as against the plaintiff, so long as the land was in possession of a lessee. In *Wood v. Veal*(*f*), it was held that there could not be a dedication of a way to the public by a tenant for ninety-nine years without consent of the owner of the fee; and that permission by such tenant would not bind the landlord after the term expired(*g*).

(*d*) *Bright v. Walker*, 1 C. M. & R. 220. *Winship v. Hindspeth*, 10 Exch. 7; 23 Law J., Exch. 268. *Wilson v. Stanley*, 12 Ir. C. L. R. 356.

(*e*) *Payne v. Shedden*, 1 Mood. & Rob. 332

(*f*), 5 B. & Ald. 454.

(*g*) *Baxter v. Taylor*, 4 B. & Ad. 75. See *Daniel v. Anderson*, 31 Law J., Ch. 610. However, in the case of public ways, it seems that from long-continued user, going back as far as

- 159 *Enjoyment of a right of common by a tenant over land in the possession and occupation of his landlord.*—Where a tenant enjoyed a right of common appurtenant to a tenement rented by him over land which was possessed and occupied by his landlord as tenant for life, it was held that, as the landlord could not have an enjoyment as of right against himself, so neither could his tenant. All the tenant's rights were derived from his landlord, and whatever he enjoyed was enjoyed by grant from the latter, and such an enjoyment is not an enjoyment as of right within the statute(*h*).
- 160 *What sort of enjoyment is essential to the gaining of a prescriptive right to the use of any watercourse or water.*—*Natural and artificial water-courses.*—All persons having lands on the margin of a flowing stream have, *ex jure naturæ*, as we have seen (*ante*, p. 63), certain rights to use the water of that stream, whether they exercise those rights or not; and they may begin to exercise them whenever they will. By usage, they may acquire a right to use the water in a manner not justified by their natural rights, but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement(*i*).

When a mill has been erected upon a stream, and has stood there and been worked for the period of twenty years, it gives to the mill owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill(*j*); if he were, that would stop all improvements in machinery. If, indeed, alterations made prejudice the right of a lower mill, the case would be different(*k*).

living memory will extend, over land under lease, a dedication to the public anterior to the lease may be inferred, although no proof of user previous to the lease be proved. *Winterbottom v. Lord Derby*, L. R., 2 Exch. 316. See Washb. on Easem. & Serv. (3d ed.) 164; *ante*, p. 137.

(*h*) *Warburton v. Parke*, 2 H. & N. 64; 26 Law J., Exch. 298.

(*i*) *Sampson v. Hoddinott*, 1 C. B., N. S. 611; 26 Law J., Exch. 148. See dissenting opinion of Gould, J., in *Ingraham v. Hutchinson*, 2 Conn. 584; *Parker v. Hotchkiss*, 25 Conn. 321; *Hall v. Augsburg*, 46 N. Y. 622.

(*j*) *Whittier v. Cochecho Manufacturing Co.*, 9 N. H. 454. *Buddington v. Bradley*, 10 Conn. 218. *Cowell v. Thayer*, 5 Metc. 253.

(*k*) *Saunders v. Newman*, 1 B. & Ald. 261. Where the owner of a mill makes such a change in the machinery that the water discharged from the wheel is insufficient to carry the mill of an owner below to advantage, the owner of the upper mill will be liable for the resulting damage. *Wentworth v. Poor*, 38 Me. 243.

It will not affect the rights of the parties that the upper mill is an ancient one. *Simpson v.*

A custom in a particular country for all persons to use the water in their districts for certain purposes—*e.g.*, mining—will not prevent a man from gaining a prescriptive right to the use of water subject to such custom(*l*).

161 *Prescriptive right to pen back water.*—If the water of a natural stream is conducted to the plaintiff's land by an artificial cut or channel made through the land of the defendant, and the plaintiff and the former occupiers of the plaintiff's land have for more than twenty years enjoyed this flow of water, and have from time to time during the period gone upon the defendant's land, and repaired the banks of the artificial cut, and cleaned it out, and placed stones and stakes, and maintained a dam in the natural stream for the purpose of penning back the water, and making it flow through the artificial watercourse, a prescriptive right to the flow of water and to the exercise of these customary acts will be gained(*m*).

162 *Prescriptive rights to foul the pure water of a stream, and convert a natural watercourse into a sewer,* may be gained by twenty years' uninterrupted user and enjoyment of the privilege. "The general rule of law," observes Lord Ellenborough, "as applied to this subject, is, that if a stream be corrupted in quality, as by means of the exercise of certain noisome trades, yet if the occupation of the stream by the party so taking or using it has existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. I take it that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament"(*n*). And where the method of manufacture is varied, *e.g.*, by the substitution of some other mate-

Seavey, 8 Me. 138. Nor that the owner of the lower mill had so changed his works as to require an increased supply of water, or had changed the mode of applying it. Buddington v. Bradley, 10 Conn. 213. Johnson v. Lewis, 13 Conn. 303.

A riparian owner has no right to erect machinery upon a stream requiring for its operation more water than the stream furnishes at an ordinary stage, and operate the machinery by ponds full, and discharge the water upon the owners below in such quantities that they are unable to use it. The machinery must be adapted to the power of the stream at its usual stage. Clinton v. Myers, 46 N. Y. 511. Merritt v. Brinkerhoff, 17 Johns. 306.

(*l*) Gaved v. Martyn, 34 L. J., C. P. 353.

(*m*) Beeston v. Weate, 5 Ell. & Bl. 986; 25 Law J., Q. B. 115.

(*n*) Bealey v. Shaw, 6 East, 214. Wright v. Williams, 1 M. & W. 77. Carlyon v. Lovering, 1 H. & N. 789. That a right to foul or incumber a stream by a person carrying on a noisome business on its banks, may be acquired by prescription is well established. McCallum v. Germantown Water Co., 54 Penn. St. 40. Holman v. Boiling Spring Co., 1 McCarter, 346. Ingraham v. Hutchinson, 2 Conn. 591. Jones v. Crow, 32 Penn. St. 398. Hayes v. Waldron, 44 N. H., 585. But a claim of a right of this nature requires the strictest proof in its support. McCallum v. Germantown Water Co., 54 Penn. St. 40.

rial for rags in the manufacture of paper, the prescriptive right to foul a stream by pouring into it the refuse from the mill is not destroyed, if the substituted materials be reasonable and proper for the purpose, and the pollution is not increased(o).

163 *User and enjoyment of water from artificial drainage, canals, etc.—*

The circumstances under which a watercourse was originally made, and under which it has been subsequently enjoyed, may prove the enjoyment, however long continued, to have been without right or any pretence or claim of right. The artificial nature of an adit or watercourse, constructed for the purpose of draining a mine, and a notorious practice in mineral districts for the owners of mines to make watercourses for the purpose of draining their mines, and resume and discontinue the working of their mines at their own convenience, and according as it suits their interests, may fix all persons with the knowledge that those who cleared the mine by the adit notoriously reserved to themselves the right of working the mine at any time, with all the rights of fouling the water flowing from the mine with the dirt and rubbish which usually attend mining operations, so as to prevent parties who have taken advantage of the accidental non-user of the mine to use the adit-water from having an enjoyment as of right, and gaining a title to the use of the water uncontaminated by mining operations(p), or to its use at all(q).

“The proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been artificial, is quite indefensible(r), but on the other hand, the general proposition that, under all circumstances, the right to watercourses arising from enjoyment is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, depends upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created(s). The flow of water for twenty years from the eaves of a house could

(o) *Baxendale v. McMurray*, L. R. 2 Ch. App. 790. The prescriptive right to foul water must be measured by the enjoyment, and it cannot be used in a different and more extensive manner. *McCallum v. Germantown Water Co.*, 54 Penn. St. 40. *Holman v. Boiling Spring Co.*, 1 McCarter, 346.

(p) *Magor v. Chadwick*, 11 Ad. & E. 585. Prior occupancy of a stream for mining purposes will not give a right to mix mud or other material with the water to the injury of others below. *Phoenix Water Co. v. Fletcher*, 23 Cal. 487.

(q) *Gaved v. Martyn*, *supra*.

(r) *Ivimey v. Stocker*, L. R., 1 Ch. App. 396, acc.

(s) *Sutcliffe v. Booth*, 32 Law J., Q. B. 136. *Gaved v. Martyn*, *supra*.

not give a right to the neighbor to insist that the house should not be pulled down, or altered so as to diminish the quantity of water flowing from the roof. The flow of water for twenty years from a drain made for agricultural improvements, could not give a right to the neighbor so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right"(t). So the user by one canal company of the surplus water of another canal company for more than forty years will give no right to the last-mentioned company for its continuance, if a grant for that purpose by the first-mentioned company would have been *ultra vires*(u).

If a steam-engine or sough is constructed and used by the owner of a mine to drain it, and the water pumped up by the engine, or collected by the sough, flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years, no right to the water in perpetuity can be gained from any such user, so as to burthen the owner of the mine and his assigns with the obligation of keeping up the steam-engine or the sough, and pumping or collecting water for the benefit of the adjoining landowners. In cases of this sort no right is acquired as against the owner of the property from which the course of water takes its origin, though as between the first and any subsequent appropriator of the watercourse itself such a right may be acquired(x). If a farmer, by some system of drainage, draws off the rain-fall from his lands, and pours it into the plaintiff's ditch, and so creates a new and artificial supply of water, and the latter uses the water for more than twenty years, and after that the farmer adopts a new mode of drainage, and in so doing cuts off the artificial supply of water, the plaintiff has no remedy for the loss of the water, the supply being of a temporary character, and the circumstances showing that the one party never intended to give, nor the other to enjoy, the use of the artificial drainage-water, as a matter of right(y).

164 *What sort of enjoyment is essential to the gaining of a right of support to buildings from the adjoining land of a neighboring proprietor.*—When

(t) Per cur., *Wood v. Waud*, 3 Exch. 779. Acc. *Mason v. Shrewsbury & Hereford Rail.*, ante, p. 78.

(u) *Staffordshire and Worcestershire Canal Co. v. Birmingham Canal Navigations*, L. R. 1 App. Ca. 254.

(x) *Arkwright v. Gell*, 5 M. & W. 232. *Curtiss v. Ayrault*, 47 N. Y. 73-82.

(y) *Greatrex v. Hayward*, 8 Exch. 291. *Rawstron v. Taylor*, 11 ib. 369. See *Hilliard on Torts*, 110, n.

houses and buildings have been notoriously supported by the adjoining land of a neighboring proprietor for the full period of twenty years, a right to such adjacent support is gained, unless something be shown to displace such right^(z). A defendant who has acquiesced for more than twenty years in the enjoyment, by the plaintiff, of the privilege of lateral support from the defendant's adjoining soil, cannot afterwards lawfully interrupt the enjoyment of such privilege^(a).

"There may be some difficulty," observes Lord Campbell, "whence the grant of the easement of support to a house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it, without serious loss or inconvenience to himself; but the law favors the preservation of enjoyments acquired by the labor of one man, and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle"^(b); but a grant ought not to be inferred from any lapse of time short of twenty years after the neighbor was, or ought to have been, fully aware of the facts. The easement must have been enjoyed for twenty years under a claim of right, "and if neither party was acquainted with the fact that the easement was actually used at all, we should probably," observes Alderson, B., "be of opinion that there was no user of the easement under a claim of right"^(c).

165 *Houses resting against each other.*—If two houses are built against each other, with separate and independent walls resting upon separate and independent foundations, so as to stand independently of each other, one house has no right to support from the other; and if the foundations of one of the houses subside, and the house rests upon the adjoining house, and requires the support of the latter, it does not follow that, because it has required and received that support for twenty years, any right to support is thereby acquired. Such a right cannot be claimed as a right by prescription, which supposes a state of things existing before the time of legal memory; nor is it a right under the Prescription Act, which has been hitherto confined to rights in their nature of a perpetual and permanent character, and

(z) Parke, B., *Hide v. Thornborough*, 2 C. & K. 255.

(a) Wood, V.-C., *Hunt v. Peake*, 1 Johns. 710; 29 Law J., Ch. 785. *Brown v. Windsor*, 1 Cr. & Jerv. 27. *Rogers v. Taylor*, 2 H. & N. 828; 27 Law J., Exch. 175.

(b) *Humphries v. Brogden*, 12 Q. B. 749.

(c) *Partridge v. Scott*, 3 M. & W. 230.

the ownership of which is in fee simple; and it seems contrary to justice and reason that a man, by building a weak house adjoining to the house of his neighbor, can, if the weak house gets out of the perpendicular and leans upon the adjoining house, be subjected to the burthen of supporting and propping up the weak house after it has stood for twenty years: an enjoyment of such a privilege is not an enjoyment "as of right" within the Prescription Act(d).

- 166 *What sort of enjoyment of the benefit of a boundary fence is requisite to gain a prescriptive right to have the fence kept up at the expense of one landowner for the benefit of another.*—We have seen that the presumption of legal title by grant to easements and incorporeal rights in the lands of others is founded on adverse enjoyment of such rights from time immemorial. But where the enjoyment can be satisfactorily accounted for, and is consistent with there having been no grant, there is, as we have seen, no ground for presuming one (ante, p. 136).

In the case, therefore, of proof of enjoyment by one landowner of a fence erected by his neighbor, and repaired, as occasion required, by the latter, there is no proof of such adverse enjoyment, as raises a presumption of a grant of the benefit of the fence by one landowner to the other. Every man is bound by law to take care that his beasts do not trespass upon the lands of his neighbors. He may prevent their doing so, either by employing servants to keep them within the limits of his own land, or by enclosing his land with fences, so that the cattle cannot escape. The making of a fence, therefore, between his own land and that of his neighbor, does not raise any inference that the fence was intended for the benefit of his neighbor, although the fence prevents his neighbor's beasts from trespassing as well as his own; for it is for his own benefit to prevent his beasts from trespassing upon his neighbor's property(e).

- 167 *What sort of enjoyment is essential to the gaining of a prescriptive right to the access of light to windows.*—The third section of the Prescription Act provides, as we have seen, that where the access and use of light

(d) *Solomon v. Vintners' Co.* *Peyton v. Mayor of London.* *Kempton v. Butler*, ante, p. 112.

(e) *Boyle v. Tamlyn*, 6 B. & C. 337. That there may be a valid prescription binding the owner of land to maintain perpetually the fence between him and the adjoining proprietor, see *Adams v. Van Alstyne*, 25 N. Y. 232; *Burney v. The Proprietors etc.*, in *Hull*, 5 Pick. 503; *Rust v. Low*, 6 Mass. 90; *Heath v. Ricker*, 2 Me. 72; *Thayer v. Arnold*, 4 Metc. 589. But no such prescription can be established in respect to part of a boundary line by the maintenance for any length of time of the fence by one of the adjoining proprietors while the other maintained an equal length on another portion of the boundary, the presumption being that each maintained what had been found by agreement to be his just proportion of the fences in discharge of his own duty and not in exoneration of the other. *Adams v. Van Alstyne*, 25 N. Y. 232. *Wright v. Wright*, 21 Conn. 242.

to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local custom or usage to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose, by deed or writing. "Upon this section it is material to observe," says Lord Westbury, "that the right to what is called 'an ancient light' now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be rested on, any presumption of grant or fiction of a license having been obtained from the adjoining proprietor."(*f*).

"This section," observes Parke, B., "is differently worded from the others, and the acquisition of right to light is much favored, as a far less time gives an indefeasible right; and the proviso in the 7th section (*ante*, p. 117-18), which excludes the time when a person, otherwise capable of objecting, is an infant, idiot, *non compos*, *feme covert*, or tenant for life, from other periods of computation, includes it in this. It also differs from the 2d section, in not requiring that the enjoyment should be by a person 'claiming right' in express terms. What, then, is the clear enjoyment contemplated by the 3rd section? We think it clear, notwithstanding the absence of the words in the 2nd section above referred to, that it converts into a right such an enjoyment only of the access of light over contiguous land as had been had for the whole period of twenty years, in the character of an

(*f*) *Tapling v. Jones*, 34 L. J., C. P. 344. In most of the states of the Union the doctrine of gaining a prescriptive right to light and air, by mere length of enjoyment, has been discarded. In a leading case in New York it has been held, that "There is no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England, but it cannot be applied in the growing cities and villages of this country without working the most mischievous consequences. It has never, I think, been deemed a part of our law, nor do I find that it has been adopted in any of the states." *Parker v. Foote*, 19 Wend. 309. This decision was approved in *Myers v. Gemme* (10 Barb. 537), and may be considered the settled rule in New York. See *Radcliff's Executors v. Mayor*, etc., of Brooklyn, 4 N. Y. 195, 200. The English doctrine of prescriptive rights in light and air has been repudiated in Massachusetts, Texas, Alabama, Vermont, Pennsylvania, Maryland, Iowa, South Carolina, Maine, Connecticut and Ohio. *Richardson v. Pond*, 15 Gray (Mass.), 387. *Royce v. Guggenheim*, 106 Mass. 201, 205. Statutes of Mass. 1852, ch. 144. *Klein v. Gehrung*, 25 Texas (Supp.), 332. *Ward v. Neal*, 37 Ala. 500. *Hubbard v. Town*, 33 Vt. 295. *Haverstick v. Sipe*, 33 Penn. St. 368. *Cheery v. Stein*, 11 Md. 1. *Napier v. Bulwinkle*, 5 Rich. 311. *Morrison v. Marquardt*, 24 Iowa, 35. *Heatt v. Morris*, 10 Ohio St. 523. *Mullen v. Stricker*, 19 Ohio, 135. *Pierre v. Fernald*, 26 Me. 436. *Ingraham v. Hutchinson*, 2 Conn. 584. Statutes of Conn. 1854, tit. 29, ch. 1, s. 18, p. 636. On the other hand, the English doctrine of prescriptive right to light and air seems to prevail in New Jersey, Louisiana and Illinois. *Robeson v. Pittenger*, 1 Green Ch. 57, 64. *Durel v. Boisblanc*, 1 La. An. 407. *Gerber v. Grabel*, 16 Ill. 217. As to the easement of light and air under an implied grant, see *ante*, p. 113, note.

easement, distinct from the enjoyment of the land itself, and that the statute puts this species of negative easement, as it has been termed, on the same footing, in this respect, as those positive easements provided for by the other sections, all of which, after long enjoyment as easements, are invested with the quality of rights. In the first place, the access of light, under this section, must have been enjoyed for twenty years without interruption—not in the sense of an uninterrupted or continuous user, but without such interruption as is mentioned in the subsequent section—that is, an interruption submitted to for one year after the party shall have had notice thereof, and of the persons making or authorizing the same to be made(*g*). From this it follows, that the legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier, at least during some some part of the time”(h).

Where, therefore, the owner in fee of an ancient house, and the land surrounding it, having enjoyed the access of light to his windows across such adjoining land, his own property, for more than twenty years, sells such surrounding land, and the purchaser builds thereon, so as to shut out the light from the ancient house, the owner has no remedy, as his enjoyment being over his own land is not such an enjoyment as is contemplated by the statute(*i*).

• If windows have been enjoyed, subject to the payment of a rent, this is an enjoyment by consent or agreement, and therefore confers no right under the statute; but the payment of the rent is no evidence of any interruption of enjoyment(*j*).

168 *Unity of ownership of the dominant and servient tenements preventing the acquisition of a prescriptive right to the free access of light.*—If the house and windows and the adjoining premises over which light comes are in the possession of the same person, no grant can be presumed from the enjoyment of the light in that condition of the property, and no right to the light can be acquired, as we have just seen, under the statute by reason of such enjoyment(*k*). Therefore, where the plaintiff and his father, whom he succeeded, had occupied a house, of which they were successively seised in fee for more than sixty years, and

(*g*) See *Flight v. Thomas*, 8 Cl. & Fin. 231.

(*h*) *Parke, B., Harbidge v. Warwick*, 3 Exch. 556; 18 Law J., Exch. 245.

(*i*) *White v. Bass*, 7 H. & N. 722; 31 Law J., Exch. 283. In support of the principle that no one can prescribe in his own land, see *Gayetty v. Bethune*, 14 Mass. 49; *Atkins v. Bordman*, 2 Mete. 457; *Ritger v. Parker*, 8 Cush. 145.

(*j*) *Plasterers' Co. v. Parish Clerks' Co.*, 6 Exch. 630. See *Cunningham v. Dorsey*, 4 W. Va. 293.

(*k*) *White v. Bass*, *supra*.

had also, during the whole period of their occupation of the house, occupied an adjoining garden as tenants from year to year under three successive landlords, of whom the defendant was the last, and the light came to the windows of the house across this garden, and the defendant, having determined the yearly tenancy, and got possession of the garden, began to raise the garden-wall, and in so doing obstructed the windows of the plaintiff's house, it was held that the enjoyment of the light across the garden, during the unity of possession of the house and garden, was not such an enjoyment of light as could be made the foundation of a prescriptive right under the statute, and that the plaintiff consequently could not maintain any action for the obstruction of his windows(*l*). The accruing right to the light is suspended during the unity of possession(*m*).

Where, on the other hand, the windows and the land across which the light comes are in the occupation of different parties, and there is no unity of possession of the dominant and servient tenements, a prescriptive right would be gained by twenty years' uninterrupted enjoyment, although the servient land across which the light comes is held on lease(*n*). It is true, that if a man open a window on adjoining land let on lease, and the landlord or reversioner of that land object to it, the latter may have no means of redress, or power of preventing the right to light being acquired by twenty years' enjoyment, unless he can induce his tenants to block up the windows, or get an acknowledgment in writing that the right is enjoyed by consent only; but such want of redress and inability of prevention will, nevertheless, not prevent the right from being acquired(*o*).

169 *Enlargement of windows—Enjoyment of enlarged windows.*—A person cannot, by enlarging a window, enlarge his right to the enjoyment of light. The enlarged portion of an ancient window constitutes a new window, and does not enjoy the same rights and privileges as the ancient aperture. If an ancient window is supplanted by a new window, varying in size, elevation, or position, from the ancient window, the new window may be obstructed by the adjoining landowner, but not the space occupied by the ancient aperture(*p*). If a window has been

(*l*) *Harbidge v. Warwick*, *supra*.

(*m*) *Ladyman v. Grave*, L. R., 6 Ch. App. 763.

(*n*) *Cross v. Lewis*, 2 B. & C. 686; *ante*, p. 151.

(*o*) *Freven v. Phillips*, 11 C. B., N. S. 455; 30 Law J., C. P. 356.

(*p*) *Blanchard v. Bridges*, 4 Ad. & E. 191. *Chandler v. Thompson*, 3 Campb. 80. *Cooper v. Huhhock*, 30 Beav. 180. *Davies v. Marshall*, 1 Dr. & Sm. 567. *Turner v. Spooner*, 30 Law J., Ch. 801; 1 Drew. & Sm. 467. *Heath v. Bucknall*, 38 L. J., Ch. 372. And see *Extinguishment of Easements*, *post*, p. 159, 162-3.

enlarged and then obstructed, and the window is then reduced to its ancient size, the obstruction becomes unlawful as soon as the window has been restored to its former state(*q*).

The right to light is *primâ facie* to that amount which would come naturally to the window. A man, therefore, does not lose his right because for a period he may require for the purpose of his business only a subdued light(*r*), nor, on the other hand, can he be entitled to the peculiar kind or an extraordinary quantity of light which may be requisite for certain trades or professions, unless he has enjoyed the light *to that extent* for the prescribed period(*s*).

It is not necessary that the house should be occupied, or even that it should be fit for immediate habitation, during the statutory period, provided it is structurally complete(*t*).

170 *What interruption in the enjoyment prevents the acquisition of a title by prescription.*—By s. 4 of the Prescription Act, it is enacted, that no act or other matter shall be deemed to be an interruption, unless the same shall have been submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof and of the person making the same, or authorizing the same to be made. Where, therefore, the use of light and air had been enjoyed for nineteen years and three hundred and thirty days, and was then interrupted by the erection of a building, which interruption continued to the time of the commencement of the action, but the interruption was not submitted to or acquiesced in, as the plaintiff brought his action within a few months thereof, it was held that such erection of a wall was not an interruption preventing the establishment of the right within the terms of the fourth section of the statute(*u*). But though an interruption must be acquiesced in for a full year before it breaks the period, where the subject-matter has, previously to the interruption, been enjoyed as of right, interruptions acquiesced in for less than a year may be of great weight as evidence on the question whether there ever was a commencement of an enjoyment as of right. Such interruptions are explanatory of the real nature of the user. If the enjoyment has been contentious, it is not of right. Therefore, where a per-

(*q*) *Jones v. Tapling*, *post*, p. 163.

(*r*) *Yates v. Jack*, L. R., 1 Ch. App. 295.

(*s*) *Lanfranchi v. Mackenzie*, L. R., 4 Eq. Ca. 421. An easement acquired by prescription is restricted to the extent of the user. *Wright v. Moore*, 38 Ala. 593. *Holman v. Boiling Spring Co.*, 1 M'Carter, 346. *McCallum v. Germantown Water Co.*, 54 Penn. St. 40. *Richardson v. Pond*, 15 Gray, 389. *Brooks v. Curtiss*, 4 Lans. (N. Y.) 283.

(*t*) *Courtald v. Legh*, L. R., 4 Exch. 126.

(*u*) *Flight v. Thomas*, 11 Ad. & E. 699; 8 Cl. & Fin. 241.

son had been summoned, and convicted, and fined, for drawing off water from a watercourse, it was held that the conviction and fine, and payment of the fine, were proper and most material evidence of the user and enjoyment not having been of right(v). Nor does it follow that an interruption is acquiesced in because an action has not been brought. Where the lord has attempted to stop the user of a common, the fact that some of the tenants have yielded to such attempts is not an interruption of the right within the meaning of the Act, so as to bar the freeholders as a body, who have never yielded to or acquiesced in the lord's claim(x). It is in general for a jury to determine whether or not there has been acquiescence(y).

- 171 *Of the necessity of a continuous enjoyment as of right and without interruption.*—The enjoyment of the profit à prendre, or easement, under the statute, must be an enjoyment for a continuous period, without such interruption as is defined in the fourth section of the statute. The enjoyment of the privilege must be continuous(z), but the exercise of the right need not be continuous. Formerly it was thought that some act of user must take place within each year(a), but this has since been held not to be necessary; for where proof was given of the enjoyment of a profit à prendre at the time of the commencement of an action, and for thirty years before, but enjoyment during the whole of the intermediate period could not be proved, it was held to be a question for a jury, whether at that time the right had ceased, or was still substantially enjoyed. Thus, where there was an actual enjoyment of common of pasture for forty years next before the commencement of an action, with the exception of an interval of two years out of the forty, when the claimant ceased to use the common, because he had no commonable cattle to depasture, and not in consequence of any obstruction to his exercise of the right, it was held that the jury were

(v) *Eaton v. Swansea Water Co.*, 17 Q. B. 267.

(x) *Warwick v. Queen's College*, L. R., 10 Eq. Ca. 105; 6 Ch. App. 716. If at any time before the expiration of the time necessary to create a prescriptive right, the owner of the land in which an easement is claimed, has by any verbal act resisted the exercise of the right or denied its existence, the presumption of a grant will be rebutted, and the acquiescence of the owner disproved. *Powell v. Bagg*, 8 Gray, 441. *Nichols v. Aylor*, 7 Leigh, 546, 565. *Smith v. Miller*, 11 Gray, 148. See *Ingraham v. Hough*, 1 Jones (N. C.), 39; *Tracy v. Allerton*, 36 Vt. 514. One of the essentials of a valid prescription is that it must have a continued and peaceable usage and enjoyment. *Rhodes v. Whitehead*, 27 Texas, 304. And when an uninterrupted user has existed for the time requisite to establish a prescriptive right acquiescence will not be presumed if the owner of the land has had no choice but to acquiesce. *Jessup v. Loucks*, 55 Penn. St. 350.

(y) *Bennison v. Cartwright*, 33 Law J., Q. B. 137. See *Bradley's Fish Co. v. Dudley*, 37 Conn. 136.

(z) *Onley v. Gardiner*, 4 M. & W. 500. *Ward v. Robins*, 15 M. & W. 242. *Pollard v. Barnes*, 2 Cush. 191. *Carlisle v. Cooper*, 4 C. E. Green, 261.

(a) *Lowe v. Carpenter*, 6 Exch. 831. See *Cuthbert v. Lawton*, 3 McCord, 195.

justified in finding a continued enjoyment of the right during the two years in which it was not exercised(b). "It has been ingeniously argued," observes Lord Denman, "that a thirty years' enjoyment cannot have taken place where there has been two years' intermission; but the words of s. 1 are 'without interruption,' not 'without intermission,' and the intermission must be a matter open in every case to explanation; and where actual enjoyment is shown before and after the period of intermission, it may be inferred from evidence that the right continued during the whole time." "Interruption," further observes Patteson, J., "must clearly mean an obstruction by the act of some other person than the claimant, not a cessation by him of his own accord." "No necessary inference of interruption in the enjoyment arises," further observes Williams, J., "from a cesser of enjoyment during two, three, or seven years." And "if there is proof to the satisfaction of a jury of a long enjoyment of the alleged privilege, they ought not to negative it merely because there was a time during which there was no enjoyment"(c). Where, on the other hand, an artificial impediment in the shape of a stang or rail had been erected, which prevented the access of cattle from the plaintiff's farm to the land over which the right of common was claimed, and this stang was removed by agreement, and then the plaintiff's cattle depastured on the land, and continued so to do for twenty-eight years continuously after the removal of the stang, down to the time of the commencement of the action, it was held that an enjoyment for thirty years could not be presumed from this evidence(d).

(b) *Carr v. Foster*, 3 Q. B. 581; *post*, 161. So where the owner of buildings which had stood more than twenty years, claimed as an easement the right to carry on an offensive trade therein, and it was shown that he had carried on such business therein for eighteen years uninterruptedly, it was held that the mere suspension of the business for two years, where there had been no interference with the enjoyment of the right, was not such an interruption as would defeat the right in the absence of an intent to abandon the business and not resume it. *Dana v. Valentine*, 5 Metc. 8. But see *Carlisle v. Cooper*, 4 C. E. Green, 261. So where the owner of a dam claimed as an easement the right to flow land, it was held that the suspension of the flowing during the time the owner was repairing the same, was not such an interruption of the continuity of the user and enjoyment as to defeat the right. *Wood v. Kelley*, 30 Me. 47. *Gevanger v. Summers*, 2 Ired. 229. Continuous adverse use of a way may be established without direct evidence of actual use during each year. *Bodfish v. Bodfish*, 105 Mass. 317. And in general the requisite continuity of enjoyment which will establish a prescriptive right to an easement, depends upon the character and nature of the right claimed. *Id.*

(c) *Willes, J., Darling v. Clue*, 4 F. & F. 334. The term "interruption" within the meaning of the Massachusetts statutes is applicable to whatever breaks the continuity of the possession and enjoyment of the easement claimed, whether by cessation of enjoyment on the part of the claimant, or by some act of the owner of the tenement in which the right is claimed. *Pollard v. Barnes*, 2 Cush. 191. Thus where a person claimed the right to pile boards on the land of another on the ground that the right had been exercised from 1822 to 1846, except from the years 1829 to 1834, it was held that there was a voluntary interruption which destroyed the continued enjoyment of the right. *Id.*

(d) *Bailey v. Appleyard*, 8 Ad. & E. 166. See *Plympton v. Converse*, 42 Vt. 712.

172 *What breaks the continuity of the enjoyment—Asking leave.*—"The asking leave from time to time breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and, therefore, the evidence of such asking within the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right"(e).

173 *Of the necessity of a continuous enjoyment down to the period of the commencement of the action.*—The Prescription Act expressly requires (ss. 1, 2) enjoyment "without interruption for the full periods therein mentioned." Section 6 enacts, that no presumption shall be allowed in support of any claim on proof of enjoyment for any less period or number of years; and by s. 4 it is enacted, that each of the respective periods of years thereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been, or shall be, brought in question; and it was formerly held that the enjoyment, in order to give a right under the statute, must be up to the time of the commencement of the suit(f). But when a prescriptive right has once been gained by twenty or thirty years' uninterrupted enjoyment as of right, it is not lost again by mere non-user, for it does not follow that a man has lost his right merely because he has not thought fit to exercise it (ante, p. 154). An exercise of the right once a year down to the time of the commencement of the action is not, therefore, essential to the proof of a prescriptive title under the statute. "The intention," observes Willes, J., "was to give enjoyment under the Act the same effect as the evidence which would sustain a prescriptive claim before the Act, except that the terminus of the statutory enjoyment must be a suit or action which discloses the nature of the claim, and gives an opportunity of litigating it. The evidence, therefore, to sustain a prescriptive claim need not come down to the commencement of the suit, nor to any definite period"(g).

174 *Exclusion from the computation of the thirty and twenty years' enjoyment of those periods during which parties otherwise capable of resisting the claim were infants, idiots, feme covertes, or tenants for life.*—The seventh

(e) *Tickle v. Brown*, 4 Ad. & E. 382. *Bright v. Walker*, 1 Cr. M. & R. 219. *Monmouth Canal Co. v. Harford*, id. 631. But after an easement has been once actually acquired, asking permission to continue its use will not affect the right, although it may be considered in determining whether the prior use has been adverse or permissive. *Perrin v. Garfield*, 37 Vt. 310.

(f) *Ward v. Robins*, 15 M. & W. 242. *Battishill v. Reed*, 18 C. B. 705; 25 Law J., C. P. 290. *Parker v. Mitchell*, 11 Ad. & E. 788.

(g) *Cooper v. Hubbuck*, 12 C. B., N. S. 470. See *Ward v. Ward*, post, pp. 160, 164.

section of the Prescription Act provides, as we have seen, that the time during which any person otherwise capable of resisting the claim shall be an infant, *non compos mentis*, *feme covert*, or tenant for life, shall be excluded from the computation of the respective periods, except where the claim is thereby declared to be absolute and indefeasible(*gg.*) The claim is by the statute declared to be absolute and indefeasible in those cases where there has been an enjoyment as of right and without such interruption as is mentioned in s. 4 of a way, watercourse, or use of water, or other easement, for the term of forty years, and of a profit à prendre for the term of sixty years, and of the access and use of light and air to any dwelling-house, work-shop, or other building for twenty years, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Where a defendant claiming a prescriptive right to the enjoyment of a profit à prendre in the soil of the plaintiff showed an uninterrupted enjoyment for twenty years before a life estate, and during its continuance, and for six years after its determination up to the commencement of the action, and the question was whether that enjoyment was sufficient, or whether the thirty years must be the actual thirty next before the commencement of the action, it was held that the two sections of the statute,—viz. s. 4, enacting that the respective periods of enjoyment should be deemed and taken to be the period next before some suit or action, and s. 7, providing that the time during which any person capable of resisting the claim was tenant for life, etc., should be excluded in the computation,—must be read together, so that the period is thirty years next before the action, excluding in the computation of those thirty years any tenancy for life(*h.*)

(*gg.*) No prescriptive rights can be acquired by adverse enjoyment as against a minor, *feme covert* or an insane person. *Watkins v. Peck*, 13 N. H. 360. *Melvin v. Whiting*, 13 Pick. 184. *Reiner v. Stuber*, 20 Penn. St. 458. *Edson v. Munsell*, 10 Allen, 557. It has been held in Massachusetts and South Carolina, that where the ancestor dies before the lapse of time requisite to establish a prescriptive right, and the estate descends to a minor heir, the prescription is suspended during the minority. *Melvin v. Whiting*, 13 Pick. 184. *Lamb v. Crossland*, 4 Rich. 536. But in Vermont, North Carolina and New Hampshire, it is held that the prescription in such cases is not suspended during the minority of the heir. *Tracy v. Atherton*, 36 Vt. 503. *Wallace v. Fletcher*, 10 Foster, 434. *Mebane v. Patrick*, 1 Jones (N. C.) 26. These decisions being based upon different theories are irreconcilable. But whichever rule is adopted, it is settled that if the enjoyment begun during the lifetime of the ancestor is continued after the majority of the heir, the two periods of adverse user may be taken together to make the requisite period of prescription. *Watkins v. Peck*, 13 N. H. 360. In Pennsylvania it is held that a second disability added to one which existed when the adverse enjoyment first began is to be disregarded. Thus a coverture which took place during infancy is not taken into account after the infancy has ended. *Reiner v. Stuber*, 20 Penn. St. 458. *Schenley v. Commonwealth*, etc., 36 Penn. St. 29.

(*h.*) *Clayton v. Corby*, 2 Q. B. 824. No prescriptive rights can be acquired in respect to lands while in the possession of a tenant for life, or for years, as against the remainderman or

175 *Of the right of reversioners to exclude from the computation of the forty years the periods of the enjoyment of a way or watercourse, and use of water, over lands demised for life or years.*—By s. 8 of the Prescription Act (*ante*, p. 141), it is expressly enacted, that when any land or water upon, over, or from which any right of way or convenient watercourse, or use of water, shall have been enjoyed or derived, hath been or shall be held under any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way, watercourse, or water, during the continuance of such term, shall be excluded in the computation of the said period forty years, in case the claim shall within three years next after the determination of such term be resisted by the reversioner.

By the ancient law of prescription, whenever it appeared that the land over or upon which an easement of this sort had been enjoyed was in the occupation of a tenant for life, or tenant for term of years, during the whole period of the enjoyment of the privilege, the presumption of a grant was rebutted and the easement extinguished, however long and notorious might have been the user and enjoyment, and although the owner of the fee was fully aware of all that had been done upon the land(*i*), and had made no protest against, or objection to, the enjoyment of the privilege. But since the Prescription Act, if the privilege has been enjoyed without such interruption for forty years, or as far back as living memory will go, the right cannot be defeated merely by showing that the land was on lease during the whole period of enjoyment; for the jury, under such circumstances, may infer a dedication previous to the lease(*k*). It must be shown either that the enjoyment was had without the knowledge of the reversioner (*ante*, pp. 136, 137), or that the reversioner, within three years after the determination of the particular estate, resisted the claim to the easement(*l*).

“The period during which the land over which the right is claimed has been leased for a term exceeding three years is not, under s. 8, to be excluded from the computation of a twenty years’ enjoyment. Section 7 excludes certain times, including that of a tenancy for life, but not that of a tenancy for years, from the computation of the

reversioner. *Parker v. Farmingham*, 8 Metc. 260. *Pierre v. Fernald*, 26 Me. 436. But a valid easement may be acquired by adverse user as against the tenant for life, or for years, and those who hold his estate during its continuance. *Wallace v. Fletcher*, 10 Foster, 453.

(*i*) *Bradbury v. Grinsell*, 3 Saund. 175, (*i*) in notis. *Barker v. Richardson*, 4 B. & Ald. 581. *Wood v. Veal*, 5 ib. 456.

(*k*) *Winterbottom v. Lord Derby*, L. R., 2 Exch. 316.

(*l*) *Wright v. Williams*, 1 M. & W. 100. *Wilson v. Stanley*, 12 Ir. Com. Law Rep. 357.

'periods' thereinbefore mentioned; and a twenty years' enjoyment is one of those periods. But section 8 provides for the exclusion of certain other times, among which is a tenancy for more than three years, not from the periods thereinbefore mentioned, but from one particular period only, expressly mentioned, namely, that of an enjoyment for forty years"(m).

176 *Waiver and extinguishment of easements.*—A title once gained by prescription or custom cannot be lost by interruption of the possession or enjoyment for ten or twenty years, but it may be lost by interruption in the right, as if a man have a rent or common by prescription, unity of possession of as high and perdurable estate in the land is an interruption in the right(n), for when there is once a title by prescription vested, it cannot be taken away by a cesser of user of the right of late time, but it will be destroyed by unity of ownership of the dominant and servient tenements(o). Thus, where a *modus decimandi* was alleged by prescription time out of mind for tithes of lambs; and thereupon issue was joined, and the jury found that before twenty years then last past there was such a prescription, and that for these twenty years he (the plaintiff) had paid tithe lamb in specie; and it was objected: 1. That the issue was found against the plaintiff, for that the prescription was general for all the time of prescription, and twenty years fail thereof. 2. That the party, by the payment of tithes in specie had waived the prescription or custom. But it was adjudged for the plaintiff in the prohibition, for albeit the *modus decimandi* had not been paid by the space of twenty years, yet, the prescription being found, the substance of the issue is found for the plaintiff.

And if a man hath a common by prescription, and taketh a lease of the land for twenty years, whereby the common is suspended, after

(m) *Ld. Campbell, Palk v. Skinner*, 18 Q. B. 574; 22 Law J., Q. B. 27.

(n) *Co. Litt.* 114b.

(o) *Onley v. Gardiner*, 4 M. & W. 500. *Battishill v. Reed*, 18 C. B. 697. *Miller v. Lapham*, 44 Vt. 416. *Grant v. Chase*, 17 Mass. 443. *Gayetty v. Bethune*, 14 Mass. 53. *Hancock v. Wentworth*, 5 Metc. 446. *Keiffer v. Imhoff*, 26 Penn. St. 438. *Coleman's Appeal*, 62 Penn. 274. *Plympton v. Converse*, 42 Vt. 712. But where an owner holds the servient estate by a defective title, and has an easement in the same land under a valid title, the easement will not be extinguished by the unity of possession. *Tyler v. Hammond*, 11 Pick. 193. So where the owner of the servient estate is also a joint owner of the dominant estate, the unity of ownership is not of such a character as to extinguish the easement. *Bradley's Fish Co. v. Dudley*, 37 Conn. 136. And where both the dominant and servient estates were vested in the same person as mortgagee, under separate mortgages, it was held that the easement existing between the estates was not extinguished until both mortgages were foreclosed. *Ritger v. Parker*, 8 Cush. 145. It will be observed that the cases make a wide distinction between the effect of the union of an absolute title to and possession of both the dominant and servient estate in the same person, and the union of estates not permanent but conditional and determinable, and liable to be again disjoined by operation of law. See *post*, p. 170.

the years ended, he may claim the common generally by prescription, for that the suspension was but to the possession and not to the right, and the inheritance of the common did always remain; and when a prescription or custom doth make a title of inheritance (as Littleton speaketh), the party cannot alter or waive the same *in pais*(p).

In an action against the defendant for a trespass upon the plaintiff's land, the defendant justified in the exercise of a right of way which he claimed by reason of his possession of a close, the owners and occupiers of which had enjoyed the right from time immemorial, though it had not been exercised for thirty-seven years prior to the commencement of the action, mainly because one of the tenants had other land of his own adjoining, over which he had a shorter and more convenient way, and in the argument of the case a dictum of Littledale, J., was cited, to the effect that if a party, who has acquired a right by immemorial usage, ceases for a long period of time to make use of the privilege, it may thence be presumed that he has released the right(q); but per Alderson, B.: "The presumption of abandonment cannot be made from the mere fact of non-user. The non-user must be the consequence of something which is adverse to the user;" and per Pollock, C.B.: "The only inference that could reasonably be drawn from the non-user is that the party had no occasion for the user"(r).

177 Parol abandonment of incorporeal rights.—Where an easement is granted for a particular purpose, or arises as accessorial to a thing granted (*ante*, p. 86), and the purpose can no longer be accomplished, or the thing granted ceases to exist, so that the easement can no longer be applied to the object for which it was originally granted,

(p) Coke's Institutes, s. 170.

(q) Moore v. Rawson, 3 B. & C. 332.

(r) Ward v. Ward, 7 Exch. 838. See Cook v. Mayor of Bath, L. R., 6 Eq. Ca. 177; Corning v. Gould, 16 Wend. 531; Wilder v. St. Paul, 12 Minn. 208. An easement acquired by prescription may be lost by non-user, but mere non-user can never extinguish an easement acquired by deed. Wiggins v. McCleary, 49 N. Y. 346. Smyles v. Hastings, 22 N. Y. 217. Jewett v. Jewett, 16 Barb. (N. Y.) 150. Arnold v. Stevens, 24 Pick. 106. As a general rule, the abandonment of an easement acquired by prescription will not be presumed unless the non-user has existed for the same length of time necessary to create the original presumption of the grant. Corning v. Gould, 16 Wend. 531. Townsend v. McDonald, 12 N. Y. 381. Bannon v. Angier, 2 Allen (Mass.), 128. Hatch v. Dwight, 17 Mass. 289. Williams v. Nelson, 23 Pick. 141. Pillsbury v. Moore, 44 Me. 154. Dyer v. Depuy, 5 Whart. 584. Perkins v. Dunham, 3 Strobb. 224. Farrar v. Cooper, 34 Me. 394. Wilder v. St. Paul, 12 Minn. 192. But this rule is not without exceptions; and the presumption of the abandonment of an easement may arise from non-user for a period of time much less than it will take to acquire it. Rhodes v. Whitehead, 27 Texas, 304. Louisville, etc., R. R. Co. v. Covington, 2 Bush (Ky.), 526. It will be seen from an examination of the authorities that non-user of an easement for the period required to create it, is mere evidence of an intent to abandon it, and not a conclusive presumption.

the easement is at an end(s). A mere parol license or agreement will suffice for the destruction, although it is insufficient for the creation of an easement(ss). Thus, if a person possessed of an easement over the land of the adjoining landowner verbally authorizes the latter to do an act of notoriety upon his own land which, when done, will be inconsistent with the continued enjoyment of the easement, and the license or authority is acted upon, and the thing done, the authority so given and acted upon cannot be revoked, and the easement consequently is extinguished(t). Where the plaintiff, for example, having a right to the uninterrupted access of light and air across the defendant's area, had given the defendant a parol license or permission to put a skylight over his area, and the skylight was erected by the defendant on his own land, and, when built, was found to impede the passage of the air and light, and to obstruct the plaintiff's easement, it was held that, as the parol license or permission had been acted upon and executed, and the skylight built, the license was irrevocable, and the easement was extinguished(tt).

So where the plaintiff, having a right to the use of a stream of water which flowed through the land of the defendant, gave the defendant a parol license or permission to lower the banks of the river, and erect a weir, and divert a portion of the water which had previously flowed to the plaintiff's mill, it was held that the plaintiff, after he had so given up his right to the water that had been diverted, and suffered the defendant to act upon the faith of such relinquishment, and incur expense in doing on his own land the very thing that was authorized by the plaintiff to be done, could not then lawfully retract such consent, and throw on the defendant the burthen of restoring things to their former condition(u).

The same rule prevails in the civil law. In the "Digest," for example, it is laid down, that "if I have a right of discharging my eaves'-droppings into your area, and I authorize you to build in this

(s) *National Guaranteed Manure Co. v. Donald*, 4 H. & N. 8; 28 Law J., Exch. 185. *Hancock v. Wentworth*, 5 Metc. 446. *Gayetty v. Bethune*, 14 Mass. 49. *Chase v. Sutton Manuf. Co.*, 4 Cush. 152. *McDonald v. Lindall*, 3 Rawle, 492.

(ss) The proposition as stated in the text is not strictly true. An easement cannot be extinguished or renounced by a mere parol agreement between the owner of the dominant and servient tenement. *Dyer v. Sandford*, 9 Metc. 395. *Pue v. Pue*, 4 Md. Ch. Decis. 386. But if a license is given by the owner of the dominant tenement to the owner of the servient tenement to obstruct an easement, and the license is executed, the license is not revocable, and it may operate as an abandonment of the easement to the extent of the license.

(t) *Morse v. Copeland*, 2 Gray (Mass.), 302. *Dyer v. Sandford*, 9 Metc. 395.

(tt) *Winter v. Brockwell*, 8 East, 309. See *Dyer v. Sandford*, 9 Metc. 395.

(u) *Liggins v. Inge*, 7 Bing. 682. *Blood v. Keller*, 11 Ir. Com. Law. Rep. 130. *Morse v. Copeland*, 2 Gray (Mass.), 302.

area, I lose my right of discharge; and so, if I have a right of way over your property, and I authorize you to do anything in the place over which my right of way exists, I lose my right of way"(v).

178 *Waiver and extinguishment of an easement of light and air.*—If a person entitled to an easement of light and air does any act of notoriety showing that he abandons the benefit of the light and air he enjoyed, he may lose his right in a much less period of time than would suffice to enable him to gain it. Where the owner of a building with ancient windows overlooking the defendant's premises pulled down the building, and erected another with a blank wall without any windows, and fifteen years afterwards the defendant erected a building next this blank wall, and the plaintiff then opened windows in the blank wall in the place where his ancient windows formerly stood, and then brought an action against the defendant for the obstruction to the light and air caused by the defendant's new building, it was held that the windows thus opened could not claim the privileges of the ancient windows which had formerly existed on the same spot; that those privileges had been lost by manifest disuse, and that the action was not maintainable (x).

If a window has been bricked up for twenty years, it is, when reopened, *primâ facie*, a new window(y). But if the facts show that the windows were only temporarily disused, that the frames and sashes were kept in, or the spaces filled with a temporary boarding, which could readily be removed, the owner of the window-spaces will not lose his right to the easement of light and air by the disuse of the windows for any period short of twenty years, unless the adjoining landowner has been permitted to build against them, and to incur expense, in the reasonable belief that the windows have been permanently abandoned, in which case the owner of the windows cannot then insist upon his ancient right, and claim damages for an injury which has been brought about by his own negligence and want of care(z).

If a tenant stops up any of the windows of a house that has been denied to him, he is responsible in damages to his landlord(a).

(v) "Si stillicidii immittendi jus habeam in aream tuam, et permisero jus tibi in eâ area ædificandi, stillicidii immittendi jus amitto. Et similiter si per tuum fundum via mihi debeatur, et permisero tibi, in eo loco, per quem via mihi debetur, aliquid facere, amitto jus viæ." —Dig. lib. 9, tit. 6, l. 8. See *Pue v. Pue*, 4 Md. Ch. Decis. 386.

(x) *Moore v. Rawson*, 3 B. & C. 532. *Dyer v. Sanford*, 9 Metc. 395; and see *Ballard v. Butler*, 30 Me. 94.

(y) *Lawrence v. Obee*, 3 Campb. 514.

(z) *Stokoe v. Singers*, 8 Ell. & Bl. 39; 26 Law J., Q. B. 257. *Acc.* in case of water; *Crossley v. Lightowler*, L. R., 3 Eq. Ca. 279; 2 Ch. App. 478; and of a door, *Cook v. Mayor of Bath*, L. R., 6 Eq. Ca. 177.

(a) *Thomlinson v. Brown, Sayer*, 215.

179 *Extinguishment of an easement of light by alterations in windows and buildings.*—A person may so alter ancient windows and apertures through which light has been admitted into the interior of a building as to lose his right altogether. He may so change the course and direction of the light, and so alter the position of his windows, as to entitle the owner of the adjoining land to block them up altogether(*b*). If windows have been allowed to be opened, with blinds attached to them sloping upwards, so as to admit the light but obstruct the view over the adjoining land, the right to light which these windows may have acquired by user cannot be enlarged by removal of the blinds. If the blinds are removed, the view from the windows may be obstructed, provided the obstruction causes no greater impediment to the light than was caused by the old blinds(*c*). However, a person possessed of ancient windows has a right to the full benefit of all the light he can get through the ancient aperture by any change he can effect in the form and character of the window. If it is an ancient window, with heavy mouldings, and small diamond panes glazed in lead, he may remove them, and substitute a large pane of plate glass, without giving the occupier of the servient tenement a right to block up the window, on the ground that the ancient right has been enlarged, and a new easement created, for this is only an alteration in the mode of enjoying the light within the house, and does not vary the size of the external aperture; and if ancient windows have been painted on the inside, and so used, and the paint is rubbed off, this will not entitle the occupier of the servient tenement to block up the unpainted windows(*d*). And it has been laid down in the House of Lords, that as the right is declared by the Prescription Act to be absolute and indefeasible after twenty years' enjoyment, without interruption, it cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment, and cannot be prejudiced by any attempt to extend the excess or use of light(*e*), for the mere attempt to increase the servitude, which is a lawful act, will not work a forfeiture of the right(*f*). So if new or enlarged windows cannot be obstructed without at the same time obstructing ancient, unaltered windows, an obstruction to such last-named windows cannot be justified;

(*b*) *Garritt v. Sharp*, 3 Ad. & E. 330.

(*c*) *Cotterell v. Griffiths*, 4 Esp. 69.

(*d*) *Kindersley, V.-C.*, *Turner v. Spooner*, 1 Drew. & Sm. 467; 30 Law J., Ch. 893.

(*e*) *Tapling v. Jones*, 34 Law J., C. P. (H. L.) 342, overruling *Renshaw v. Bean*, and *Hutchinson v. Copestake*. See *Weatherby v. Ross*, 32 Law J., Ch. 123.

(*f*) *Erle, C. J.* and *Williams, J.*, *Jones v. Tapling*, 11 C. B., N. S. 289; 31 Law J., C. P. 119-121; *ib.* 342.

neither can an obstruction to a lower window be justified merely on the ground that an upper window has been enlarged, or a new garret window has been thrown out(*g*). Nor will the right be prejudiced by any proposed decrease of light caused by buildings erected by the owner of the dominant tenement himself(*h*), nor by any increase of light caused by clearances effected in the neighborhood, unless amounting to so much light that no one could reasonably want more(*i*).

180 *Disuse of right of way*.—The presumption of abandonment of a right of way does not arise from the mere fact of non-user, when nothing has been done adverse to the user, and no obstruction has been offered to the enjoyment of the right(*ii*). Thus, where an immemorial right of way had been enjoyed by the defendant from the defendant's close across the adjoining land of the plaintiff to the high road, and the defendant had demised his close to the plaintiff, and after that to several other tenants, who obtained by leave and license of the plaintiff and others a more easy and convenient access to and from the property, and the old prescriptive way was consequently disused for a great many years, it was held that the prescriptive right was not extinguished by the non-user(*j*). The use of the new track may be considered as an exercise of the old right, and evidence of the continued enjoyment of it(*k*). When, therefore, a new way has been substituted by agreement of the parties in lieu of an old prescriptive way, and the new way is stopped, the old prescriptive right of passage revives(*l*).

If the jury find the right of way once well commenced, it must be shown that it has subsequently been released, abandoned, or destroyed. An express release of the easement would of course destroy it any moment; so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time. It is not so much the duration of the cesser of enjoyment as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him and the intention in him which either the one or the other indicates. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and

(*g*) *Binckes v. Pash*, 11 C. B., N. S. 342; 31 Law J., C. P. 121; *ib.* C. P. 347, 350.

(*h*) *Staight v. Burn*, L. R., 5 Ch. App. 163.

(*i*) *Dyers' Co. v. King*, L. R., 9 Eq. Ca. 433.

(*ii*) *Bannon v. Angier*, 2 Allen (Mass.), 128. *Smyles v. Hastings*, 22 N. Y. 271. *Miller v. Garlock*, 8 Barb. 153.

(*j*) *Ward v. Ward*, 7 Exch. 838. See *Hamilton v. White*, 5 N. Y. 9; *Crounse v. Wemple*, 29 N. Y. 540.

(*k*) *Payne v. Shedden*, 1 M. & Rob. 338.

(*l*) *Lovell v. Smith*, 3 C. B., N. S. 120.

what period may be sufficient in any particular case must depend on all the accompanying circumstances(*m*).

A private right of way is not extinguished by the subsequent dedication of the way to the public(*n*).

181 *Extinguishment of ways of necessity*.—A way by necessity is commensurate only with the existence of such necessity, so that when the necessity ceases the right of way also ceases(*nn*). Where, therefore, a person who has a way of necessity over the lands of another is able to approach the land for which the way was used by passing over his own soil, the right of way is extinguished. "When, by a subsequent purchase, he is enabled to reach his house, farm or field, without touching the land of his neighbor, the necessity of going upon the land of the latter ceases, and, the necessity ceasing, the right founded upon such necessity ceases also"(*o*). But the easement revives again when the necessity for it revives(*p*).

182 *Suspension and forfeiture of rights of way and watercourse by the non-performance of conditions annexed to the grant*.—If a right of way is granted to another, he contributing and paying his rateable share and proportion of the expense of repairing the way, and repairs become necessary, and the way is repaired by the grantor, and the grantee refuses to pay his rateable proportion of the expense, his right of way will become forfeited, or will be suspended, until the accomplishment of the condition annexed to the grant; but the grantee has the right to use the way without paying anything until repairs become necessary, and the cost of them has been ascertained, and the grantee has refused to pay his share of the cost(*q*). If

(*m*) *Reg. v. Chorley*, 12 Q. B. 519. *Williams v. Eyton*, 27 Law J., Exch. 176; 2 H. & N. 771. *Corning v. Gould*, 16 Wend. 531. *Crain v. Fox*, 16 Barb. (N. Y.) 184.

(*n*) *Abbott v. Stewartstown*, 47 N. H. 228. *New York Life Insurance and Trust Co. v. Milnor*, 1 Barb. Ch. 353.

(*nn*) *Duncan v. Louch*, 6 Q. B. 901.

(*o*) *Holmes v. Goring*, 2 Bing. 76. *Viall v. Carpenter*, 14 Gray (Mass.) 126. *New York Life Insurance and Trust Co. v. Milner*, 1 Barb. Ch. 353. *Pierce v. Selleck*, 18 Conn. 321. *Holmes v. Seeley*, 19 Wend. 505. *Collins v. Prentice*, 15 Conn. 39. *Lawton v. Rivers*, 2 M'Cord, 445. *Scriven v. Gregorie*, 8 Rich. (Law.) 158. *Nichols v. Luce*, 24 Pick. 102. *Seeley v. Bishop*, 19 Conn. 128. *Gayetly v. Bethune*, 14 Mass. 49. *Alley v. Carleton*, 29 Texas, 78.

(*p*) *Pearson v. Spencer*, 1 B. & S. 584. Where the owner of a right of way by necessity has put an end to the right by acquiring another right of way over his own land to the same highway, he cannot again revive it by conveying away that land. *Baker v. Crosby*, 9 Gray (Mass.) 421. When the title to the dominant and servient estates unite in a common owner easements of necessity are merged and lost; and on separate conveyances of the estates by the common owner, such easements are not revived, nor deemed to have existed during the time the two estates were held by the same person, but are re-created by the conveyance of the estate separately, on the principle that whoever grants a thing impliedly grants whatever may be necessary for its beneficial enjoyment. *Miller v. Lapham*, 44 Vt. 416. *Grant v. Chase*, 17 Mass. 443, 448. *Post*, p. 170.

(*q*) *Duncan v. Louch*, 6 Q. B. 904.

a right of watercourse is granted, with certain limitations and restrictions, and the grantee exceeds his limited right, and refuses to conform to the restrictive conditions, he loses his right altogether, until he makes his enjoyment of it conformable to the conditions of grant(*r*).

183 *Disuse of right to water*.—A person who has a prescriptive right to a flow of water to a pond or well does not lose his right merely because he has ceased to use his pond or well, and has allowed it to become choked with weeds(*s*). But, if having a right to foul water he lies by, and allows other persons to incur expense, which would be useless, if his right to foul the water continued, he must be taken to have abandoned it(*t*).

184 *Merger and extinguishment of easements and servitudes by a unity of ownership of the dominant and servient tenements*.—Easements, profits à prendre, and servitudes, may become merged and extinguished in the general rights of property, when the land benefited by, and the land burthened with, the easement, profit, or servitude, pass into the hands of one common proprietor, or when the person possessed of the incorporeal right becomes the owner of the land over or upon which the right is exercised, for a man cannot, strictly speaking, have an easement in his own land(*u*). Thus, if one man erects on his own land a building which wrongfully darkens the windows of the adjoining proprietor, and afterwards purchases the house with the darkened windows, the tort is thenceforth purged by the unity of ownership, and the easement or privilege of enjoying the unobstructed access of light and air annexed to the darkened windows is extinguished, for, both houses being in the hand of one person, he may deal with them as it seemeth best to him. If, therefore, he afterwards grant or conveys the house with the darkened windows, the grantee cannot lawfully complain of the nuisance, and has no remedy for its abatement. If one of two houses, which belonged to two different proprietors, has been built so as wrongfully to overhang the other, and they afterwards come into one hand, the wrong is now purged; so that if the houses come afterwards again into several hands, yet neither party can complain of the wrong done before(*x*).

The obligation imposed in certain cases by custom, prescription, or

(*r*) *Cawkwell v. Russell*, 26 Law J., Exch. 34.

(*s*) *Hale v. Oldroyd*, 14 M. & W. 792; Co. Litt. 114 b, *ante*, p. 159.

(*t*) *Crossley v. Lightowler*, L. R., 3 Eq. Ca. 279; 2 Ch. App. 478.

(*u*) *Ante*, p. 159–60.

(*x*) *Robins v. Barnes*, Hob. 131; Rolle's Abr. CUSTOMS (D.), pl. 7. *Battishill v. Reed*, 18 C. B. 696

contract, upon the owner of an estate to maintain a fence for the benefit of the owner or occupier of the adjoining land, is an obligation in the nature of a servitude. Where, therefore, adjoining lands, which have once belonged to different persons, one of whom is bound to repair the fences between the two, afterwards becomes the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive unless express words be introduced into the deed of conveyance for that purpose(y).

If a man who has a right of common appurtenant (*ante*, p. 1) becomes himself the owner of the land over which the right of common extends, the incorporeal right is merged in the legal ownership, and the land is discharged, for a man cannot have common in his own land(z); and if the owner afterwards grants the land to which, before the extinguishment, the right of common was attached, with all easements and profits thereunto "appertaining" or "belonging," these words will not be sufficient to revive or re-create the right(a).

However, if a copyhold tenement, to which a right of common is annexed, becomes vested in the lord by forfeiture, the right of common is not extinguished; it remains by custom annexed to the customary tenement; and though the right is in abeyance whilst the estate remains in the lord, it is re-created or revived by a re-grant of the estate as a copyhold tenement *cum pertinentiis*. If, indeed, the lord grants the fee to a copyholder, the estate can never again become a copyhold estate, and the right of common is extinguished, "for the common first used was gained by custom, and annexed to the estate, and is lost with it"(b).

185 *What sort of unity of ownership is essential to the extinguishment of easements.*—For the extinguishment of a prescriptive right by unity of ownership and possession "it is requisite that the party should have an estate in the lands *a quâ*, and in the lands *in quâ*, equal in duration, quality, and all other circumstances"(c). "If," observes Alderson, B., "I am seized of freehold premises, and possessed of

(y) Bayley, J., *Boyle v. Tamlyn*, 6 B. & C. 337.

(z) *Nelson's case*, 3 Leon. 128. *Saunders v. Oliffe*, Moore, 467. *Tyringham's case*, 4 Rep. 38a.

(a) *Clements v. Lambert*, 1 Taunt. 204. *Grymes v. Peacock*, 1 Bulstr. 17.

(b) *Badger v. Ford*, 3 B. & Ald. 155. *Massam v. Hunter*, Yelv. 189.

(c) *Rex v. Hermitage*, Carth. 241. See *Ivimey v. Stocker*, L. R., 1 Ch. App. 470-8; *Co. Litt* 114 b, *ante*, p. 159-60; *Tyler v. Hammond*, 11 Pick. 193; *Bradley's Fish Co. v. Dudley*, 37 Conn. 136; *Ritger v. Parker*, 8 Cush. 145.

leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands the easement is necessarily suspended, but it is not extinguished, because there is no unity of seizin; and if I part with the premises, the right, not being extinguished, will revive"(d). If a lessor of the dominant tenement takes a week's tenancy of the servient tenement, he does not lose all the servitudes: he would only lose the statutory mode of establishing them; and he would only lose that, when it could be said that at the time of granting the lease he could grant the servitude(e).

Easements of necessity are not extinguished by unity of ownership, and therefore, a necessary way over land continues, notwithstanding a unity of ownership of the dominant and servient tenements, and a subsequent conveyance of such tenements to separate proprietors(f); but this is not the case with regard to mere easements of convenience, which are used from time to time only, such as the right of taking water from a pump(g).

- 186 *Revival and re-creation of easements and servitudes which have been extinguished or suspended by unity of ownership.*—When an easement or servitude has become extinct by reason of the ownership of the dominant and servient estates having become centred in the same person, and he again conveys away that estate to which the easement or servitude has belonged, the general rule is, that if he merely grants such estate with the appurtenances, the easement is not revived, unless it is a visible apparent easement, manifestly necessary for the commodious occupation and enjoyment of the property which is conveyed(h); but if he grants it with all easements, etc., therewith used and enjoyed, that operates as a revival; and any other words clearly intended to have such an effect will operate in the same manner(i). If a right of way has become extinguished by unity of ownership of the dominant and servient tenements, and the messuage for which the right of way was anciently used is subsequently severed from the land over which the way passed, and is conveyed "with all ways, roads, rights of road, paths, and passages thereto belonging; or in anywise

(d) *Thomas v. Thomas*, 2 C. M. & R. 41.

(e) *Bramwell, B., Warburton v. Parke*, 26 Law J., Exch., 298; 2 H. & N. 64.

(f) *Packer v. Wellstead*, 2 Sid. 111. *Pearson v. Spencer*, 1 B. & S. 584. See however, *Baker v. Crosby*, 9 Gray (Mass.) 421; *Miller v. Lapham*, 44 Vt. 416; *Grant v. Chase*, 17 Mass 443, 448; *Du Val v. Du Val*, 21 Md. 149.

(g) *Polden v. Bastard*, 32 L. J., Q. B. 372; L. R., 1 Q. B. 156.

(h) *Suffield v. Brown*, ante, p. 102.

(i) See per Kelly, C. B., in *Langley v. Hammond*, L. R., 3 Exch. 168.

appertaining," the extinct right of way is not revived, and does not pass by the conveyance of the house, unless it is a way of necessity(k); "for nothing is more clear than that, under the word 'appurtenances,' according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass. If the grantor wishes to revive or create such a right, he must do it by express words, or introduce the terms 'therewith used and enjoyed,' in which case easements existing in point of fact, though not existing in point of law, would be transferred to the grantee"(l). If, therefore, the occupiers of farm *A* have a right of way, not being a way of necessity, over farm *B*, and both farms come into the hands of one and the same owner, and afterwards the two farms are again severed and granted to two different grantees, the extinct right of way will not be revived and re-created unless the grantor uses language to show that he intended to create the easement *de novo*(m). Nor will the use of the words "therewith used and enjoyed" operate to pass a way, which was previously only used by the grantor for the more convenient occupation of both tenements, and which therefore never became attached to either(n).

But there is a distinction between what are termed discontinuous easements, such as rights of way, and continuous easements, such as drains and watercourses; for if the owner of a mill, who has a right of passage for water to his mill through the land of the adjoining land-owner, purchases such adjoining land, and becomes the owner both of the mill and of the land over which his watercourse extends, and afterwards alienes the mill, the watercourse and incorporeal right to the free passage of the water to the mill are not extinguished, but pass with the mill as appendant and appurtenant thereto. So if a man hath a dye-house, and there is water running thereto, and afterwards he purchaseth the land upon which the stream runs, and subsequently re-sells such land, his original right to the watercourse remains(o). But if a man hath a stream of water which runneth in a leaden pipe through the adjoining land, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is thenceforth ex-

(k) *Barlow v. Rhodes*, 1 Cr. & M. 488; *Wardle v. Brocklehurst*, *ante*, p. 103. But see *Watts v. Kelson*, L. R., 6 Ch. App. 166.

(l) *Plant v. James*, 5 B. & Ad. 794. *James v. Plant*, 4 Ad. & E. 764. *Bradshaw v. Eyre*, Cro. Eliz. 570. *Wardle v. Brocklehurst*, *ante*, p. 104. *Baird v. Fortune*, 4 Macq. 127.

(m) *Worthington v. Gimson*, 29 Law J., Q. B. 117. *Daniel v. Anderson*, 31 Law J., Ch. 610. *Pearson v. Spencer*, 1 B. & S. 571. *Pheysey v. Vicary*; *Dodd v. Burchall*, *ante*, p. 104.

(n) *Langley v. Hammond*, L. R., 3 Exch. 161. See *Gayford v. Moffat*, L. R., 4 Ch. App. 133.

(o) *Sury v. Pigot*, Poph. 172; *Palm*, 444.

tinct, because ne thereby declares his intention that the watercourse and the land shall no longer be enjoyed together(*p*).

Where a way has been extinguished by the unity of seizin of two estates, by the partition of the two the way is revived. Thus it has become laid down as law, "that a way extinguished by unity of possession is revivable afterwards upon a descent to two daughters, where the land through which the way passed is allotted to one, and the other land, to which the way belonged, is allotted to the other sister; and this allotment, without specialty, to have the way anciently used, is sufficient to revive it"(*q*).

In the Roman law, when the servitude was a non-apparent servitude, it was merged and extinguished by unity of ownership of the dominant and servient tenements; but when it was an apparent continuing servitude, such as a window enjoying light and air, or lands having drains or watercourses, or manifest ways running through them, the servitude was not extinguished; so that if the tenements were subsequently severed, they would be respectively benefited and burdened with their ancient, manifest, and continuing privileges and obligations(*r*).

By the French law, "servitudes cease when things are in such a state that it is impossible any longer to make use of them." They revive, if things are re-established in such a manner that they can be made use of, unless a sufficient space of time has already elapsed to raise a presumption that the servitude has been extinguished. Every servitude is extinguished when the estate to which it is due, and that which owes it, are united in the same hands. Servitude is extinguished also by non-usage during thirty years(*s*).

187 *Effect of the destruction or alteration of the dominant tenement.*—When mills or houses which have watercourses, or estovers, or other things appendant or appurtenant to them, be overthrown by the wind, or burned by fire, or fall by any other act of God, if the owner rebuilds them in the same manner as they stood before, they shall have the same ancient rights appendant and appurtenant to the new structure. And although the house or mill falls by the act or default of the owner, or by the wrong of another, yet forasmuch as the durable materials remain, he may rebuild it without the loss of anything

(*p*) Popham, C. J., *Lady Brown's case*, cited Palm. 446.

(*q*) 1 Jenk. Cent. Ca. 37. Bro. Abr. EXTINGUISHMENT, 15.

(*r*) Dig. lib. 8, tit. 2, 3.

(*s*) Cod. Civ. art. 703-706.

appendant or appurtenant to it; but it ought to be reconstructed upon the old foundations of the ancient house(*l*).

188 *Of the maintenance and repairs of ways and watercourses.*—Every grantee of a right of way or watercourse, to be exercised and enjoyed over or through the land of the grantor, must himself repair the way, if he desires to have it repaired and kept in repair for his use, or if repairs are necessary to prevent the enjoyment of the right becoming an annoyance and nuisance to the owner of the servient tenement(*ll*). “If I grant a way over my land I shall not be bound to repair it. If I stop it, an action lies against me for the misfeasance, but for the bare nonfeasance, viz., in not repairing it, when it is out of repair, no action at all lies(*u*). So if I grant a right to a watercourse through my land, the grantee is bound to keep the watercourse in proper order and repair; and if it becomes ruinous and obstructed, so that the water floods my land, the grantee will be responsible for the nuisance”(*x*). Where a landowner is under an obligation to repair a road *ratione tenuræ*, it is doubtful whether an action can be maintained against him by a person who has sustained damage by reason of the road being out of repair; but an action has been held maintainable by a lord of a manor, who relied on a prescription that he and all who had his estate had a right to have a bridge kept in repair by the owner of a mill(*y*). In executing the repairs, the person entitled to the right of way is not justified in doing anything to increase the burthen upon the servient tenement, or to enlarge or alter the nature of the easement. He must use the way as it has always previously been used. If it was a soft way over a ploughed field he has no right to lay down gravel, and if it was a gravelled path he has no right to lay down stones and make a hard macadamized road, without the consent of the owner of the servient tenement.

(*l*) 4. Co. 86, b, 88, a. See *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Partridge v. Gilbert*, 15 N. Y. 601, 615; *Campbell v. Mesier*, 4 Johns. Ch. 334; *Hancock v. Wentworth*, 5 Metc. 446, 451

(*ll*) *Walker v. Pierce*, 38 Vt. 95. *Doane v. Badger*, 12 Mass. 65. *Holmes v. Seeley*, 19 Wend. 507. *Wynkoop v. Burger*, 12 Johns. 222. *Atkins v. Boardman*, 2 Metc. 457.

(*u*) *Pomret v. Ricroft*, 1 Wms. Saund. 322, *ante*, pp. 93, 104.

(*x*) *Ld. Egremont v. Pulman*, M. & M. 404; cited 1 Q. B. 775. *M'Swiney v. Haynes*, 4 Ir. Eq. R. 322, *post* ch. 4; *ante*, p. 94. So in the civil law: “In omnibus servitutibus reffectio ad eum pertinet qui sibi servitutem adserit, non ad eum cujus res servit.” Gale on Easements, 4th ed., p. 472.

(*y*) 11 Hen. 4, c. 28, p. 83. *Young v. Davis*, 31 Law J., Exch. 254; 7 H. & N. 760.

SECTION II.

REMEDY FOR THE INFRINGEMENT OF INCORPOREAL RIGHTS.

- 189 *Abatement of obstructions to the enjoyment of easements and profits à prendre*.—An obstruction to the enjoyment of a right of common, or of a private right of way, may be abated as a nuisance(z).
- 190 *Of the right to distrain beasts wrongfully put upon a common*.—Where there is a color of right to put beasts upon a common, one commoner cannot distrain the cattle of another. If there is no color of right he may, and therefore he may distrain the beasts of a stranger. In the case of levancy and couchancy, one commoner cannot distrain another's cattle for a surcharge, but must try by a jury the number accommodated to the land. And where any admeasurement lies between commoners to ascertain what quantity of land the commoner has, one cannot distrain the cattle of the other(a). But this general rule may be superseded, and a right to distrain given by an agreement between commoners to restrain the exercise of their privilege to certain specified portions of the common field(b).
- 191 *Of actions for the infringement of incorporeal rights*.—An injury to a right imports a damage, though it does not cost the party one farthing(c). “Whenever,” observes Parke, B., “an act done would be evidence against the existence of a right, that is an injury to the right, and the party injured may bring an action in respect of it”(d). “It is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal”(e).
- 192 *Actions for taking manure from commons*.—A commoner may maintain an action for an injury done to the common by taking away from thence the manure which was dropped on it by the cattle, though his

(z) *Post*, ch. 4, s. 2.(a) *Hall v. Harding*, 1 W. Bl. 674.(b) *Whiteman v. King*, 2 H. Bl. 4.(c) *Holt, C.J., Ashby v. White*, 2 Ld. Raym. 955. *Bower v. Hill*, 1 Sc. 526. *Woodman v. Tufts*, 9 N. H. 88. *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191. *Hastings v. Livermore*, 7 Gray, 194. *Grant v. Lyman*, 4 Metc. 470. *Bolivar Manuf. Co. v. Neponset Manuf. Co.* 16 Pick. 241. *Newhall v. Ireson*, 8 Cush. 595. *Butman v. Hussey*, 12 Me. 407. *Parker v. Foote*, 19 Wend. 309. *Hendrick v. Cook*, 4 Ga. 241. *Stein v. Burden*, 24 Ala. 130. *Graver v. Sholl*, 42 Penn. 67. *Chatfield v. Wilson*, 27 Vt. 670. *Parker v. Griswold*, 17 Conn. 288. *Welton v. Martin*. 7 Mo. 307. *Plumleigh v. Dawson*, 1 Gilm. 544. *Whipple v. Cumberland Manuf. Co.*, 2 Story, 661. *Connel v. Kibbe*, 33 Ill. 175. *Tuttle v. Walker*, 46 Me. 280. *Dudley v. Tilton*, 14 La. An. 283. *Delaware & Hudson Canal Co. v. Torrey*, 33 Penn. St. 143.(d) *Nicklin v. Williams*, 10 Exch. 227.(e) *Holt, C.J.*, 2 Ld. Raym. 953.

proportion of the damage may be inappreciable, for the repetition of a tortious act of this kind might eventually be made the foundation of a right, to the serious injury of the other commoners. The action may be brought by the lord, or by any one of the commoners, and all the commoners may maintain separate actions for the wrong(*f*).

- 193 *Actions for surcharging of commons*.—If one commoner puts more cattle on the common than he is entitled to do, he is liable to be sued by all or any one of the other commoners who have a right to depasture beasts upon the same common; and it is no answer to the action that the plaintiff has himself surcharged the common, or that the damage is insignificant, for the wrong-doer might, by repeated torts of this sort, eventually enlarge his right. But if the beasts have been put upon the common by the lord of the manor, or with his license and permission, the commoner cannot maintain an action, unless he has sustained actual damage, and can show that there was not a sufficiency of pasture for his beasts(*g*). Any act that totally destroys the herbage, as feeding innumerable rabbits on a common, will support an action against the lord(*h*).

- 194 *Actions for obstructions to the enjoyment of a private right of way*.—Every person who sustains injury from an unknown and dangerous obstruction to the enjoyment of a private right of way is entitled to an action for damages, whether the obstruction be caused by the owner of the land over which the way exists or by a stranger, and whether the way be claimed by prescription or grant, or be enjoyed only under a parol license or permission, which has not been revoked; for if a landowner gives his neighbor permission to use a beaten track or path across the land of such landowner, and the latter places a dangerous obstruction in the path, which causes injury to the licensee, he will be responsible in damages to the latter, if he has failed to give him timely notice and warning of the obstruction; and, *a fortiori*, therefore, a stranger will, although he may have created the obstruction with the permission of the landowner(*i*). A continuing obstruction to the exercise and enjoyment of an incorporeal right is a continuing nuisance; so that if an

(*f*) *Pindar v. Wadsworth*, 2 East, 159.

(*g*) *Hopson v. Todd*, 4 T. R. 73. *Smith v. Feverell*, 2 Mod. 7. *Greenhow v. Hsley, Willes*, 619.

(*h*) *Wells v. Watling*, 2 W. Bl. 1233.

(*i*) *Corby v. Hill*, 4 C. B., N. S. 556; 27 Law J., C. P. 318. Where a private way has been obstructed by the grantor the grantee may remove the obstruction and maintain an action against the grantor for placing it there. But he cannot lawfully go out of the way upon the grantor's land to avoid the obstruction. *Williams v. Safford*, 7 Barb. 309. *Boyce v. Brown*, 7 Barb. 80.

action has been brought, and damages recovered for the injury, and the nuisance is not then abated, the continuance of the obstruction constitutes a fresh injury, for which another action may be brought, and so *toties quoties*, until the obstruction is removed(*k*).

195 *Of the parties to be made plaintiffs—Tenant and reversioner.*—The action for an injury to real property resulting from obstructions to the enjoyment of profits à prendre, or easements appurtenant to messuages or tenements, may be brought by the occupier in respect of the immediate injury to his possessory interest, and by the reversioner in respect of the deterioration in the marketable value of the property, when the damage done is of a permanent character(*kk*).

An obstruction to the exercise of a private right of way appurtenant to lands or tenements which, if allowed to continue unopposed, would be evidence against the enjoyment of the right, is, of course, an injury to the reversioner, in respect of which an action for damages is maintainable(*l*). "The erection of a wall," observes Maule, J., "across a way—assuming, of course, that there was no contract as between the tenant and the defendant—would be an injury to the reversion, although such wall might be pulled down before the plaintiff became entitled to the actual possession of the land; and there might be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall"(*m*). But a reversioner cannot maintain an action against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in the exercise of an alleged right of way, such an act during the existence of the tenancy not being necessarily injurious to the reversion. Neither can he maintain an action in respect of an obstruction of a public way leading to his property, unless he can show, either that the obstruction is of a permanent character,

(*k*) *Shadwell v. Hutchinson*, 4 C. & P. 333. *Beckwith v. Griswold*, 29 Barb. 291, *post*, ch. 4.

(*kk*) *Tinsman v. Belvidere*, etc. R. R. Co., 1 Dutch. (N. J.) 255. *Hastings v. Livermore*, 7 Gray, 194. *Brown v. Bowen*, 30 N. Y. 519. *Richardson v. Bigelow*, 15 Gray, 154. Thus the owner of land leased at will for purposes of pasturage may maintain an action for the obstruction of a right to drain land through an ancient watercourse, and recover for the injury thereby occasioned to the reversion. *Hastings v. Livermore*, 7 Gray (Mass.), 194. And the tenant would also have a cause of action against the same person for injuries sustained by him resulting from the same wrongful act. See *Foley v. Wyeth*, 2 Allen, 135. So the occupant of premises injured by the setting back of water upon land may recover damages against the wrong-doer to an amount sufficient to indemnify him for the injury to such interest as he had in the premises: and an action will also lie by the reversioner for the injury done to the inheritance. *Brown v. Bowen*, 30 N. Y. 519. See *Ashley v. Ashley*, 4 Gray (Mass.), 197; *Noye v. Stillman*, 24 Conn. 15.

(*l*) *Battishill v. Reed*, 18 C. B. 696. See *Hastings v. Livermore*, 7 Gray (Mass.), 194; *Foley v. Wyette*, 2 Allen, 135.

(*m*) *Kidgill v. Moor*, 9 C. B. 378. *Tinsman v. Belvidere* etc. R. R. Co., 1 Dutch. (N. J.) 255.

or that it would afford evidence against the existence of the right, if it was allowed to continue unopposed. For the public injury the landlord has a remedy, as one of the public, by indictment, and he is not himself personally damnified merely by his tenant's being temporarily prevented from enjoying his house in so ample a manner as he might otherwise have done. But if the obstruction appears to be of a permanent character, or professes, either by notice affixed, or in any other way, to deny the public right, and so lead to an opinion that no road was there, the value of the house might be lowered in public estimation, and pecuniary loss might follow, for which an action might be maintained by the reversioner(n).

An action is also maintainable by the reversioner of a mill demised to a tenant, for diversion by a stranger of water from the mill-head; for if the diversion was allowed to continue with the knowledge of the reversioner, and without interruption from him or his tenant, it might eventually be made the foundation of a legal right to divert the water, to the serious injury of the inheritance. Where permanent damage has been done to property let on lease by the erection of a wall or hoarding obstructing ancient lights, and lessening the value of the property in the market, there is an injury to the reversion, in respect of which the reversioner is entitled to maintain an action(o), as well as an injury to the possession, in respect of which the occupier may sue. A wooden hoarding of an unsubstantial character may cause permanent injury to the property, by the obstruction it offers to the passage of light and air, and may be an injury to the reversioner(p).

If the windows of a house occupied by the servant of the owner have been unlawfully darkened or obstructed, the owner may sue for the immediate injury as the occupier of the house, the occupation of the servant being the occupation of the master(q): but if the house is in the possession of a lessee paying rent, the action should be brought in respect of the injury to the reversion; and if there is a lease in writing, it must be produced(r).

196 *Parties to be made defendants.*—If a man erects on his own land an obstruction to the access of light and air to his neighbor's ancient windows, and then demises the land with the obstruction upon it, an

(n) *Dobson v. Blackmore*, 9 Q. B. 1004; 16 Law J., Q. B. 233. *Hopwood v. Schofield*, 2 M. & Rob. 34. *Kidgill v. Moor*, 9 C. B. 379. *Mumford v. Oxford etc. R. R. Co.*, 36 Eng. Law & Eq. 580. *Tinsman v. Belvidere R. R. Co.*, 1 Dutch. (N. J.) 255.

(o) *Jesser v. Gifford*, 4 Burr. 2141; 3 Leon. 209. *Shadwell v. Hutchinson*, M. & M. 350.

(p) *Metrop. Association v. Petch*, 5 C. B., N. S. 504; 27 Law J., C. P. 332.

(q) *Bertie v. Beaumont*, 16 East, 33.

(r) *Cotterill v. Hobby*, 4 B. & C. 465.

action will lie both against him and his tenant for the continuance of the obstruction(s). And so it will lie against the landlord for a permanent nuisance, although the nuisance was created before the reversion came to him, *i.e.*, if he knew of it, and might have determined the tenancy before the injury happened, as in the case of a tenancy from year to year(*t*). A clerk who has superintended the erection of a building by which ancient lights were darkened, and who alone directed the workmen, may be joined as a co-defendant with the contractor who appointed him to superintend the progress of the building(*u*).

The actual occupier of lands burthened with the servitude of keeping up a boundary-fence for the benefit of the adjoining occupier or landowner is the proper party to be made defendant in an action for neglecting to maintain and repair the fence, for it is the duty of the actual occupier, and not of the landlord, to keep up the fences(*x*). If the occupier of a house or land, having control over all workmen upon his premises, suffers such workmen to bring stone and dirt therefrom, and place them in a highway adjoining the house, he will be responsible for any damage that may be caused to third parties by the obstruction(*y*); and so also will the workman who actually placed the obstruction in the thoroughfare.

197 *Of the plaintiff's declaration—Venue—Statement of the cause of action.*

—The venue in declarations for obstructions to the enjoyment of profits à prendre and easements is local, and the cause of action must be laid in the county in which it arose. When the easement is claimed by grant, it is not necessary to mention or refer to the deed of grant in

(*s*) *Rosewell v. Prior*, 2 Salk. 460; 12 Mod. 636. * A landlord who leases premises which are already a nuisance, or must become so from user, and receives rent therefor, is liable for injuries resulting from the nuisance, whether he is in or out of possession. *Owings v. Jones*, 9 Md. 108. *Pickard v. Collins*, 23 Barb. (N. Y.) 444. But a tenant for years is not liable for merely continuing a nuisance as it existed at the commencement of his tenancy, if he has done no new act which of itself was a nuisance, and has not been requested to remove it. *Hubbard v. Russell*, 24 Barb. (N. Y.) 404. *Bravers v. Trimmer*, 1 Dutch. (N. J.) 97. *McDonough v. Gilman*, 3 Allen (Mass.) 264. And see *Thornton v. Smith*, 11 Minn. 15; *Pillsbury v. Moore*, 44 Me. 154; *Crommelin v. Cox*, 30 Ala. 318; *Ray v. Sellers*, 1 Duval (Ky.) 254; *Morris Canal and Banking Co. v. Ryerson*, 3 Dutch. (N. J.) 457.

(*t*) *Gandy v. Jubber*, 33 L. J., Q. B. 151. *Saxby v. Manchester Rwy.* 38 L. J., C. P. 154; L. R., 4 C. P. 198. Where demised property is not a nuisance at the time of the demise, but becomes so solely from an act of the tenant while in possession, during which time an injury results therefrom, the landlord cannot be held liable. *Owings v. Jones*, 9 Md. 108. *Pickard v. Collins*, 23 Barb. (N. Y.) 444.

(*u*) *Wilson v. Peto*, 6 Moore, 47. And see *post*, ch. 20.

(*x*) *Cheetham v. Hampton*, 4 T. R. 318. *Buller, J., Rider v. Smith*, 3 T. R. 768. *Rooth v. Wilson*, 1 B. & Ald. 59.

(*y*) *Burgess v. Gray*, 1 C. B. 591. *Palmer v. Silverthorn*, 32 Penn. St. 65. The rule would be otherwise if the owner had no control over the workmen or property in the material forming the obstruction. *Hilliard v. Richardson*, 3 Gray, 349. *Earle v. Hall*, 2 Met. 353. *Scammon v. Chicago*, 25 Ill. 424; *post*, ch. 4, s. 2.

the declaration. It is enough for the plaintiff to allege that he is entitled to it by reason of his possession of a particular messuage or land(z). But the plaintiff's right to the enjoyment of the easement should in all cases be asserted on the face of the declaration(a). In all actions for the disturbance of an easement or privilege, the obstruction ought to be charged on the pleadings in the thing itself in which the party has a right. Thus, if the declaration complains that the plaintiff's right of common was obstructed by the locking of a gate, or his right to take water from a cistern by the blocking up of a way or passage leading to the cistern, the declaration should assert and set forth the plaintiff's right of common, or right of taking water from the cistern, by reason of his possession of a messuage, tenement, or land, and allege that the plaintiff had a right to go through the door with his cattle to enjoy his right of common, or along the way or passage in order to take water from the cistern(b).

The plaintiff must show how his right arises; but it is sufficient for the plaintiff to declare on his possession of a right of way, or a right of common, or other profit or easement, by describing it, and claiming it by reason of his possession of the land. His possession is enough; and it is unnecessary in an action for an injury to it to show whether it arises from grant or prescription. So, in the case of an injury to a market or a ferry. In the case of an injury to the plaintiff's mill, where the plaintiff has a right to have the grain of others ground there by tenure, prescription, or custom, it is enough to allege the plaintiff's possession and the defendant's obligation to grind; which is, indeed, part of the plaintiff's right in a general form, as by reason of the possession of a house, or that all the inhabitants ought to grind there, and that the defendant is an inhabitant, which is a description of the right by tenure in the one case, and by custom in another.

"There is another class of cases, in which an obligation is cast on the defendant to repair a way to a close of the plaintiff over the defendant's land, to repair fences against the plaintiff's land, or to repair a wall adjoining the plaintiff's house. In these cases, it is enough to state in a general way the defendant's obligation by reason of his possession of his land, or wall, or an equivalent averment. One reason given is, that in such cases a charge is laid upon the

(z) *Northam v. Hurley*, 22 Law J., Q. B. 185; 1 Ell. & Bl. 665

(a) *Whaley v. Laing*, 2 H. & N. 476; 27 Law J., Exch. 422. *Laing v. Whaley*, 28 ib. 685.

(b) *Tebbutt v. Selby*, 6 Ad. & E. 786.

right of another, which, it may be, the plaintiff cannot particularly know"(c). In a declaration by a plaintiff for an injury sustained by him from an obstruction placed in a private way, which the plaintiff was authorized to use by the parol permission of the owner of the soil, it is enough for the plaintiff to describe the road, and assert that he had, by the permission of the owner and occupier of the soil, a right to use the road, and that the defendant wrongfully placed an obstruction in the road, *per quod* the plaintiff was injured(d).

Where a declaration by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and that the defendant wrongfully chained and fastened a certain gate standing in and across the way, and wrongfully kept the same fastened, and so obstructed the way, whereby the plaintiff was injured in his reversionary estate, it was held that the declaration set forth a sufficient cause of action, and that the plaintiff's reversionary interest might be injured by the acts complained of(e).

If the declaration is for the obstruction of a flow of water through a drain, it should set forth the right of the plaintiff to the flow of water through the drain, and that the defendant wrongfully obstructed it, stating the nature of the obstruction, and showing that the lands of the plaintiff became flooded and injured, and his crops damaged and destroyed, and that he was put to expense in draining off the water, and restoring his land to a state of good cultivation, claiming damages(f).

A declaration setting forth the plaintiff's possession of a house, and alleging that the defendant wrongfully excavated beneath, or contiguous to, the foundations of the house, without leaving proper support for the said foundations, and thereby caused the house to fall; or that he wrongfully pulled down and destroyed the foundations of the

(c) Parke, B., *Metcalf v. Hetherington*, 11 Exch. 271; 24 Law J., Exch. 319. See Hartnall v. Ryde Commissioners, 33 L. J., Q. B. 39.

(d) Corby v. Hill, 4 C. B., N. S. 556; 27 Law J., C. P. 318. And see further, *ante*, pp. 71, 145. *Holford v. Hankinson*, 5 Q. B. 584. In an action to recover damages for injuries arising from the obstruction of a private way, the way should be described as extending from one place to another, otherwise the declaration will be insufficient. *Lamphier v. Worcester & Nashua R. R. Co.*, 33 N. H. 495. And in an action for disturbing a way of necessity, while the plaintiff need not set out the origin of his title, still if he does so, he must aver it according to the truth. *Wissler v. Hershey*, 23 Penn. St. 333.

(e) *Kidgill v. Moor*, 9 C. B. 378. In an action by a reversioner for an injury to the reversion, the plaintiff must either set forth an injury of a permanent nature which must necessarily be injurious to the reversion, or must explicitly allege that the act complained of was done to the injury of the reversion. *Beavers v. Trimmer*, 1 Dutch. (N. J.) 97. *Tinsman v. Belvidere R. R. Co.*, id. 255. *Mumford v. Oxford, etc., R. R. Co.*, 36 Eng. Law & Eq. 580. See *Noyes v. Stillman*, 24 Conn. 15.

(f) *Hewlins v. Shippam*, 5 B. & C. 221.

house; or that he dug beneath the house and undermined it, so that the walls cracked, and the plaintiff was obliged to remove with his family, and hire another house, discloses a good cause of action(*g*). If it appears on the face of the declaration that the alleged wrongful act was done on the adjoining land, the declaration is not now demurrable, because it does not show any right to support from the adjoining land, unless it appears upon the face of the declaration that the alleged wrongful act was done by the defendant himself on his own land. If the defendant does not appear upon the face of the declaration to be the owner of the adjoining land, he is, *prima facie*, a wrongdoer; for, if a house is *de facto* supported by the soil of a neighbor, this is a sufficient title to the support against any one but that neighbor, or one claiming under him. A man who should prop his house up by a shore, resting on his neighbor's ground, would have a right of action against a stranger who, by removing it, should cause the house to fall, though he could have no action against his neighbor if the latter took it away and caused the same damage(*h*).

If the damaged buildings are in the possession of tenants to whom they have been demised, and the plaintiff claims compensation for damage done to his reversion, the declaration should set forth that the buildings are in the occupation of certain tenants of the plaintiff, that the reversion of the buildings is vested in the plaintiff, and that the plaintiff, by reason of his reversionary interest in them, is of right entitled to have the buildings supported laterally by the adjoining land of the defendant, and showing that by the wrongful withdrawal of the necessary support, the buildings became uninhabitable, and the plaintiff was injured in his reversionary estate(*i*).

- 198 *Declarations for an obstruction to the plaintiff's lights or privileged windows* should set forth the plaintiff's possession of a dwelling-house, describing it by name and situation, and of certain windows belonging to the dwelling-house, and that the plaintiff had a right to the free passage for light across the defendant's land to the windows, and that the defendant wrongfully erected a wall or building so near to the windows that the light was prevented from passing to the windows, whereby they became darkened. When the declaration is for an injury to the plaintiff's reversionary estate, it should allege that the

(*g*) *Rogers v. Taylor*, 2 H. & N. 829; 27 Law J., Ex. 175. *Bonomi v. Backhouse*, *ante*, p. 58, 9 H. L. C. 503.

(*h*) *Jeffries v. Williams*, 5 Exch. 800; 20 Law J., Exch. 14.

(*i*) *Bonomi v. Backhouse*, Ell. Bl. & Ell. 622; 28 Law J., Q. B. 378. *Backhouse v. Bonomi*, 9 H. L. C. 503. *Bibby v. Carter*, 4 H. & N. 153; 28 Law J., Exch. 182.

plaintiff was entitled to the reversion of the dwelling-house, and that, by means of the obstruction to the free passage of light caused by the defendant, the plaintiff was injured in his reversionary estate(k).

199 *What may be given in evidence under the plea of not guilty.*—In actions for obstructions to the enjoyment of easements and profits à prendre, the plea of not guilty operates as a denial only of the obstruction, and not of the plaintiff's right; and no other defence than such denial is admissible under that plea. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration. If the facts stated in the indictment are not intended to be admitted, they must be expressly traversed and denied(l).

200 *Not guilty by statute.*—When the act complained of has been done in the exercise of some statutory authority, enabling the defendant to give the special circumstances of justification in evidence under the plea of not guilty, the defendant's right to do the act, in the exercise of the powers conferred upon him by statute, may be given in evidence under the plea of not guilty, provided he has inserted "by statute" in the margin of his plea(m).

201 *Traverse of the right.*—If the defendant denies the existence of the right claimed by the plaintiff, he must, as we have seen, traverse it in the very words in which it is asserted in the declaration (ante, p. 88). Under a traverse of the right, the defendant may show that the right was granted by a mere parol license or agreement, not under seal, and that the defendant, finding the exercise and enjoyment of the right troublesome and inconvenient, had revoked the license, or refused to perform the agreement, and had prevented any further exercise and enjoyment of the privilege(n).

202 *Plea of leave and license.*—Under a plea of leave and license it may be shown that the plaintiff, having an easement of light and air to his ancient windows across the defendant's area, gave the defendant a parol license or permission to put a skylight over his area, and that the license had been acted upon and executed by the defendant, and the skylight built, and that the building of the skylight caused the injury of which the plaintiff complains(o).

203 *The evidence at the trial will, of course, depend upon the pleas upon*

(k) *Metrop. Association v. Petch*, 5 C. B., N. S. 504; 27 Law J., C. P. 330.

(l) Reg. Gen. Hil. Term, 16 Vict. 1 Ell. & Bl., App. lxxxi.

(m) *Ante*, p. 88, n.; and *post*, ch. 21.

(n) *Hewlins v. Shippam*, 5 B. & C. 221. *Cocker v. Cowper*, 1 C. M. & R. 418. *Wood v. Leadbitter*, 13 M. & W. 838.

(o) *Winter v. Brockwell*, ante, p. 161. *Waterlow v. Bacon*, post, p. 189.

the record. Under the plea of not guilty, the plaintiff must prove that the injurious act was done by the defendant, or by his procurement(*p*). If the existence of the incorporeal right is denied by the pleadings, the plaintiff must establish his title by proof of a grant, express or implied, or by proof of immemorial enjoyment (*ante*, p. 101), or of uninterrupted user and enjoyment as of right (*ante*, pp. 135–159), for the full period required by the Prescription Act.

204 *Proof of enjoyment so as to gain a prescriptive title at common law, or under the Prescription Act*, must be given in the mode previously pointed out. If all the acts of user and enjoyment have taken place during the occupation of the land by tenants, their submitting to them will not, as we have seen, bind the owner of the land, without proof of his being also aware of them; but if the acts of user have been open and notorious, and have gone on for a great length of time, a jury may presume therefrom that the owner knew of them(*q*). All circumstances tending to show that no grant could have ever existed, or have lawfully been made, are, as we have seen, admissible in evidence, to show that there was no enjoyment as of right within the meaning of the statute (*ante*, pp. 136, 142). When the plaintiff rests his claim to an easement upon the defendant's land, upon a prescriptive title from twenty years' enjoyment as of right, and without interruption, the claim may be answered by proof of a license, written or parol, for a limited period, falling short of the twenty years relied upon(*qq*); for every time that leave is asked for and obtained there is, as we have seen, a break in the continuance of the enjoyment (*ante*, p. 156).

If the plaintiff proves a larger and more extended right than he claims in his declaration, the proof is not objectionable on the ground of variance, provided the right claimed is included in the more extended right proved, and is not inconsistent with it(*r*).

205 *Proof of right of way*.—Proof that a person has used a way for various purposes, whenever he required it, for twenty years, is *primâ facie* evidence of a right of way for all purposes, from which a jury may infer a general right; but proof of user for one purpose, or for particular purposes, will not raise an inference of a general right(*s*). Proof

(*p*) *Ante*, p. 89; *post*, ch. 20, s. 1.

(*q*) *Davies v. Stephens*, 7 C. & P. 570; *ante*, p. 137.

(*qq*) Where there has been such a continued user of an easement injurious to the land of another, as to authorize the presumption of a grant, it is for the party submitting to the user to show that it was by license or permission, and not for the party exercising it to prove an express claim of right in order to characterize the user as adverse. *Hammond v. Zehner*, 21 N. Y. 118. See *Blake v. Everett*, 1 Allen (Mass.), 248; *Steffy v. Carpenter*, 37 Penn. St. 41.

(*r*) *Duncan v. Louch*, 6 Q. B. 914.

(*s*) *Cowling v. Higginson*, 4 M. & W. 255. See *Richardson v. Pond*, 15 Gray, 387.

of the exercise of a right of way for twelve years for all purposes, and for twenty years for the only purposes for which the person using it required it, is sufficient to establish the existence of a general right(*t*). When the right depends upon express grant, the nature and extent of the right are defined by the express terms of the grant(*u*). When it rests upon user and enjoyment, the extent of the right is defined and limited by the extent of the user and enjoyment(*uu*); and it is, then, in general, a question for the jury in each particular case as to whether the evidence of user shows a general right of way, both for horses and carriages, and for all reasonable and necessary purposes, or only a restricted and limited right for a particular purpose(*v*). If the plaintiff has a right to go backwards and forwards with carts and carriages, and it is reasonable that he should have room to turn round, he will have a right to go on the adjoining land, if the road is not wide enough for the purpose; but what is a reasonable exercise of a right of way is a question for a jury(*w*); and therefore, where the jury found that the carting by *A* over another person's land of hay, grown partly on land to which it was admitted there was a right of way over such other person's land, and also partly on land beyond, to which no such right was appurtenant, was a reasonable bonâ fide exercise of right by *A*, the court refused to interfere(*x*).

206 *Proof of a right to the free access of light*.—The right to the free access of light across the adjoining land of a neighboring proprietor may be established, as we have seen (*ante*, pp. 149, 150), by proof of uninterrupted user and enjoyment for twenty years. But a right to the free access of light from uninterrupted user and enjoyment does not extend to open spaces of ground and yards or gardens(*y*). Thus, where a saw-pit and timber-yard had been placed close to the edge of the adjoining property, it was held that the pit and yard might be darkened at any time, and the access of light thereto impeded, by the erection of buildings by the adjoining landowner(*z*). So a right to the free passage of air over vacant land to a mill cannot, as we have seen,

(*t*) *Darc v. Heathcote*, 25 Law J., Exch. 245. *Holt v. Sargent*, 15 Gray (Mass.), 97.

(*u*) See *Cousens v. Hall*, L. R., 12 Eq. Ca. 366; *Espley v. Wilkes*, L. R., 7 Exch. 298; *French v. Marstin*, 4 Foster, 440, 449; *Bakeman v. Talbot*, 31 N. Y. 366; *Kuler v. Beaman*, 49 Me. 208; *Atkins v. Bordman*, 2 Metc. 457; *Comstock v. Van Deusen*, 5 Pick. 163.

(*uu*) *Brooks v. Curtiss*, 4 Lans. (N. Y.) 63. *Wright v. Moore*, 38 Ala. 593. *Richardson v. Pond*, 15 Gray, 387.

(*v*) *Ballard v. Dyson*, 1 Taunt. 287. *Bower v. Hill*, 2 Sc. 535. *Brunton v. Hall*, 1 G. & D. 207.

(*w*) *Hawkins v. Carbines*, 27 Law J., Exch. 44.

(*x*) *Williams v. James*, L. R., 2 C. P. 577.

(*y*) *Potts v. Smith*, L. R., 6 Eq. Ca. 311.

(*z*) *Roberts v. Macord*, 1 M. & Rob. 230.

be acquired by mere enjoyment, however long continued, as the owner of the land has no means of interrupting the free current of air, and the law raises no presumption of a grant from enjoyment had under such circumstances(a).

207 *Proof of obstruction to a right of way—Erection of gates.*—If a gate is erected across a private footway by the owner of the soil, so as to afford no actual obstruction to the use of the way by the grantee, an action would not be maintainable against the landowner so erecting the gate; but in the case of a grant of a way for horses and carriages, and the use of the way by the grantee free from gates, a gate could not afterwards be lawfully placed across the way(b).

208 *Proof of obstructions to the access of light.*—To establish a cause of action for an obstruction to the access of light to the plaintiff's ancient windows, the plaintiff must prove a substantial privation of light, sufficient to render the occupation of his house comparatively uncomfortable(c), or to prevent him from carrying on his business as beneficially and profitably as he had formerly done. The mere diminution of a ray or two of light will not suffice for the maintenance of an action(d). When the action is brought by a reversioner in respect of an injury to his reversionary estate, it must be shown that the obstruction is of such a nature as to cause a permanent injury to the property(e). The Metropolitan Building Act, 18 & 19 Vict. c. 122, which by s. 83 gives a right to the building owner to raise any structure, etc., upon condition of making good all damage occasioned thereby to the adjoining premises, does not authorize the erecting of such a structure as will obstruct ancient lights in the adjoining premises(f).

209 *Proof of the right to an ancient weir and fishery in a navigable river.*—The right to have a weir in the channel of a navigable river for the purpose of catching fish is, as we have seen, a right founded on grant or prescription; and the right to ancient weirs has in some instances been legalized by statute, although they totally obstruct the navigation of the river(g). A several fishery in a tidal river, the waters of

(a) *Webb v. Bird*, *ante*, p. 142.

(b) *James v. Hayward*, W. Jones, 221; Cro. Car. 184. See *Maxwell v. McAtee*, 9 B. Mon. 120.

(c) See *Kelk v. Pearson*, L. R., 6 Ch. App. 809.

(d) *Back v. Stacey*, 2 C. & P. 466. *Parker v. Smith*, 5 ib. 438. *Pringle v. Wernham*, 7 C. & P. 378. *Wells v. Ody*, ib. 410.

(e) *Metrop. Association v. Petch*, 5 C. B., N. S. 504. *Fifty Associates v. Tudor*, 6 Gray, 255. *Biddle v. Ash*, 2 Ashm. 211, 222. *Durell v. Boisblanc*, 1 La. Ann. 407. *Oregon Iron Co. v. Trullinger*, 3 Oregon, 1, 6. See *ante*, p. 175.

(f) *Crofts v. Haldane*, L. R., 2 Q. B. 194.

(g) *Williams v. Wilcox*, 8 Ad. & E. 336. See *post*, ch. 4, sect. 2.

which have permanently receded from one channel and flow in another, cannot be followed from the old to the new channel(*h*).

210 *Proof of the servitude of maintaining and repairing fences.*—The mere fact of an owner or occupier having repaired a fence does not, as we have seen, afford any ground for presuming that his land was burthened with the servitude of keeping up the fence for the benefit of his neighbor; because it is for his own benefit to keep up a fence for the purpose of preventing his own cattle from straying from his land, and committing trespasses upon the adjoining land. If it be proved that the defendant had been threatened with legal proceedings if he did not repair the fences, or that, if he did not repair, and the plaintiff became damnified in consequence of his cattle trespassing upon the lands of other persons, the plaintiff would look to him for compensation, and that the defendant *then* repaired, this would be some evidence of the defendant's being under a legal obligation to maintain and repair the fence.

An allegation in a declaration that the defendant, by reason of his possession of a particular close, was bound to repair a fence dividing such close from the adjoining land, is proved by the production of a deed whereby the defendant has undertaken the performance of that duty(*i*).

211 *Inadmissibility in evidence of statements and declarations by a tenant in derogation of the title of his landlord.*—"You cannot," observes Lord Campbell, "admit in evidence the declarations of a tenant which derogate from the title of the reversioner. It would be very mischievous if it were in the power of a tenant to destroy a profit à prendre belonging to the land which he occupies, or to impose a servitude upon it. There is no difference in this respect between destroying an easement and creating one. If the tenant might say that the land enjoyed no right of way, he might also say that it was liable to an easement for taking water, or to a profit à prendre, turbary, or other common, and create evidence of servitude against the reversioner. The acquiescence of a tenant cannot prejudice his landlord(*j*), and *à fortiori*, his declarations cannot"(*k*).

212 *Of the damages recoverable in actions for the infringement of incorporeal rights(l).*—Wherever the exercise or enjoyment of an incorporeal right

(*h*) Mayor, etc., of Carlisle *v.* Graham, L. R., 4 Exch. 361; 38 L. J., Exch. 226.

(*i*) Boyle *v.* Tamlyn, 6 B. & C. 338.

(*j*) Daniel *v.* North, 11 East, 372.

(*k*) Papendick *v.* Bridgwater, 5 Ell. & Bl. 177. Vrooman *v.* King, 36 N. Y. 477.

(*l*) As to damages in general, see *post*, ch. 22, s. 1.

has been obstructed, damages are, as we have seen, recoverable, though no actual or specific damage in point of fact can be proved: for every unresisted obstruction to the enjoyment of the right would be evidence against the existence of the right, and therefore highly injurious to the person claiming it. Therefore an action may be maintained by a commoner for an injury done to his common, without proving actual damage. And whenever there has been an obstruction to the exercise of a right of way, which, if acquiesced in for twenty years, would be evidence against the existence of the right, there is an injury, in respect of which damages are recoverable, although there is no proof of actual pecuniary damage(*m*).

Where the occupier of a field, who had a right to have a fence separating his field from the adjoining land repaired at the expense of the adjoining occupier, took in the horse of a neighbor for the night, and the horse got through the boundary fence into the servient tenement, and fell into a ditch and was killed, it was held that the occupier of the dominant tenement was entitled to recover the full value of the horse(*n*). And where the plaintiff brought an action against the defendant for the non-repair of the fences of the latter, whereby the plaintiff's horses escaped into the defendant's close and were there killed by the falling of a hay-stack, it was held that the damage was not too remote, and that there is no distinction between the smothering of cattle by the accidental falling of a hay-stack, and their being drowned by tumbling into a ditch(*o*).

In all cases of nuisance from obstructions to the free access of light and air to ancient windows (*post* ch. 4), damages are recoverable by the reversioner, because the injury is an injury to a right; and if the reversioner were to be prevented from bringing his action during the existence of the lease, the testimony of the witnesses who could speak to the windows being ancient windows might be lost(*p*).

When an action is brought by a reversioner for an injury to his reversionary interest, from a temporary obstruction of a right of way theretofore used by the tenants and occupiers of his land, nominal damages only are, in general, recovered in the first instance, as the defendant is liable to another action every day that he continues the obstruction; and it is to be presumed that he will immediately remove

(*m*) *Bower v. Hill*, 1 Sc. 533; 1 B. N. C. 549; *ante*, pp. 10, 11; *post*, ch. 22.

(*n*) *Rooth v. Wilson*, 1 B. & Ald. 59; *ante*, p. 149.

(*o*) *Powell v. Salisbury*, 2 Y. & J. 391.

(*p*) *Ld. Tenterden, C.J., Shadwell v. Hutchinson, M. & M. 352. Jesser v. Gifford*, 4 Burr 2141.

it; but if he persists in continuing the obstruction, and a second action is brought for the continuance of the nuisance, exemplary damages will be given, in order to compel him to abate it(*g*).

213 *Injunction to prevent the disturbance of easements granted by parol.*—

If a landowner verbally agrees to allow an adjoining proprietor a right of way, or a right to the passage of water through his land, and the enjoyment of the privilege involves the outlay of money, and the consenting landowner allows the licensee or person to whom the privilege has been granted to expend money in making a road or laying down a railway, or constructing a watercourse, or erecting buildings, the Court of Chancery will interfere by injunction to prevent such consenting landowner from disturbing the enjoyment of the way or watercourse, or easement, so verbally granted(*r*). And where works involving expense are made on land belonging to an incorporated company, on a spot where the company may be considered personally present, where their premises are situated and their operations carried on, the company, though an incorporated body, must be considered, for all purposes of knowledge and acquiescence, to be in the same position as a private individual, and will be bound in the same way(*s*). In cases of this sort, where a person has obtained an equitable right to the enjoyment of an easement or privilege by reason of the expenditure of his money on the faith of a verbal promise or understanding, but has no legal title to any incorporeal right over the land of another, his equitable claim may, in general, be got rid of by tendering him the amount of his expenditure before the privilege is withdrawn or the enjoyment of it has been interrupted.

If a tramway is made across land with the consent of the owner of the fee, and is used for a number of years on payment of rent, the Court of Chancery will interfere to prevent an arbitrary increase of the rent, and prevent the licensee from being deprived of the use of the tramway on proper compensation being paid to the owner of the soil for the enjoyment of the way(*t*).

(*g*) *Hopwood v. Schofield*, 2 M. & Rob. 35. *Battishill v. Read*, 18 C. B. 715; 25 Law J., C. P. 280. See *Smiles v. Hastings*, 24 Barb. (N. Y.) 44; *post*, ch. 4, s. 2.

(*r*) 2 Eq. Cas. Abr. 522, pl. 3. *Jackson v. Cator*, 5 Ves. 689. *Powell v. Thomas*, 6 Hare, 300. *Mold v. Wheatcroft*, 27 Beav. 510. *Duke of Devonshire v. Elgin*, 20 Law J., Ch. 495. *East Ind. Co. v. Vincent*, 2 Atk. 82. *Davies v. Marshall*, 10 C. B., N. S. 697. See *Bankart v. Tennent*, L. R., 10 Eq. Ca. 141; *Veighté v. Raritan Water Power Co.* 4 C. E. Greene, 153; and see *ante*, p. note.

(*s*) *Laird v. Birkenhead Rail. Co.* 1 Johns. 500; 29 Law J., Ch. 218.

(*t*) *Mold v. Wheatcroft*, 27 Beav. 510

If the owner in fee of land stands by and allows another person to erect a building upon his land, and afterwards agrees with him as to the rent to be paid for it, neither he nor any person claiming under him can deprive the person who has so laid out his money of the use of the building(*u*). And if an adjoining landowner assents to the rebuilding of a house upon a certain plan, with an increased elevation, or with an enlargement of ancient windows, or the opening of new windows, and the house is accordingly rebuilt on the approved plan, the landowner cannot afterwards object to the alterations(*v*).

Where an easement has been bargained for and sold by parol, and been enjoyed for years by the purchaser thereof, the court will restrain the vendor and any person claiming under him (not being a purchaser of the land for value without notice), from disturbing or interrupting the enjoyment of the privilege. Thus, where *A* sold to his neighbor *B* the right of using two chimneys in *A*'s wall for a certain consideration, which was paid, and the chimneys used for several years, and *C* purchased *A*'s house without notice of the right, the court held that, there being fourteen chimney-pots on the wall, and only twelve flues in *A*'s house, *C* was put on inquiry, that he had constructive notice of the right, and an injunction was granted to restrain him from stopping up the two chimneys leading to the extra chimney-pots(*x*).

Whenever a licensee has enjoyed an easement for several years, the court will not allow such enjoyment to be summarily interfered with and the licensee put to great immediate inconvenience, but will by injunction prevent the disturbance of the privilege and put the question in dispute between the parties in a proper course of investigation(*y*).

214 *Injunction to prevent obstructions to the free access of light to windows.*

—If a building has been commenced which, when carried up and finished, will cause a serious(*z*) obstruction to the passage of light and air to ancient windows, the owner of the windows may obtain an injunction to restrain the erection of the building(*a*), and there is no distinction in this respect between houses in town and in the country(*b*). But the court will not, upon an *ex parte* application for an injunction, order a building which is in course of erection to be pulled down, as

(*u*) *Dann v. Spurrier*, 7 Ves. 236.

(*v*) *Cotching v. Basset*, 32 Law J., Ch. 286.

(*x*) *Hervey v. Smith*, 22 Beav. 299; 1 K. & J. 392.

(*y*) *Hervey v. Smith*, *ut sup.* See *London and Northwestern Rail. v. Lancashire and Yorkshire Rail.*, L. R., 4 Eq. Ca. 174.

(*z*) See *Lanfranchi v. Mackenzie*, L. R., 4 Eq. Ca. 421.

(*a*) *Arcedeckne v. Kelk*, 2 Giff. 683. *Back v. Stacy*, 2 Russ. 121. *Sutton v. Ld. Montfort*, 4 Sim. 559.

(*b*) *Martin v. Headon*, L. R., 2 Eq. Ca. 425.

that might do irreparable injury to the person erecting it, if on the final hearing of the matter it should be found that the right was with him. The proper order will be for the building not to be further proceeded with, until the rights of the parties have been decided by the proper tribunal(c).

"Whenever it is shown that the comfort or enjoyment of a man or his family in the occupation of his house is seriously interfered with(d), and still more where he is prevented from carrying on his business with the same degree of convenience and advantage as theretofore, there is sufficient ground for the interference of the court"(e). And there is no rule which prevents the court from interfering on the ground that the injury sought to be restrained has been completed before the filing of the bill(f). It depends, however, upon all the circumstances of the case whether the court will grant a mandatory injunction, or only order an inquiry as to damages under 21 & 22 Vict. c. 27 (Cairns's Act)(g). And it has been held that the court will not, as a rule, grant an injunction against the erection of a building the height of which above an ancient light is not greater than its distance from the light(h).

If ancient windows looking over or upon the land of another have been enlarged, and then totally obstructed by the adjoining landowner, a court of equity will, on the windows being restored to their ancient dimensions, grant an injunction to restrain such adjoining landowner from continuing the obstruction to the restored windows(i). And if a person possessed of an ancient diamond-paned, or stone-mullioned, or Gothic window, or a window painted on the inside, puts in a modern sash with plate glass, or rubs off the paint and so increases the amount of light inside his house, and his neighbor blocks up the window, or builds immediately before it, the court will by injunction compel him to remove the obstruction, on the ground that there has been no enlargement of the external aperture(j).

A person does not lose his right to an injunction merely because he has himself erected buildings which deprive him of a certain amount

(c) *Ryder v. Bentham*, 1 Ves. Sen. 543. *Wynstanley v. Lee*, 2 Swanst. 333.

(d) *Kelk v. Pearson*, L. R., 6 Ch. App. 809.

(e) Per *Kindersley, V.-C.*, in *Martin v. Headon*, L. R., 2 Eq. Ca. 434. See *Clarke v. Clark*, L. R., 1 Ch. App. 16; *Durell v. Pritchard*, *infra*.

(f) *Durell v. Pritchard*, L. R., 1 Ch. App. 244.

(g) *Senior v. Pawson*, L. R., 3 Eq. Ca. 330.

(h) *Beadel v. Perry*, L. R., 3 Eq. Ca. 465.

(i) *Cooper v. Hubbuck*, 30 Beav. 160; 31 Law J., Ch. 123. *Weatherley v. Ross*, 32 ib. 128. See *Jones v. Tapling*, *ante*, pp. 150, 163.

(j) *Turner v. Spooner*, *ante*, p. 163.

of light and air(*k*), nor because he happens to be then carrying on a business which, as a matter of fact, requires a subdued light(*l*). If the defendant, in an action for obstructing the plaintiff's ancient lights, pleads an equitable plea that he was to be allowed to obstruct such lights on certain terms, this will not prevent him from also applying for an injunction to restrain the action, if the Court of Law cannot give such relief as the Court of Equity would give(*m*).

215 *Injunction to prevent the working of mines and quarries so as to deprive the adjoining or superjacent land of its necessary support*.—If a tenant in fee-simple grants a portion of his land for building purposes, he impliedly grants, as we have seen, an easement of lateral support for the buildings from his adjoining land; and if he, or those who claim under him, attempt to derogate from the grant by excavating so as to endanger the buildings, the court will grant an injunction to prevent the threatened mischief. And where a landowner has sold his land to a railway company under the compulsory powers of an Act of Parliament, the court will interfere by injunction to prevent him from working mines in his adjoining land, so as to endanger the stability of the railway, unless the legislature has given the company the power of purchasing such adjoining land, and has provided that they shall protect themselves by purchasing so much of it as may be required to give their railway and works the requisite amount of lateral support(*n*). Where land had been allotted under a local enclosure Act, the effect of which was to vest the surface in the allottee, and the minerals in the lord of the manor, it was held, under the words of the Act, that the latter could not be restrained from working the mines, although by so doing he let down the surface, even to the extent of destroying it, and that there was no difference for this purpose between lands allotted under the General Enclosure Act (41 Geo. 3 c. 109, s. 32), and lands sold to pay the expenses of the enclosure(*o*).

216 *Bill of peace*.—In addition to the remedy by action or injunction, there are certain cases in which what is termed a bill of peace may be filed for the purpose of quieting a person in the enjoyment of his legal rights and preventing the interference with them by others(*p*). "It

(*k*) *Arcedeckne v. Kelk*, 2 Giff. 683.

(*l*) *Yates v. Jack*, L. R., 1 Ch. App. 295. See *ante*, p. 153, *Lanfranchi v. Mackenzie*.

(*m*) *Waterlow v. Bacon*, L. R., 2 Eq. Ca. 514.

(*n*) *North-East. Rail. Co. v. Elliott*, *ante*, pp. 110, 111.

(*o*) *Wakefield v. Duke of Buccleuch*, 36 L. J., Ch. 763; L. R., 4 Eq. Ca. 613; 4 Eng. & Ir. App. 377.

(*p*) *Spence's Eq. Jur.*, pp. 656, 657. See *Sheffield Waterworks v. Yeomans*, L. R., 2 Ch. App. 8. *Peak v. Hayden*, 8 Bush. (Ky.) 125. *Low v. Staples*, 2 Nev. 209.

is certain," says Lord Hardwicke, "that where a man sets up a general and exclusive right, and where the persons who controvert it are very numerous, and he cannot by one or two actions at law quiet that right, he may come to this court first, which is called a bill of peace, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another, for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant"(g). Thus, a bill may be filed by one copyholder on behalf of himself and the other copyholders against the lord(r), or by the lord against the commoners(s), to have their respective rights of common ascertained. So by the freehold tenants of a manor against the lord, to establish their rights to common of pasture and turbary, and to dig gravel and sand in the lord's waste(t), or by a freeholder and copyholder jointly, on behalf of themselves and all other copyhold and freehold tenants of the manor(u), if their rights are co-extensive(x). So to establish a right to a fishery, where the persons disputing the right are very numerous(y). But, although a court of equity will thus protect the private rights of those who are comprehended under one common capacity, as the inhabitants of a parish or the tenants of a manor, it will not establish a right in contradiction of a public right, as a right to a highway or a common navigable river, for that would be to enjoin all the people of England(z).

(g) *Tenham v. Herbert*, 2 Atk. 483.

(r) *Phillips v. Hudson*, L. R., 2 Ch. App. 243.

(s) *Arthington v. Fawkes*, 2 Vern. 356.

(t) See *Warrick v. Queen's College*, L. R., 4 Eq. Ca., 254; 10 *ibid.*, 105; 6 Ch. App. 716. *Minet v. Morgan*, L. R., 11 Eq. Ca. 284.

(u) *Smith v. Brownlow (Earl)*, L. R., 9 Eq. Cases, 241. See *Peck v. Spencer*, L. R., 5 Ch. App. 548; *Commissioners of Sewers v. Glasse*, L. R., 7 Ch. App. 456.

(x) *Betts v. Thompson*, L. R., 6 Ch. App. 732.

(y) *York (Mayor of) v. Pilkington*, 1 Atk. 282. As to somewhat similar proceedings by the Crown, see *Att.-Gen. v. Barker*, L. R., 7 Exch. 177.

(z) *Mitt. Ch. Plead.* 147. See *Fauconberg v. Piers*, 2 Eq. Ca. Abr. 171.

CHAPTER IV.

OF NUISANCES AND INJURIES FROM THE NEGLIGENT USE AND MANAGEMENT OF REAL PROPERTY, AND FROM KEEPING FEROCIOUS ANIMALS.

SECTION I.—*Of nuisances.*—Nuisances from sewers, drains, brick-burning, noisome trades, chimneys and manufactories—Defilement of springs and streams—Noisy nuisances—Collection of crowds—Injuries from spring guns, dog-traps, etc.—Unguarded wells, mining shafts, areas and cellars—Dangers and obstructions in private and public ways and navigable rivers—Locomotive steam-engines—Dedication of highway, subject to certain dangers and risks—Injuries to land from groins and defences against tides and currents—Injuries from overloading warehouses and from the fall of ruinous buildings—Negligence in pulling down houses and making excavations—Ruinous party-walls—Ruinous and defective fences—Railway fences—Negligent management of stations—Ruinous and insecure railway-bridges, viaducts and embankments—Negligent management of railway-gates, docks, canals, baths, and steam machinery—Injuries to servants and guests from dangerous premises, defective hoisting tackle in mines, and insecure scaffolding and ladders—Contributory negligence on the part of the plaintiff—Where the plaintiff's right to recover is not defeated by his being a trespasser—Injuries from ferocious animals and mad dogs.

SECTION II.—*Abatement of nuisances—Statutory remedies and penalties—Actions.*—Abatement of nuisances—Statutory remedies and penalties in respect of nuisances from gas-works and the fouling of wells and pumps—Actions for nuisances—Notice before action—Continuing nuisances—Parties to be made plaintiffs and defendants—Pleadings, defences, evidence, and damages.

SECTION III.—*Prevention of nuisances by injunction, prohibition, and indictment.*—Injunction—Acquiescence precluding equitable relief—Prevention of public nuisance by prohibition and by indictment—Nuisances in public highways—Proof of dedication of way to the public—Proof of *animus dedicandi*—Who may dedicate—Limited dedication—Highway of necessity—Proof of highway by proof of parish repairs—Indictable obstructions in highways and navigable rivers—Repair of highways.

SECTION I.

OF NUISANCES AND INJURIES FROM THE NEGLIGENT USE AND MANAGEMENT OF REAL PROPERTY, AND FROM KEEPING FEROCIOUS ANIMALS.

217 *Of nuisances.*—The term nuisance, derived from the French word *nuire*, to do hurt or to annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights. A man may become responsible for a nuisance by erecting a building which overhangs the house or land of his neighbor, or by constructing a cornice, or fixing a spout, or any projection which causes, or has a tendency to cause, an unnatural quantity of rain-water to descend on his neighbor's house and land(*a*); also by erecting and working a noisy smith's forge, or noisy workshops(*b*), or a stinking tallow-furnace, smelting-house, dye-house, lime-kiln, tan-pit, privy, or hog-sty(*c*), or making a cesspool, the filth of which percolates through the soil and contaminates the water of his neighbor's well or spring(*d*), or burning lime or bricks, or erecting a glass-house or brew-house so near to a dwelling-house that the smoke and smell thereof enter the house and render it unfit for habitation(*e*), or setting up a lime-pit for cleaning skins, or a dye-house, and letting the drainage therefrom run into a watercourse or pond, and corrupt the water, or destroy or injure the fish and the fishing(*f*), or disturbing a decoy-pond by the firing of guns in the neighborhood of the pond(*g*), or stopping or diverting water that used to run to another's mill(*h*).

(*a*) Penruddock's case, 5 Co. 205. Baten's case, *ib.* 96. Reynolds *v.* Clark, Fort. 212. Fay *v.* Prentice, 1 C. B. 828. Aiken *v.* Benedict, 39 Barb. 400.

(*b*) Bradley *v.* Gill, Lutw. 69. Eliotson *v.* Feetham, 2 B. N. C. 134. McKeon *v.* See, 4 Rob. (N. Y.) 449. Fish *v.* Dodge, 4 Denio, 311.

(*c*) Poynton *v.* Gill, Morley *v.* Pragnell, Cro. Car. 510. Jones *v.* Powell, Hutt. 135. Bliss *v.* Hall, 4 B. N. C. 183. Dubois *v.* Budlong, 10 Bosw. (N. Y.) 700. Smith *v.* McConathy, 11 Mo. 517. Howell *v.* McCoy, 3 Rawle, 256. Allen *v.* State, 34 Texas, 230. Cropsey *v.* Murphy, 1 Hilt. (N. Y.) 126. Brady *v.* Weeks, 3 Barb. 157.

(*d*) Norton *v.* Scholefield, 9 M. & W. 665. State *v.* Taylor, 29 Ind. 517. So he may become liable for negligently leaving noxious substances on his land which are washed by rain into a neighbor's well. Brown *v.* Illius, 27 Conn. 84. Woodward *v.* Aborn, 35 Me. 271.

(*e*) Walter *v.* Selfe, 4 De G. & Sm. 321; 20 Law J., Ch. 433. Jones *v.* Powell, Palm. 539. Whalen *v.* Keith, 35 Mo. 87. Ross *v.* Butler, 4 Green (N. J.), 294. Mulligan *v.* Elias, 12 Abb. (N. Y.) Pr., N. S. 259.

(*f*) Aldred's case, 9 Co. 59a. Hodgkinson *v.* Ennor, 4 B. & S. 229. Lewis *v.* Stein, 10 Ala. 214.

(*g*) Keble *v.* Hickerlingill, 11 Mod. 74, 130; 3 Salk. 9; Holt, 14. Carrington *v.* Taylor, 11 East, 571. See Ibbotson *v.* Peat, *ante*, p. 13.

(*h*) F. N. B. 184. A livery stable located in a populous part of a city may be both a public and a private nuisance. Coker *v.* Birge, 9 Geo. 425. Kirkman *v.* Handy, 11 Humph. 406. Morris *v.* Brower, Anth. N. P. (N. S.) 368.

218 *Nuisances from the non-repair of, or from neglecting to cleanse, sewers, drains, and watercourses.*—Every occupier is bound to prevent the filth from his drains or cesspools from filtering through the ground into his neighbor's house or land. It is a charge or duty laid on him of common right, for neglect of which he is answerable(*i*). Every grantee also of an artificial drain or watercourse constructed for the passage of water through the land of the grantor, for the use and benefit of the grantee, is bound to maintain and repair the drain and watercourse and keep it in proper order; and if he neglects so to do, and the watercourse becomes obstructed so that the grantee's surplus water floods the land of the grantor, the latter is entitled to compensation in damages for the nuisance(*j*).

The grantee of a right of passage for waste water from his messuage or tenement, through a drain or watercourse in the land of the grantor, is guilty of a nuisance if he allows the foul water and filth from privies or water-closets to enter the drain; and the grantor of the easement or the owner of the land through which the right of watercourse extends may stop up the watercourse for the purpose of abating the nuisance(*k*). Every landowner who constructs a sewer on his own land, and uses it for the purpose of draining his own premises, is bound to keep the filth from his sewer from becoming a nuisance to the adjoining occupiers; and if, by reason of an original faulty construction of the sewer, the filth therefrom percolates through the soil and floods the cellars of the adjoining occupiers, the landowner will be responsible for the nuisance, although such occupiers are his own tenants(*l*). But a landlord who builds houses, and constructs a sewer through his own land for the purpose of draining them, and makes drains from each house into the sewer, does not thereby render himself responsible to his own tenants for the repair of the sewer, or for injuries that may be occasioned to them from overflowings of the sewer; for the grantor of a right of watercourse or passage for water through his land is not,

(*i*) *Tenant v. Golding*, 1 Salk. 21. *Hawkesworth v. Thompson*, 98 Mass. 77. A municipal corporation is liable for injuries arising from the negligent construction of its sewers. *Montgomery v. Gilmer*, 33 Ala. 116.

(*j*) *Ld. Egremont v. Pulman, M. & M.* 404, cited in *Bell v. Twentyman*, 1 Q. B. 775. *Hoare v. Dickenson*, 2 Ld. Raym. 1568. *Ante*, pp. 171, 172. As to the repair of ditches on the side of a turnpike road, see *Merivale v. Trustees of Exeter Turnpike Road*, L. R., 3 Q. B. 149.

(*k*) *Cawkwell v. Russell*, 26 Law J., Exch. 35.

(*l*) *Alston v. Grant*, 3 Ell. & Bl. 128. A party in possession, though without title may maintain an action for damages caused by the accumulation of rain-water in an open cellar and its percolation through the earth into the plaintiff's cellar on an adjoining lot. *Crommelin v. Cox*, 30 Ala. 318. And an action may be maintained against one obstructing a gutter with building materials, to recover the damages caused by the overflow of water into the plaintiff's cellar. *Ball v. Armstrong*, 10 Ind. 181.

as we have seen, bound to keep the watercourse in repair for the benefit of the grantee, unless he has by express contract taken that duty upon himself. It is the grantee of the easement who is bound to keep the drain or watercourse in proper order and prevent it from becoming a nuisance (*ante*, p. 171).

- 219 *Offensive smells and noisome trades (m).*—A man may, without being liable to an action, exercise a lawful trade, as that of a butcher, brewer, or the like, notwithstanding it be carried on so near the house of another as to be an annoyance to him, in rendering his residence less delectable or agreeable: provided the trade be so conducted that it does not cause what amounts in point of law to a nuisance to the neighboring house. But if a nuisance is created, it is no answer to an action for damages to show that the place where the trade is carried on is a fit and convenient place for such a trade, and that the exercise of the trade there is only a reasonable use by the defendant of his own land. The spot may be very convenient for the defendant or for the public at large, but very inconvenient to a particular individual, who chances to occupy the adjoining land; and proof of the benefit to the public from the exercise of a particular trade in a particular locality can be no ground for depriving any individual of his right to compensation in respect of the particular injury he has sustained from it(*n*). When, therefore, it is said that “a tan-house is necessary, for all men wear shoes,” yet this may be pulled down if it is erected so as to cause a nuisance to another: so of a glass-house, for they ought to be erected in places convenient for them(*o*): what is meant is, that they must be erected in a place where they will not cause a nuisance to anybody. There is, however, it seems, a distinction in this respect between a

(*m*) As to keeping pigs in the metropolis, see *Chelsea Vestry v. King*, 34 Law J., M. C. 9; the trade of cattle slaughtering, *Liverpool New Cattle Market Co. v. Hodson*, L. R., 2 Q. B. 131; *Anthony v. Brecon Markets Co.*, L. R., 2 Exch. 167; the consumption of smoke in Birmingham, *Cooper v. Woolley*, L. R., 2 Exch. 88.

(*n*) *Bamford v. Turnley*, 31 Law J., Q. B. 286. *Cavey v. Lidbetter*, ib. 290 n., 13 C. B., N. S. 470, overruling *Hole v. Barlow*, 4 C. B., N. S. 335. See *Hegingbotham v. Eastern and Continental Steam Packet Co.*, 8 C. B. 337. A blacksmith's shop in a small village is not *per se* a nuisance. *Ray v. Lynes*, 10 Ala. 63. And a livery stable in a town or city is not of necessity in itself a nuisance. *Kirkman v. Handy*, 11 Humph. 406. *Dargan v. Waddill*, 9 Ired. 244. But both may be so conducted or constructed as to become so. *Id.* *Ray v. Lynes*, 10 Ala. 63. *Coker v. Birze*, 9 Geo. 425. *Morris v. Brower*, Anth. N. P. (N. Y.) 368. *Burditt v. Svenson*, 17 Texas, 489. The attachment of steam power to works already constructed may become a nuisance, by causing such a vibration of the adjoining premises, creating such a noise as to depreciate their value for rent. *McKeon v. See*, 4 Rob. (N. Y.) 449. Noises that occasion physical distress and annoyance and may affect health are nuisances; and the fact that the persons creating the nuisance are the owners of the land is no justification. *Sparhawk v. Union etc. R. R. Co.* 54 Penn. St. 401.

(*o*) *Jones v. Powell*, Palm. 536.

trade that injuriously affects property, and one that causes only a certain amount of personal discomfort(*p*).

It is not necessary to prove that the smell is unwholesome. The smell of stied hogs, melting tallow, and other smells, may not be positively noxious, but they may be very noisome and sickening, keeping all who inhale them in a state of chronic discomfort, though they may not injure or destroy health(*q*). Trades are no doubt carried on for the benefit of the public, but the primary object is the benefit of the particular manufacturer who realizes the profit of the business; and it is no answer to a private individual, who is prejudiced or injured by the exercise of the trade in such a way as to be a nuisance, to say that others are benefited by it(*r*).

220 *Brick-burning*.—Brick-burning is not in itself a noxious trade(*s*), for bricks may be burned, by the selection and combination of proper substances for burning, without the emission of smoke or disagreeable smells; but if, by the use of coals or impure ashes and animal substances, smoke, and vapor, and noisome gases are communicated to the air which surrounds and enters the plaintiff's house, so as to cause inconvenience to the occupiers thereof, and render the house manifestly less comfortable, the brick-burning will be a nuisance, though the pollution of the air may not be carried to the extent of rendering it noxious to animal or vegetable health. But the inconvenience or discomfort must go to the extent of materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions amongst English people(*t*).

In cases where a man is not carrying on the trade of brick-making, but is merely digging out the soil from his own land for the building of a house thereon, and when the nuisance consequently is of a temporary nature, and is also of a trifling character, the court will not

(*p*) *St. Helen's Smelting Co. v. Tipping*, 35 Law J., Q. B. 66.

(*q*) *Walters v. Selfe*, 4 De G. & Sm. 323. *Ashbrook v. Commonwealth*, 1 Bush (Ky.), 139. *State v. Wetherall*, 5 Harring. (Del.) 487. *Dargan v. Waddill*, 9 Ired. 244. *Mulligan v. Elias*, 12 Abb. (N. Y.) N. S. 259. A tallow factory, erected in a town, city or thickly settled neighborhood, or on a public highway is a nuisance. *Allen v. State*, 34 Texas, 230. If a distillery has connected with it sties in which large numbers of hogs are kept, the offal from which pollutes a watercourse, and the stench renders the neighboring houses uninhabitable, it is a nuisance. *Smith v. McConathy*, 11 Mo. 517. So the occupation of buildings for the business of yarding and slaughtering hogs, and for boiling their fat and offals, and for burning their bristles, is *prima facie* a nuisance. *Dubois v. Budlong*, 10 Bosw. 700.

(*r*) *Stockport Waterworks Co. v. Potter*, 31 Law J., Exch. 9; 7 H. & N. 160.

(*s*) *Wanstead Local Board, etc., v. Hill*, 13 C. B., N. S. 479; 32 Law J., M. C. 135.

(*t*) *Knight-Bruce, V.-C., Walter v. Selfe*, 4 De G. & Sm. 323. *Pollock v. Lester*, 11 Hare 266. *Beardmore v. Tredwell*, 31 Law J., Ch. 893. *Bamford v. Turnley*, *supra*.

interfere by injunction, for a man must have a house to live in; and it is reasonable that he should make his own bricks out of his own land at a slight temporary inconvenience to his neighbors(*u*).

221 *Of prescriptive rights to the exercise of a noisome trade.*—If the trade is proved to be a noisome trade the defendant may, nevertheless, establish a prescriptive right to the exercise of the trade on the particular spot, by showing that he has exercised it without molestation or interruption for the period of twenty years(*v*). “It used to be thought, that if a man knew there was a nuisance, and went and lived near it, he could not recover, because, it was said, it is he that goes to the nuisance, and not the nuisance to him. That, however, is not the law now”(*x*).

222 *Nuisances from privies, chimneys, and manufactories—Liability of the landlord and occupier.*—If a nuisance be created on premises, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet, by purchasing the reversion with the existing nuisance; he makes himself liable for the continuance of the nuisance. But if, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, and he knew of it, that would make the landlord liable. He is not to let the land with the nuisance upon it(*y*).

A landowner who creates a nuisance upon his land, or purchases land with an existing nuisance upon it, cannot, by granting or conveying the land to another, get rid of his responsibility on the ground that he has no longer any control over the nuisance. “Before his

(*u*) *Att.-Gen. v. Cleaver*, 18 Ves. 219. *Cleeve v. Mahany*, 9. W. R. 882. *Cavey v. Ledbitter*, 13 C. B., N. S. 470; 32 Law J., C. P. 105.

(*v*) *Elliotson v. Feetham*, 2 B. N. C. 134. *Bliss v. Hall*, 5 Sc. 504. Carrying on an offensive business for twenty or even thirty years in a place removed from dwellings and public roads will not give a prescriptive right to continue it after houses have been built and roads laid out in the vicinity, if it is then found to be a nuisance to the inhabitants or passers-by. *Commonwealth v. Upton*, 6 Gray (Mass.), 473. *Ashbrook v. Commonwealth*, 1 Bush (Ky.), 139. There can be no such thing as a right, whether by prescription or otherwise, to maintain a public nuisance. *Philadelphia, etc., R. R. Co. v. State*, 20 Md. 157. See *House v. Metcalf*, 27 Conn. 631; *Lewis v. Stein*, 16 Ala. 214.

(*w*) *Byles, J., in Hole v. Barlow*, 4 C. B., N. S. 336; 27 Law J., C. P. 208. And see *Tipping v. St. Helen's Smelting Co.*, L. R., 1 Ch. App. 66.

(*y*) *Littledale, J., in R. v. Pedly*, 1 Ad. & E. 827. *Gandy v. Jubber*, 33 Law J., Q. B. 151. *Saxby v. Manchester Rail.*, 38 L. J., C. P. 154; L. R., 4 C. P. 198. See *Owings v. Jones*, 9 Md. 108; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Pillsbury v. Moore*, 44 Me. 154; *Crommelin v. Cox*, 30 Ala. 318; *Ray v. Sellers*, 1 Duval (Ky.), 254.

assignment over he was liable for all consequential damages; and it is not in his power to discharge himself by granting it over; more especially where he grants it over reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz., the rent, for the same: for, surely, when one erects a nuisance, and grants it over in that manner, he is a continuor with a witness. Suppose the lessor or assignor had been seized in fee, and had erected this nuisance, and then infeoffed another over, he had conveyed this as a nuisance, and *causa causæ est causa causati*. And if a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it. And it is a fundamental principle of law and reason, that he that does the first wrong shall answer for all consequential damages; and the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection till it be abated"(z).

If a landlord erect privies in such a situation that the use of them must necessarily create a nuisance, and the privies are demised to tenants who use them and create a nuisance, the landlord will be responsible for the erection and continuance of the nuisance(a). And whenever the very existence of the thing demised constitutes a nuisance, the landlord is responsible.(aa) This has been held to be the case where the thing demised consisted of a wall erected so as to impede the access to a public market(b), or to obstruct the access of light and air to ancient windows(c); a dam or mound of earth stopping up the channel of a river or watercourse, or keeping a mill-pond at an undue elevation(d); a dangerous excavation made by order of the landlord, and left unguarded and unfenced, by the side of a public thoroughfare(e). But if the landlord demises tenements and premises which

(z) Per Cur., *Roswell v. Prior*, 12 Mod. 639. *Thompson v. Gibson*, 7 M. & W. 462.

(a) *Rex v. Pedley*, 1 Ad. & E. 822. The liability of the landlord has been carried still farther. Thus, where the owner of a building rented the several floors to different tenants, and the goods of the tenant on the lower floor were damaged by the overflow of a water closet on an upper floor, to which all the tenants had access, it was held that the landlord was liable for the damage, although the closet was properly constructed, and had become out of order by reason of the negligence of the tenants. *Marshall v. Cohen*, 44 Ga. 489.

(aa) *Durant v. Palmer*, 5 Dutch. (N. J.) 544. *Owings v. Jones*, 9 Md. 108. *Pickard v. Collins*, 23 Barb. (N. Y.) 154.

(b) *Thompson v. Gibson*, 7 M. & W. 456.

(c) *Roswell v. Prior*, *ante*, p. 176.

(d) Roll's Abr. NUISANCE, K. 2.

(e) *Leslie v. Pound*, 4 Taunt. 649. *Bishop v. Trustees of Bedford Charity*, 28 Law J., Q. B. 215; 1 Ell. & Ell. 697. *Durant v. Palmer*, 5 Dutch. (N. J.) 544. So it has been held that where the owner of land erects a barn thereon in such a manner that in its ordinary use it would be injurious and offensive to the adjoining proprietor, and cast unwholesome odors into his house, the landlord was liable for the nuisance, although caused by tenants to whom he had leased the premises. *Pickard v. Collins*, 23 Barb. (N. Y.) 444.

are not in themselves a nuisance, but may or may not become a nuisance, according to the mode in which they are used by the tenant, the landlord cannot be made responsible for a nuisance created upon them by the tenant. He is not responsible for enabling the tenant to commit a nuisance, if he pleases^(ee). Therefore, where the landowner erected a coffee-shop with a low chimney under the plaintiff's windows, and let the coffee-shop to a tenant who lighted a fire in the chimney, and created a great smoke, which penetrated the plaintiff's dwelling house, and caused a nuisance, it was held that the landlord was not responsible for this nuisance, as the tenant could have burnt coke or charcoal in the chimney, and have used the chimney without necessarily creating a great smoke, or might have abstained from making fires at all when the wind was in such a direction as to carry the smoke to the plaintiff's house^(f). An occupier who uses premises demised to him so as to create a nuisance, is, of course, always responsible for the consequences of his wrongful act (*ante*, p. 162).

223 Defilement of springs and running streams(g).—We have already seen that the right to have a stream flow in its natural state is an incident to the property in the land through which it passes, and that all may reasonably use the water who have a right of access to it. Every person, therefore, who throws dirt and rubbish into the stream so as to block up the channel, or defiles the water with gas refuse and filth, and prevents the riparian proprietors and others from having the beneficial use of the water they have been accustomed to have, is guilty of a nuisance, and may be made responsible in damages^(h), unless he has gained a prescriptive right to carry on an offensive trade on the river-bank, and corrupt the water⁽ⁱ⁾.

224 Noisy nuisances.—Quietness and freedom from noise are indispensable to the full and free enjoyment of a dwelling-house. Every person, therefore, who blows a horn in the night-time in the neighborhood of a dwelling-house, so as to disturb the repose of the inmates,

(ee) *Durant v. Palmer*, 5 Dutch. (N. J.) 544. *Owings v. Jones*, 9 Md. 108. *Beavers v. Trimmer*, 1 Dutch. (N. J.) 97.

(f) *Rich v. Basterfield*, 4 C. B. 805. See *Brown v. Bussell*, L. R., 3 Q. B. 251.

(g) As to the powers of sewer authorities to prevent the pollution of streams within their district, see 28 & 29 Vict. c. 75, s. 10.

(h) *Murgatroyd v. Robinson*, 7 Ell. & Bl. 391; 26 Law J., Q. B. 233. *Hodgkinson v. Ennor*, 32 Law J., Q. B. 231; 4 B. & S. 229. *Stockport Water, etc., Co. v. Potter*, 31 L. J., Exch. 9; 7 H. & N. 160. See *Sherman v. Fall River, etc., Co.*, 2 Allen (Mass.), 524; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Lewis v. Stein*, 16 Ala. 214.

(i) *Ante*, p. 196. *Bealey v. Shaw*, 6 East, 214. This right can be supported only by the strictest proof. *McCallum v. Germantown Water Co.*, 54 Penn. St. 40.

is guilty of a nuisance, and is responsible in damages, unless he can show some justification for the making of a noise(*j*). Every person, also, who erects a mill or a smith's forge, or any noisy machine, or carries on any noisy trade or manufacture adjoining a dwelling-house, whereby the comfort and quiet of the house are destroyed, and the rest of the inmates disturbed at night, is guilty of a nuisance, and is liable to an action for damages, unless he can show that he has gained a prescriptive right to make the noise by twenty years' user and enjoyment(*k*.)

225 *Collection of crowds*.—It is an old principle of law, that if a person collects together a crowd of people to the annoyance of his neighbors, that is a nuisance for which he is answerable. Therefore where the defendant was in the habit of inviting persons into his own grounds to shoot pigeons, and the effect of that was that idle persons collected near the spot, trod down the grass of the neighboring meadows, destroyed the fences, and created alarm and disturbance amongst the women and children in the adjoining thoroughfares, it was held that the defendant was guilty of a nuisance(*l*). So, where the defendant descended in a balloon into the plaintiff's garden, and a number of persons rushed into the garden to render help and gratify their curiosity, and destroyed the plaintiff's hedges and crops, it was held that the defendant who had set the balloon in motion and caused the mischief was responsible for the injury(*m*). But the keeping of a large school is not, necessarily at all events, a nuisance(*n*).

(*j*) *Rex v. Smith*, 2 Str. 703. See *State v. Haines*, 30 Me. 65.

(*k*) *Bradley v. Gill*, 1 Lutw. 69. *Elliotson v. Feetham*, 2 B. N. C. 134; 2 Sc. 174. *Ante*, p. 196. *Soltan v. De Held*, 2 Sim. N. S. 133. The business of finishing steam boilers in a populous part of a city may be a nuisance to the occupants of adjoining dwellings. *Fish v. Dodge*, 4 Denio, 311. And an action may be maintained against a stable keeper on account of the stamping of horses in the night. *Dargan v. Waddell*, 9 Ired. 244. A tinsmith and sheetiron worker was, in one case, enjoined from carrying on his business at unseasonable hours. *Dennis v. Eckardt* (Penn.), Law. Reg. Jan. 1863, p. 166. And a dog which barks and howls day and night may be lawfully killed as a nuisance, by one whose peace and quiet is thereby disturbed if there is no other way of preventing the nuisance. *Brill v. Flagler*, 23 Wend. 354.

(*l*) *Rex v. Moore*, 3 B. & Ad. 188. *Walker v. Brewster*, L. R., 5 Eq. Ca. 25 *acc*. A person who by violent and indecent language addressed to persons passing along the highway, collects together a large crowd and thereby obstructs the free passage of the street is guilty of a nuisance. *Barker v. Commonwealth*, 19 Penn. 412. So is a distiller who delivers his slops in the public street to any one who may call for them, thereby calling together a wrangling crowd of teamsters who obstruct the street. *People v. Cunningham*, 1 Denio, 524. A dram shop may be a public nuisance and the keeper indictable. *State v. Bertheol*, 6 Blackf. 474.

(*m*) *Guille v. Swan*, 19 Johns. 331.

(*n*) *Harrison v. Good*, L. R. 11 Eq. Ca. 338.

226 *Injuries from spring-guns, man-traps, dog-spears, engines, and machines placed on land.*—By 24 & 25 Vict. c. 100, s. 31 (re-enacting the 7 & 8 Geo. 4, c. 18), it is provided, that whoever shall place or cause to be placed, or shall knowingly and wilfully continue, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith, shall be guilty of a misdemeanor; but the setting of any gun or trap, such as is usually set with intent to destroy vermin, is not to be thereby rendered illegal; nor the setting of a spring-gun, man-trap, or other engine in a dwelling-house, for the protection thereof in the night-time(o).

The setting dog-spears on land is not in itself an illegal act, nor is it rendered such by the above Act, if it appears that the dog-spears were set in a wood for the mere purpose of destroying dogs trespassing in pursuit of game, and not with intent to destroy human life, or inflict grievous bodily harm on any human being. The owner of a dog, therefore, passing with his dog through a wood, has no right of action against the owner of the wood for the death of, or for an injury to, his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured(p).

227 *Injuries to animals from dog-traps.*—Every man must be taken to contemplate the probable consequences of the act he does, and, therefore where the defendant caused traps scented with the strongest meats to be placed on his own land, so near to the plaintiff's house as to influence the instinct of the plaintiff's dogs and cats, and draw them irresistibly to their destruction, it was held that the defendant was responsible to the plaintiff for the injuries he sustained, although he had no intention of injuring the plaintiff, and meant only to catch foxes and vermin. It was held also, that the defendant would be responsible for injuries sustained by any dogs tempted from the highway, or a public path, to the traps on the defendant's land, as he had no right to invite them there for the purpose of destroying them(q).

228 *Injuries from unguarded wells, mining-shafts, areas, and cellars.*—Where the surface of land is in the possession of one man, and the

(o) See *Bird v. Hollrook*, 4 Bing. 628; *Deane v. Clayton*, 7 Taunt. 489; *Hott v. Wilkes*, 3 B. & Ad. 304; *State v. Moore*, 31 Conn. 479.

(p) *Jordin v. Crump*, 8 M. & W. 787.

(q) *Townsend v. Wathen*, 9 East, 277.

subsoil and minerals in the possession of another, and the mineral owner sinks a mining shaft to enable him to work the minerals, it is his duty to fence the shaft so as to prevent injury to the cattle and sheep depasturing upon the surface(*r*). If a man hires a meadow, and turns his cattle therein, and they fall down the disused shaft of a mine, the person to whom the shaft belongs, and who has the dominion and control over it, will be responsible for the damage done(*s*). Every occupier of land who allows wells or mining-shafts to remain on his land unguarded and unprotected, is responsible in damages to all persons who sustain injury from falling into them, provided they were lawfully traversing the land on which the shaft or well existed, and fell into it without any negligence or misconduct on their part; but if they were at the time trespassers on the land, and the well or shaft was more than twenty-five yards from a public carriage-way (*post*, p. 171), they will not be entitled to maintain an action(*t*). Where the defendants were owners of waste land which was bounded by two highways, and the defendants worked a quarry in the waste, and the plaintiff, not knowing of the quarry, passed over the waste in the dark and fell into the quarry and broke his leg, and then brought an action for damages, it was held that the action could not be maintained, as there was no legal obligation on the defendant to fence the quarry for the benefit of the plaintiff, who was a mere trespasser upon the land(*u*). But if the hole is so near a highway that a person lawfully using it may, if he slips on the highway, fall into the hole, the occupier will be liable(*v*), even though the obligation to fence may be on some other person(*x*).

If a man gets upon strange premises when it is dark, so that he cannot see, he should keep a good look-out, and has only himself to blame if he sustains injuries from running against objects, or falling down places, which might have been avoided by the exercise of ordinary care and caution(*y*); but if a person, being upon the premises of another on lawful business, without any fault or negligence of his own falls through a hole on such premises, the occupier will be respon-

(*r*) *Williams v. Groucott*, 4 B. & S. 149.

(*s*) *Sybray v. White*, 1 M. & W. 435.

(*t*) *Hardcastle v. South York, etc., Rail. Co.*, 4 H. & N. 67; 28 Law J., Exch. 139. *Bishop v. Trustees of Bedford Charity*, 1 Ell. & Ell. 697. *Pickard v. Smith*, 10 C. B., N. S. 470.

(*u*) *Hounsell v. Smyth*, 7 C. B., N. S. 731; 29 Law J., C. P. 203. *Binks v. South York & River Dun Co.*, 32 Law J., Q. B. 26; 3 B. & S. 244.

(*v*) *Hadley v. Taylor*, L. R., 1 C. P. 53. As to who is an occupier, see *S. C. Vale v. Bliss*, 50 Barb. 358.

(*x*) *Wetor v. Dunk*, 4 F. & F. 298. *Norwich v. Breed*, 60 Conn. 535.

(*y*) *Wilkinson v. Fairrie*, 32 Law J., Ex. 173.

sible, although the hole be necessary for carrying on the business of the occupier, and there is no duty upon such occupier as between himself and his servants to keep the hole fenced(z).

Every occupier of a house adjoining a highway is responsible for injuries to passengers arising from things falling from the house into the street, unless he can show that the fall arose from storm or tempest, or some inevitable accident(a). He is bound also to secure his shutters, and swing-doors, and things placed against his house, so that they cannot be readily thrown down on passengers by idle or mischievous persons. Thus, where the cellar-door of a tradesman was opened and thrown back against his house, and some little boys playing with the door threw it over upon the plaintiff and broke his leg, it was held that the tradesman was responsible for the injury, as he had provided no fastening to keep the door back. "A tradesman under such circumstances is not bound to adopt the strictest means for preventing accidents, but he is bound to use reasonable precaution, such as might be expected from a careful man"(b). But if the door is a door of great weight, and so thrown back that it could not be pushed forward into the street without the exercise of great force and strength, the remedy would be against the wilful wrong-doer and not against the tradesman, who reasonably supposed a fastening to be, under such circumstances, unnecessary(bb). Whether proper care has been taken to prevent the door from falling forward is a question for the jury.

229 *Injuries from the dangerous state of private ways.*—If landowners have given an express or implied permission to strangers to use a private way leading across their lands, or if they suffer a particular pathway to be used as an ordinary means of access to their dwelling-houses, it is not competent to them to do any act whereby injury may arise to persons using the way, without giving them timely notice of what has been done, or revoking the license or permission to come

(z) *Indermaur v. Dames*, L. R., 1 C. P. 274; 2 *ibid.* 311.

(a) *Bryne v. Boodle*, 33 Law J., Exch. 13. *Domat*, liv. 2, tit. 8, ss. 1, 10, 11. See *Scott v. London Dock Co.*, 34 L. J., Exch. 17; *ibid.* 220. But see *Welfare v. Brighton Rail.*, L. R., 4 Q. B. 693; 38 L. J., Q. B. 241. *Salisbury v. Herchenroder*, 106 Mass. 458. And where a building is so constructed that the snow and ice falling or forming on the roof must, in the natural course of things, fall down upon the sidewalk of a public street, the owner will be liable for injuries to passengers sustained thereby, although the rooms in the building are occupied by tenants, if he has access to and control of the roof. *Shipley v. Fifty Associates*, 106 Mass. 194.

(b) *Tindal, C. J., Daniels v. Potter*, 4 C. & P. 262. *Proctor v. Harris*, *ib.* 337.

(bb) But the rule stated in the text would not apply if the maintenance of the cellar-door was in itself a direct invasion of the highway, and a wrongful act. See *Congreve v. Morgan*, 18 N. Y. 84.

upon the land. And as the owners themselves are not justified in placing any unknown dangers in the way of persons using the private way, so neither can they authorize anybody else to do so(c). If the landowner takes toll for the use of the way, and invites people to use it, it is his duty to keep it in a safe state, and fit for use; and if he is cognizant of some hidden danger, he ought to remove it, or close the way to the public(d). Every occupier of a house who makes or permits the continuance or use of a pathway to the house, may fairly be deemed to hold out an invitation to all persons who have any reasonable ground for coming to the house to pass along his pathway; and he is responsible for neglecting to fence off dangerous places, in the same way that a shopkeeper, who invites the public to his shop, is liable for leaving a trap-door open without any protection, by which his customers suffer injury(e). But a person who strays from the ordinary approaches to the house, and trespasses upon the adjoining land, where there is no path, has no remedy for an injury he may sustain from falling into unguarded wells or pits, as the injury is the result of his own carelessness and misconduct(f). If *A* gives *B* permission to cross his yard, across which there are a dozen different routes, and *A* has dug a hole in the yard which he usually keeps covered, but one night he uncovers it, and *B*, crossing as usual, and not expecting any danger, falls in and is injured, *A* is liable for the injury. But if the hole has always been uncovered, and *B* walks into it in broad daylight, he has no cause of action against *A*(g).

230 Nuisances adjoining highways—Dangerous pits and excavations—Steam-engines and windmills.—By the General Highway Act, 5 & 6 Wm. 4, c. 4, s. 70, it is enacted, that it shall not be lawful for any person to sink any pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards, nor any windmill within fifty yards from any part of any carriage-way or cart-way(h), unless

(c) *Corby v. Hill*, 4 C. B., N. S. 556; 27 Law J., C. P. 320. *Gallagher v. Humphrey*, 10 W. R. 664; 6 L. T. R., N. S. 684. *Cockburn, C.J., Hodman v. West Midl. Rail. Co.*, 33 L. J., Q. B. 240. See *post*, p. 173.

(d) *Gibbs v. Trustees of Liv. Docks*, 3 H. & N. 164; 27 Law J., Exch. 321.

(e) *Tindal, C.J., Lancaster Canal Co. v. Parnaby*, 11 Ad. & E. 243. *Barnes v. Ward*, 9 C. B. 420; 19 Law J., C. P. 200. *Jarvis v. Dean*, 11 Moore, 354. *Indermaur v. Dames*, *ante*, p. 202.

(f) *Wilde, B., Bolch v. Smith*, 7 H. & N. 736; 31 Law J., Exch. 203. See *Howland v. Vincent*, 10 Met. 371.

(g) *Blythe v. Topham*, 1 Roll. Abr. 88; Cro. Jac. 158. *Stone v. Jackson*, 16 C. B. 204. *Hardcastle v. South Yorkshire Rwy., etc.*, 4 H. & N. 74. *Gaudret v. Egerton, L. R.*, 2 C. P. 371.

(h) This is extended to turnpike roads by 27 and 28 Vict. c. 75. Steam-ploughing machines are excepted by 28 & 29 Vict. c. 83, s. 6 (continued by 34 & 35 Vict. c. 95), provided certain precautions are taken while they are in use. *Ibid.* Independent of any statute a person may be-

such pit, or shaft, or steam-engine, gin, or other like engine or machinery, shall be within some house or other building, or behind some wall or fence, sufficient to conceal or screen the same from the said carriage-way or cart-way, so that the same may not be dangerous to passengers, horses, or cattle(*i*); also, that it shall not be lawful for any person to make or cause to be made any fire for calcining or burning of ironstone, limestone, bricks, or clay, or the making of coke, within fifteen yards from any part of the said carriage-way or cart-way, unless the same shall be within some house or other building; or behind some wall or fence sufficient to screen the same from such carriage-way or cart-way. Penalties are imposed upon persons offending against the statute for each and every day that any such pit, shaft, wind-mill, steam-engine, gin, machine, or fire, shall be permitted to continue contrary to the provisions of the Act.

Penalties are also imposed (s. 72) upon persons playing at games on highways, to the annoyance of passengers, or making fires (*k*), or letting off fireworks, pistols or guns, within fifty feet of the centre of the way, or laying things on the highway, to the interruption of persons travelling thereon, or suffering filth or any offensive matter to flow upon the highway from the adjoining premises, or in any way wilfully obstructing the passage of the highway. Provision is also made (s. 73) for the removal and abatement of all nuisances upon the highway(*kk*).

231 *The use of locomotive steam-engines on highways* is authorized by 24 & 25 Vict. c. 70, provided they are used (s. 13) so as not to create a nuisance(*l*). This Act has been amended by the 28 & 29 Vict. c. 83, which prescribes the rules subject to which such locomotive engines may be used (s. 3), limits the speed at which they may travel (s. 4), and makes special regulations as to their passage through towns (s. 8). The last-mentioned Act (which is a temporary one) has been continued to the 1st September, 1872, and the end of the then next session by 34 & 35 Vict. c. 95.

232 *Dangerous excavations adjoining highways*.—As persons are prohibited

come liable for the improper use of machinery operated by steam within such a distance of the highway as to endanger the lives or property of others lawfully using the way. Thus a person who erects upon his own land, but within fifty feet of the highway, a steam whistle of such size and construction as to produce a startling and terrific noise, and so uses the same as to frighten horses of ordinary gentleness when passing along the highway, will be liable for the resulting damages. *Knight v. Goodyear's India Rubber Glove Manufacturing Co.*, 32 Conn. 438.

(*i*) As to nuisances from steam-threshing machines, see *Smith v. Stokes*, 4 B. & S. 84.

(*k*) See *Stinson v. Browning*, L. R., 1 C. P. 321.

(*kk*) See *Simpson v. Wells*, L. R., 7 Q. B. 214.

(*l*) *Watkins v. Reddin*, 2 F. & F. 269.

from sinking pits or shafts within the distance of twenty-five yards from any part of a carriage-way or cart-way, being a highway, it follows that any person who has sustained injury from the doing of the prohibited act is entitled to an action to recover compensation in damages from the wrong-doer; and it is no answer to such an action to show that he had deviated from the highway, and was a trespasser upon the adjoining land, at the time he sustained the injury: but when the excavation is made beyond the distance of twenty-five yards from the carriage-way, and does not immediately adjoin any foot-path or public place of passage where all persons have a right to go, and there is no obligation imposed upon the landowner on whose land the excavation has been made to fence it off, and the person falling into it would be a trespasser upon the intervening land before he reached the excavation, no action would be maintainable by the injured party(m). The negligent quarrying of stone near a highway is an indictable offence at common law(n).

When the occupier of a dangerous area adjoining a highway sets up as a defence that the premises had been exactly in the same condition as far back as could be remembered, and many years before he took possession of them(o), Lord Ellenborough held that, however long the premises might have been in a dangerous state, the defendant, as soon as he took possession of them, was bound to guard against the danger to which the public had been before exposed; and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance; that the area belonged to the house, and the law cast upon the occupier the duty of rendering it secure(p). No question was raised in this case, however, as to whether the highway existed before the area was made; for if the area had been made, and the road afterwards dedicated to the public with the unfenced area beside it, the public would take the right of way subject to the danger and inconvenience of the unfenced area(q).

233 *Dedication of a highway to the public subject to certain risks and inconveniences.*—When a highway is dedicated to the public by the owner

(m) *Hardcastle v. South York, etc., Rail Co.*, 4 H. & N. 74; 28 Law J., Exch. 139. *Blyth v. Topham, Cro. Jac.* 159. *Hounsel v. Smith*, *Binks v. South York and River Dun Co.*, *ante*, p. 201. See *Vale v. Bliss*, 50 Barb. (N. Y.) 358; *Norwich v. Breed*, 30 Conn. 535.

(n) *Reg. v. Mutters*, 34 L. J., M. C. 22. As to the liability of persons engaged in blasting, for injuries to persons crossing a quarry by a foot path under license from the owner, see *Driscoll v. Newark and Rosendale Lime and Cement Co.*, 37 N. Y. 637.

(o) See *Barnes v. Ward*, 9 C. B. 420; 19 Law J., C. P. 200; *Jarvis v. Dean*, 11 Moore, 354.

(p) *Coupland v. Hardingham*, 3 Campb. 398. *Bishop v. Trustees of Bedford Charity, Pickard v. Smith*, *ante*, p. 201. *Irwin v. Sprigg*, 6 Gill. 200.

(q) *Blackburn, J.*, *Fisher v. Prowse*, 31 Law J., Q. B. 219.

of the soil, the public can take no larger or more extensive right than the owner of the fee thinks fit to grant or allow (*post*, s. 3). If, therefore, the right of passage has been granted subject to a right vested in the adjoining landowners of depositing goods on the soil of the way, the public must take the right subject thereto(*r*). So if the highway has been dedicated subject to the right to have door-steps or cellar-flaps projecting into it, the public must take the road as it is given to them, subject to those inconveniences and obstructions(*s*). So the owner of a field may dedicate a footpath to the public over it subject to his right to plough it up in due course of husbandry, although that, for the time, destroys all traces of the path(*t*).

Where an ancient unfenced tidal ditch ran alongside a public highway, and the commissioners of sewers took possession of the ditch under the powers of an Act of Parliament, for the purpose of their sewerage, and the plaintiff, on a dark night, tumbled into the ditch with his horse and carriage, it was held that the commissioners of sewers were not responsible for the injury, as the highway and the ditch had immemorially existed in the same state, and the commissioners were under no obligation to fence it off from the road. "The road," observes Parke, B., "was dedicated to the public with a ditch beside it. This is an ancient sewer, which has existed with the highway time out of mind, and therefore the public have only a right to the highway subject to the sewer"(*u*). But whenever a highway has been dedicated to the public, subject to certain obstructions left in it for the convenience and accommodation of the occupiers of the adjoining houses, the obstruction or inconvenience to the public must not be increased by any act of commission or omission. Cellar-doors or cellar-flaps must not be left open or unfastened, so as to expose the public to any unusual, unexpected, or unforeseen danger. And all things accessorial to the beneficial use and occupation of the adjoining dwellings must be kept in a proper and safe state, either by the occupiers of the houses or by those upon whom the law casts the burthen and duty of repairs(*v*).

234 *Obstructions in public thoroughfares*.—"If a man hangs a gate upon a post, and shuts it with a catch upon another post across a highway

(*r*) *Morant v. Chamberlain*, 6 H. & N. 541; 30 Law J., Exch. 299. *Le Neve v. Mile End, etc.*, Vestry, 8 Ell. & Bl. 1063.

(*s*) *Fisher v. Prowse*, 31 Law J., Q. B. 213. *Robbins v. Jones*, 33 L. J., C. P. 1.

(*t*) *Mercer v. Woodgate*, L. R., 5 Q. B. 26. *Arnold v. Blaker*, L. R., 6 Q. B. 443.

(*u*) *Cornwall v. Metrop. Com. of Sewers*, 10 Exch. 771. *Blackburn, J., Fisher v. Prowse, supra*.

(*v*) *Daniels v. Potter, Proctor v. Harris, ante*, p. 202.

used for horses and carriages, so that men on horseback or in carriages cannot pass without opening the gate, this is a common nuisance," for a man has no right to put such an impediment in the road where none before existed. But gates which have been in highways time out of mind are not any nuisance, because it may be intended that they began by composition with the owner of the land when he consented to the way(*w*).

Whenever one man wilfully interferes with the free right of passage of another along a public highway, there is an injury to a right, and an action for damages is maintainable. And whenever a private injury has been sustained from an unauthorized obstruction in a public thoroughfare, the injured party is entitled to compensation in damages. If one person wilfully and intentionally runs his carriage before another person's carriage in a public thoroughfare, stopping when he stops, and going ahead of him when he goes on, and crossing his path, so as to prevent him from having the free and uninterrupted use of the highway, and oblige him to pull up or slacken speed, for fear of a collision, the person so obstructing the public thoroughfare will be guilty of a nuisance, and responsible in damages to the party whose free right of passage has been wilfully and unlawfully obstructed. There is, in such a case, an injury to a right, and substantial damages are recoverable. Where, therefore, the drivers of an omnibus company headed and tailed the omnibus of a private individual with the company's omnibuses, and obstructed the highway with their vehicles, so as to create a nuisance, and interrupt the free passage of the thoroughfare, it was held that the omnibus company was responsible in damages to the private omnibus proprietor, who had been wilfully delayed and impeded in the exercise of his right to pass along the public highway(*x*).

If a man builds a house or a bridge, so as to obstruct a public thoroughfare, he cannot escape from liability by saying that it was the fault of the builder or contractor, in not constructing it in some different manner(*y*). If the occupier of a house or building adjoining a highway directs certain repairs to be done to his house, and it becomes necessary to excavate the earth, and remove stone, timber, and materials from the premises, and the excavated earth and materials are placed in the high-road in front of the house, with the knowl-

(*w*) *Vin. Abr. NUISANCE, C. James v. Hayward, Cro. Car. 184; W. Jones, 221.*

(*x*) *Green v. Lond. Gen. Omnib. Co., 7 C. B., N. S. 290; 29 Law J., C. P. 13.*

(*y*) *Hole v. Sittingbourne, etc., Rail. Co., 6 H. & N. 500; 30 Law J., Exch. 81. Gray v. Pullen, 34 L. J., Q. B. 265.*

edge and sanction of the occupier of the house, the latter will be responsible for the obstruction, although it was placed there by the servants or workmen of a builder or contractor. If, seeing the obstruction and the danger of it, and having control over everybody working upon his own land, and bringing materials out of his own house, he does nothing to prevent or abate the nuisance, if he silently acquiesces in the conversion of the highway into a place of deposit for materials brought from his own premises, there will be evidence to go to a jury of the things having been placed in the highway by his authority(z).

So, by the civil law, every occupier of a house, whether he was the proprietor of it or a lessee, was held liable for damage caused by anything thrown out of the house, or the premises belonging to it, into a street or public thoroughfare, or any other place. And the occupier was held responsible for the damage, if the thing was done by any of his family or domestics in his absence, or without his knowledge(a).

235 *Obstructions in navigable rivers*.—The right of soil in arms of the sea and public navigable rivers, which is *primâ facie* vested in the Crown, independently of any ownership in the adjoining lands, must in all cases be considered as subject to the public right of passage, however acquired, and any grantee of the Crown must, of course, take subject to such right. If, therefore, he places any obstruction in the bed of the river, which deprives another of his right of free passage along it, he is liable to an action for the private and particular injury to the individual(b). But if the obstruction has not deprived any particular individual of his right of passage along the stream, or caused him any personal damage different from, and independent of, that which is sustained by the rest of the public, an action for damages is not maintainable, but the public remedy, by way of indictment, must be pursued(c). And it is to be observed that an indictment in such a case, —*viz.*, where an action would lie, if the complainant had sustained damage different from that of the public,—being substantially a civil and not a criminal proceeding, the rule that a master is responsible for the wrongful act of his servant, though he does not himself per-

(z) *Burgess v. Gray*, 1 C. B. 591. *Bush v. Steinman*, 1 B. & P. 408. *Ellis v. Sheff. Gas Co.* 23 Law J., Q. B. 42; *post*, s. 2. *Jones v. Chantry*, 4 Sup. Ct. (N. Y.) 63, 65.

(a) *Domat. Droit. Civ. liv. 2, tit. 8, s. 1.* *Pandect, lib. 9, tit. 3.* *Instit. lib. 4, tit. 5, s. 1.* *Byrne v. Boadle, ante*, p. 202. *Corrigan v. Union Sugar Refinery*, 98 Mass. 567.

(b) *Rose v. Groves*, 6 So. N. R. 653; *post*, s. 2. *Selman v. Wolfe*, 27 Texas, 68. *Gerrish v. Brown*, 51 Me. 256. *Barnes v. City of Racine*, 4 Wis. 454. *South Carolina R. R. Co. v. Moore*, 28 Geo. 398.

(c) *Dimes v. Petley*, 15 Q. B. 283. *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44. See *Brown v. Perkins*, 12 Gray (Mass.), 89; *Blanc v. Klumpke* 29 Cal. 156; *Griffith v. McCullum*, 46 Barb. 561.

sonally interfere, and the wrongful act is contrary to his general orders and without his knowledge, will apply(*d*). If an obstruction has been placed in a navigable river for the more convenient use and occupation of a wharf, those who placed the obstruction in the river, and the occupiers of the wharf who continue it there for the use of the wharf, will be responsible for injuries caused by it to persons lawfully using the wharf who had no knowledge of the obstruction, or (*semble*) to any person navigating the river(*e*). However, if oysters and oysterbrood are so placed in a navigable creek or river, and in such masses, as unlawfully to diminish the depth of water and obstruct the navigation, a shipowner or shipmaster is not, by reason thereof, justified in negligently or wilfully running his vessel upon the oyster-beds, and destroying the oysters, if there was abundance of room and water for the vessel to have passed up the river without going upon the beds(*f*).

236 *Obstructions from sunken vessels, anchors, telegraph wires, etc.*—The owner of a ship sunk in a navigable river by accident, without his default or misconduct, is not bound to remove the nuisance, if the vessel is totally submerged, and he has no longer the possession of it; but if he has possession of the vessel, and exercises the dominion and control of an owner over it, he is bound to take all reasonable and proper care to prevent accidents to other vessels navigating the river, and must remove the obstruction with all reasonable diligence. This duty attaches to the ownership of the vessel for the time being, and will be transferred to a purchaser of the sunken vessel, who takes the wreck into his possession, and under his management and control(*g*). And so, conversely, a person navigating the high seas will be liable for injury caused by his negligence in navigation to a telegraph cable lying at the bottom of the sea(*h*). The principal above mentioned has been held to apply to the case of piles left in the bed of a river by a contractor, which were no obstruction when the works for which the piles were used were completed by the contractor and handed over to the Admiralty, but which subsequently became so by the soil around the piles being washed away(*i*).

237 *Where the public right of free navigation is taken away, and the power of removing obstructions is vested in the hands of conservators of the river*

(*d*) *Reg. v. Stephens*, L. R., 1 Q. B. 702.

(*e*) *White v. Phillips*, 33 Law J., C. P. 33.

(*f*) *Mayor of Colchester v. Brooke*, 7 Q. B. 377. See, as to oyster fisheries, 31 & 32 Vict. c. 45, ss. 27, 51; *Ibid.* c. 53; *Ibid.* c. 53; 32 & 33 Vict. c. 31.

(*g*) *White v. Crisp*, 10 Exch. 312; 23 Law J., Exch. 317.

(*h*) *Submarine Telegraph Co. v. Dickson*, 33 L. J., C. P. 139.

(*i*) *Bartlett v. Baker*, 34 L. J., Exch. 8. *Hyams v. Webster*, L. R., 2 Q. B. 264, acc.

by Act of Parliament, there can be no redress by way of action on account of any disturbance of the individual right. The individual grievance is only accessory, and, the principal being taken away, the accessory follows(*j*). There is a distinction in this respect between duties imposed by statute on trustees or commissioners for the purpose of rendering a river navigable and nothing more, and who have no interest in the soil of the river(*k*), and duties imposed for other purposes also, *e.g.*, of drainage(*l*). An Act of Parliament empowering a corporation to remove obstructions in a navigable river, giving compensation to the owners of the soil where the obstructions are situate, does not constitute them conservators of the river(*m*).

238 *Injuries to land from the erection of groins, sea-walls, and defences against tides and currents.*—Every proprietor of land exposed to the inroads of the sea may erect on his own land groins, or other reasonable defences, for the protection of his land from the inroads of the sea, although, by so doing, he may cause the sea to flow with greater violence against the land of his neighbor, and render it necessary for the latter to protect himself by the erection of similar sea-defences. “Each landowner has a right to protect himself, but not to be protected by others, against the common enemy.” But a man has no right to do more than is necessary for his defence, and to make improvements at the expense of his neighbor(*n*).

239 *Negligent overloading of the floors of warehouses and buildings.*—If one man overloads the floor of a warehouse with merchandise, so that the floor breaks and crushes the goods of another man in the floor underneath, the latter is entitled to an action for damages against the former. If the floor is ruinous, the occupier must take good care that he does not put upon such ruinous floor more than it can well bear; and if it will not bear anything, he ought not to put anything upon it to the prejudice of another. Where the defendant, who was the lessee and occupier of a warehouse, underlet a cellar beneath the warehouse to the plaintiff, and the defendant so overburthened the floor of the warehouse with merchandise that the floor gave away, and crushed the plaintiff's wine in the cellar, it was held that the defendant was respon-

(*j*) *Kearns v. Cordwainers' Co.*, 6 C. B., N. S. 388; 28 Law J., C. P. 285. See The Thames Conservancy Act, 1866, 29 & 30 Vict. c. 89.

(*k*) *Cracknell v. Mayor of Thetford*, L. R., 4 C. P. 629.

(*l*) *Parrett Navigation Co. v. Robins*, 10 M. & W. 593. See *Holt v. Corporation of Rochdale*, L. R., 10 Eq. Ca. 354.

(*m*) *Exeter (Corporation of) v. Devon (Earl of)*, L. R., 10 Eq. Ca. 232.

(*n*) *Rex v. Pagham Commissioners, etc.*, *ante*, p. 3. *Adams v. Frothingham*, 3 Mass. 352. *Jones v. Soulard*, 24 How. (U. S.) 41. *Rix v. Johnson*, 5 N. H. 520. *Gerrish v. Clough*, 48 N. H. 9.

sible for the injury, and that it was no answer to the action to say that the floor was ruinous, and that the defendant was not bound to repair it; "for he who takes a ruinous house ought to mind well what weight he put into it at his peril, that it be not so much that another shall take any damage by it. But if the floor had fallen of itself, without any weight upon it, or by the default only of the posts in the cellar which support it, with which the defendant had nothing to do, there the defendant shall be excused"(o).

240 *Non-repair of ruinous houses—Liability of the landlord and occupier.*

—As between the landlord and occupier of a house, or the landlord and tenant, there is no obligation upon the landlord to keep the house in repair, in the absence of an express contract to that effect(oo). If, therefore, the chimney of a house demised to a tenant becomes ruinous, and falls through the roof of the house, and injures the furniture and family of the tenant, the latter has no remedy against his landlord for the injury(p). But the landlord is responsible to the public, and to the occupiers and proprietors of the adjoining property, if he demises houses which are in a ruinous state and dangerous to the neighborhood, either from original faulty construction, or from want of proper and timely repair(q). But if the houses or buildings are in good repair and condition at the time of the demise, and subsequently become ruinous and dangerous to the neighborhood, the landlord is not responsible for the nuisance, unless he has taken upon himself the burthen of repairing and maintaining the premises during the existence of the lease(r), or has renewed the lease after the houses had become ruinous and in danger of falling, for an owner of a house is not as such liable for want of repair(s) (*ante*, pp. 196, 197). The occupier is also responsible for the nuisance; and it is no answer for him to say that he is a mere tenant-at-will or upon sufferance, or has only a temporary or precarious interest in the premises, and is under no obligation to maintain and repair them; for if

(o) *Edwards v. Halinder*, Poph. 46. If the lessee of a house for the storage of furniture violates his contract by storing therein other heavy articles, and thereby occasions the destruction of the building, he will be liable to the lessor for the injury. *Brooks v. Clifton*, 22 Ark. 54.

(oo) *Witty v. Mathews*, 52 N. Y. 512. *Doupe v. Genin*, 45 N. Y. 119. *Kahn v. Lovez*, 3 Oregon, 206. *Brewster v. De Fremery*, 33 Cal. 341. *Estep v. Estep*, 22 Ind. 114.

(p) *Gott v. Gandy*, 2 Ell. & Bl. 847; 23 Law J., Q. B. 1.

(q) *Todd v. Flight*, 9 C. B., N. S. 377; 30 Law J., C. P. 21; *ante*, pp. 196, 197. *Rex v. Pedly*, 1 Ad. & E. 822. *Bensen v. Suarez*, 43 Barb. (N. Y.) 408. See *Vincent v. Cook*, 6 Sup. Ct. (N. Y.) 562; *Whalen v. Gloucester*, 6 Sup. Ct. (N. Y.) 135.

(r) *Payne v. Rogers*, 2 H. & Bl. 349. *Leslie v. Pounds*, 4 Taunt. 648. *Bishop v. Trustees of Bedford Charity*, 1 Ell. & Ell. 697. *Robbins v. Jones*, 33 L. J., C. P. 1. *Clancy v. Byrne*, 56 N. Y. 129. See *Fisher v. Thirkell*, 21 Mich. 1.

(s) *Chauntler v. Robinson*, *infra*.

he chooses to take the benefit of the occupation of premises, he must take them with the accompanying burthen of preventing them from becoming a source of danger to others.

Thus, where the defendant was indicted for not repairing a ruinous house abutting upon a highway, and the indictment charged that the house was likely to fall down, and that the defendant occupied it, and ought to repair it, and the jury found that the house was ruinous and likely to fall, and that the defendant occupied it, but was only tenant-at-will, the court held that he was nevertheless answerable to the public for its dangerous condition^(t). But the liability of a mere tenant-at-will, in this respect, ought in reason to be confined to cases where he knew or ought to have known that the house was in a dangerous state, and chose to become and continue the occupier of it, with knowledge of its dangerous condition. All that the occupier is bound to do, in any case, is to shore up the building so as to prevent it from falling. He is not bound, as between himself and the public or the neighbors, to put it into a state of repair.

By the civil law, wherever anything hung out from a house happened to fall and injure another, the occupier of the house was held responsible in damages for the injury ; but if tiles fell from the roof from the effect of a storm, and the roof was in good repair, the occupier was not answerable for the accident. If the roof was out of repair, then the person bound to keep it in repair was guilty of a breach of duty, and was answerable for the damage to the person injured^(u).

241 *Negligence in pulling down houses—Negligent excavations.*—It is the duty of all persons to use due care and skill, and take due, reasonable, and proper precautions in pulling down houses and walls which rest against, or are in contact with, an adjoining house or wall ; and if an injury is sustained from a neglect to exercise such care, skill, and precaution, a wrong is done, and the wrong-doer is responsible for the damage^(v) ; and it is no answer to an action for damage done to set forth that the damage was repaired by the defendant before action, but the fact must be given in evidence in reduction of damages^(w). If a man negligently and carelessly excavates his own land close to the

(t) *Reg. v. Watts*, 1 Salk. 357.

(u) Domat. liv. 2, tit. 8, ss. 1, 10, 11. *Byrne v. Boadle*, *ante*, p. 169. *Robbins v. Jones*, *supra*.

(v) *Trower v. Chadwick*, 3 Sc. 722 ; 3 B. N. C. 334 ; 8 Sc. 19. *Walters v. Pfiel*, M. & M. 365. *Davies v. Lond. & Bl. Rail. Co.*, 2 Sc. N. R. 74 ; 1 M. & Gr. 799. And see *ante*, pp. 73-77, 111, 148, 149.

(w) *Taylor v. Stendall*, 7 Q. B. 634.

foundation of his neighbor's house without giving the latter any warning, or given him an opportunity of shoring up or protecting his house, the careless excavator will be responsible for the damage he occasions(*x*), and the penalty which the Metropolitan Building Act (18 & 19 Vict. c. 122), by s. 94, imposes upon any building-owner who fails to make good the damage done to an adjoining owner by the execution of any work authorized by him, is cumulative upon the remedy by action(*y*). But the duty of taking care does not arise where the excavator is ignorant of the existence of the thing which may be injured by the want of care. Thus, where a landowner excavated in his own land close to a cellar of his neighbor's, not knowing of the existence of the cellar, it was held that he could not be made responsible for an injury to the cellar(*z*); no right to support having been gained by long enjoyment (*ante*, p. 148). There is no duty imposed by the Metropolitan Building Act upon a building-owner, who pulls down a party-wall under its authority, of protecting by a boarding or otherwise the rooms of the adjoining owner which are left exposed to the weather while the wall is being re-built(*a*).

242 *Ruinous party walls*.—If injury results from the non-repair of a party wall, of which the plaintiff and defendant are tenants in common, and there has been a neglect of the duty to repair on the part of the plaintiff, as well as on the part of the defendant, the plaintiff cannot recover damages(*b*).

In Fitzherbert's Abridgment we read, "that where there are three tenants in common, or joint tenants of a mill or house which falls to decay, and one will repair, but the others will not repair the same, he shall have a writ *de reparatione faciendâ* against them, and the writ is such, etc. And so, if a man have a house adjoining to my house, and and he suffers his house to lie in decay to the annoyance of my house, I shall have a writ against him to repair his house in such form: 'Command A that, etc. he cause to be repaired his certain house in N, which threatens destruction to the nuisance of the freehold of B, in the same town, which he ought and hath been used to repair' "(*c*).

(*x*) *Dodd v. Holme*, 1 Ad. & E. 506. *Bradbee v. Christ's Hosp.*, 4 M. & Gr. 758. *Massey v. Goyder*, 4 C. & P. 165. *Jones v. Bird*, 5 B. & Ald. 837. *Austin v. Hudson River R. R. Co.*, 25 N. Y. 334. *Moody v. McClelland*, 39 Ala. 45. *Lasala v. Holbrook*, 4 Paige, 169.

(*y*) *Williams v. Golding*, L. R., 1 C. P. 69.

(*z*) *Chadwick v. Trower*, 8 Sc. 20; 6 B. N. C. 1. See *Fletcher v. Rylands*, *ante*, p. 83; *Shrieve v. Stokes*, 8 B. Mon. 453.

(*a*) *Thompson v. Hill*, L. R., 5 C. P. 564.

(*b*) See *Chauntler v. Robinson*, 4 Exch. 163.

(*c*) *Fitz. Nat. Brev.* 127; *Co. Litt.* 56b. This writ was abolished by 3 & 4 Wm. 4, c. 27, s. 38.

243 *Insecure fences, hedges, and gates.*—When lands are burthened by grant or prescription with the servitude of maintaining a wall, fence, hedge or gate for the benefit of the adjoining land (*ante*, p. 125), the occupier of the servient tenement will, as we have seen, be responsible in damages to the occupier of the dominant tenement if he allows the wall, fence, etc., to be ruinous and defective, so that cattle and sheep break through the fence and stray from one tenement to the other. The occupier of the dominant tenement is entitled to the benefit of his field for turning in other peoples' cattle as well as his own stock; and if he takes in another man's horse, and the horse gets through a ruinous fence, which the adjoining occupier ought to have repaired, and falls into a pit on the adjoining land and is killed, the occupier who ought to have repaired the fence, is, we have seen, responsible for the full value of the horse to the occupier of the field from which the horse strayed(*d*).

244 *Railway fences—Statutory servitude imposed upon railway companies of keeping up and maintaining fences.*—The General Railway Act, 8 & 9 Vict. c. 20, which enacts (s. 68) that railway companies shall make and maintain fences for separating the land taken for the use of the railway from the adjoining lands, and for preventing the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, applies only to adjoining land of other persons(*e*), and does not impose upon railway companies any greater liability in respect of the maintenance of fences than is imposed by the common law upon occupiers who are bound to maintain and repair fences for the benefit of the adjoining occupiers(*f*). Railway companies, therefore, are not bound to fence against trespassers upon the adjoining lands, and persons who are neither the owners nor occupiers thereof(*ff*). Where the

(*d*) *Rooth v. Wilson*, 1 B. & Ald. 59; *ante* p. 185.

(*e*) *Marfell v. South Wales Rail. Co.*, 8 C. B., N. S. 225; 29 Law J., C. P. 315. The servitude imposed upon railroad companies of keeping up and maintaining fences along the line of their track, has, in this country, been limited and defined by the statutes of the various States through which the road is maintained. It is obviously impracticable to give, in a mere note, even an abstract of these statutes. For the statutory rule in the State of New York, see *Laws of New York*, 1850, ch. 140, s. 44; *Laws of 1854*, ch. 532, s. 2; 2 R. S., (5th ed.) 689, 690, ss. 55, 56. See, also, *Corwin v. New York & Erie R. R. Co.*, 13 N. Y. 42; *Shepard v. Buffalo, New York & E. R. R. Co.*, 35 N. Y. 641; *Tallman v. Syracuse, Binghamton & New York R. R. Co.*, 4 Keyes, 128; *Murray v. New York Central R. R. Co.*, *id.* 274.

(*f*) *Maich. Sheff. & Linc. Rail. Co. v. Wallis*, 14 C. B. 224; 23 Law J., C. P. 85. *Buxton v. North East Rwy., L. R.*, 3 Q. B. 549. See *ante*, p. 176. See, however, *Bessant v. Gt. West. Rail. Co.*, 8 C. B., N. S. 368.

(*ff*) *Bemis v. Connecticut & Passumpsic Rivers R. R. Co.*, 42 Vt. 375. *Mayberry v. Concord R. R. Co.*, 47 N. H. 391. *Eames v. Salem, etc., R. R. Co.*, 98 Mass. 560. *Morse v. Rutland & Burlington R. R. Co.*, 1 Will. (Vt.) 49. *Cornwall v. Sullivan R. R.*, 8 Fost. (N. H.) 161. *Jackson v. Rutland & Burlington R. R. Co.*, 25 Vt. (2 Deane,) 150. And see *Cecil v. Pacific R. R.*

plaintiff's sheep escaped from his own land into the adjoining close, and were trespassing there, and then passed on to the defendant's railway, from defect of fences, and were killed by a train, it was held that the defendants were not responsible for the injury; for the plaintiff was not the owner or occupier of land adjoining the railway, and the company consequently, was not bound to fence against him(g). And where cattle strayed into a high-road adjoining a railway, and through defect of fences got upon the railway and were killed, it was held that the company was not responsible for the injury, as the cattle were trespassers on the highway, and the owners of the cattle were not occupying the road with their cattle at the time they strayed from the road on to the railway(h).

Co., 47 Mo. 246; Toledo R. R. Co. v. Wickery, 44 Ill. 76; Chicago & Alt. R. R. Co. v. Utley, 38 Ill. 410. The rule is otherwise in New York, Indiana and Alabama. Corwin v. New York & Erie R. R. Co., 13 N. Y. 42. Duffy v. New York, etc., R. R. Co., 2 Hilt. (N. Y. C. P.) 496. New Albany, etc., R. R. Co. v. Aston, 13 Ind. 545. New Albany, etc., R. R. Co., v. Bishop, 13 id. 566. Indianapolis, etc., R. R. Co. v. Townsend, 10 id. 38. Jeffersonville R. R. Co. v. Applegate, id. 49. Indianapolis, etc., R. R. Co. v. Meek, id. 502. Jeffersonville R. R. Co. v. Dougherty, id. 549. Nashville & Chattanooga R. R. Co. v. Peacock, 25 Ala. 229.

(g) Ricketts v. East & West India Docks, etc., Rail. Co., 12 C. B. 174. Eames v. Salem, etc., R. R. Co., 98 Mass. 560.

(h) Manch. Sheff. & Linc. Rail. Co. v. Wallis, 14 C. B. 224; 23 Law J., C. P. 85. Price v. New Jersey R. R. Co., 3 Vroom (N. J.), 19. Galpin v. Chicago, etc., R. R. Co., 19 Wis. 604. Chapin v. Sullivan R. R., 39 N. H. 53, 564. Woolson v. Northern R. R., 19 id. 267.

To the contrary see Hanibal & St. Joseph's R. R. Co. v. Kenney, 41 Mo. 271; Indianapolis, etc., R. R. Co. v. Guard, 24 Ind. 222; Indianapolis, etc., R. R. Co. v. McKinney, id. 283. In the following cases, among others, it has been held that a railroad corporation, which has neglected to fence its road and maintain cattle guards as required by statute, is liable for injuries to cattle straying on the track of the company, although the owner permitted them to run at large. Browne v. Providence, etc., R. R. Co., 12 Gray (Mass.), 55. Macon, etc., R. R. Co. v. Lester, 30 Ga. 911. Indianapolis, etc., R. R. Co. v. Guard, 24 Ind. 222. Indianapolis, etc., R. R. Co. v. McKinney, 24 id. 283. Munch v. New York Central R. R. Co., 29 Barb. 647. Tarwater v. Hanibal, etc., R. R. Co., 42 Mo. 193. Jeffersonville, etc., R. R. Co. v. Dunlap, 29 Ind. 426. Spence v. Chicago, etc., R. R. Co., 25 Iowa, 139. Brown v. Milwaukie, etc., R. R. Co., 21 Wis. 39. Whitbeck v. Dubuque, etc., R. R. Co., 21 Iowa, 102. McCall v. Chamberlain, 13 Wis. 637. Laws v. North Carolina R. R. Co., 7 Jones (N. C.), 468. And see Chicago, etc., R. R. Co. v. Cauffman, 38 Ill. 424; Williams v. New Albany, etc., R. R. Co., 5 Ind. 111.

In other cases it has been held that a railroad company is not liable for cattle killed while straying upon the railroad track, even though they escaped from a properly enclosed field without knowledge of the owner, and were on the highway at the time of the accident. North Penn. R. R. Co. v. Rehman, 49 Penn. St. 101.

Unless the accident occurred through the negligence of the company or its agents. Galpin v. Chicago, etc., R. R. Co., 19 Wis. 604. Jackson v. Rutland & Burlington R. R. Co., 25 Vt. (2 Deane,) 150. Kerwhacker v. Cleveland, Columbus & Cincinnati R. R. Co., 3 Ohio (N. S.), 172. New York & Erie R. R. Co. v. Skinner, 19 Penn. (7 Harris,) 298. Chicago, etc., R. R. Co. v. Barrie, 55 Ill. 528.

There is no law in Ohio requiring a railroad company to fence their road. Kerwhacker v. Cleveland, Columbus & Cincinnati R. R. Co., 3 Ohio (N. S.), 172. Nor is there such a statute in Pennsylvania. New York & Erie R. R. Co. v. Skinner, 19 Penn. (7 Harris,) 298.

But where a railroad corporation is legally bound to fence their line, an adjoining owner is not guilty of negligence in turning his cattle into a field traversed by the track, although he knew at the time that there was no fence. McCoy v. California R. R. Co., 40 Cal. 532. Shephard v. Buffalo, New York & Erie R. R. Co., 35 N. Y. 641. See Vicksburg & Jackson R. R. Co. v. Patton, 31 Miss. (2 George,) 156; Macon, etc., R. R. Co. v. Baber, 42 Ga. 300.

But if a railroad corporation have fenced their road to the extent and in the manner

But if cattle are passing along a highway under the care of the servants of the owner, the latter is lawfully using the way, and is deemed to be a temporary occupier of the highway, and, consequently, an occupier of land adjoining the railway within the words of the statute, so as to render it incumbent upon the company to maintain fences for the safety of his cattle so traversing the highway. Where a colt strayed from a field on to a public road, and the servants of the owner of the colt went in pursuit of it, headed it, and drove it back along the highway towards the field from which it had escaped, and the colt turned through an open gate into a coal-yard abutting upon a railway, and not fenced therefrom, and passed on to the railway, and was killed by a passing train, it was held that the railway company was responsible for the accident, as the owner's servants were in the act of driving the colt home at the time it escaped through the open gate, and the colt was not then trespassing upon the highway⁽ⁱ⁾. But there

required by statute, the corporation will be liable for injuries to stock trespassing on their track only on the ground of negligence or wilful misconduct; and in an action by the owner of the cattle to recover for such injuries, the owner will be charged with negligence in permitting them to escape. *Fisher v. Farmer's Loan, etc., Co.*, 21 Wis. 73. *Hance v. Cayuga & Susquehanna R. R. Co.*, 26 N. Y. 428. *Indianapolis, etc., R. R. Co. v. Irish*, 26 Ind. 268. *Toledo, etc., R. R. Co. v. Fowler*, 22 Ind. 316. *Toledo, etc., R. R. Co. v. Thomas*, 18 Ind. 215. But see *Isbell v. New York, etc., R. R. Co.*, 27 Conn. 393; *Bulkley v. New York, etc., R. R. Co.*, id. 479. See *Chicago, etc., R. R. Co. v. Harris*, 54 Ill. 528.

And where a company is not required by law to fence its road, it is only liable for such injuries to animals as result from wantonness or gross negligence. *Illinois, etc., R. R. Co. v. Phelps*, 29 Ill. 447. *Indianapolis, etc., R. R. Co. v. Oestel*, 20 Ind. 231. *Knight v. New Orleans, etc., R. R. Co.*, 15 La. An. 105. *Great Western R. R. Co. v. Morthland*, 30 Ill. 451. *Galena, etc., R. R. Co. v. Griffin*, 31 Ill. 303. *Meyer v. North Missouri R. R. Co.*, 35 Mo. 352. *Indianapolis, etc., R. R. Co. v. McClure*, 26 Ind. 370. *St. Louis, etc., R. R. Co. v. Linder*, 39 Ill. 433. *Davis v. Burlington, etc., R. R. Co.*, 26 Iowa, 549. *Alger v. Mississippi, etc., R. R. Co.*, 10 Iowa (2 With.), 268. *Louisville, etc., R. R. Co. v. Ballard*, 2 Met. (Ky.) 177. *Northern Indiana R. R. Co. v. Martin*, 10 Ind. 460. *New York & Erie R. R. Co. v. Skinner*, 19 Penn. (7 Harris), 298. *Kerwhacker v. Cleveland, Columbus & Cincinnati R. R. Co.*, 3 Ohio (N. S.), 172.

As to what will be a sufficient fence to comply with the requirements of the statutes of the various states. See *Enright v. San Francisco, etc., R. R. Co.*, 33 Cal. 230; *Toledo, etc., R. R. Co. v. Thomas*, 18 Ind. 215; *Eames v. Salem, etc., R. R. Co.*, 98 Mass. 560; *Chicago, etc., R. R. Co. v. Utley*, 38 Ill. 410; *Tallman v. Syracuse, Binghamton & N. Y. R. R. Co.*, 4 Keyes (N. Y.), 128.

Where the statute of a state makes it the duty of railroad companies to fence their roads and keep their fences in repair, and also declares that such companies shall be liable for all injuries to animals arising from a neglect to perform this duty, the company will not be liable for such injuries, notwithstanding the phraseology of the statute, if such fences become out of repair through some accident or event beyond the control of the company, and repairs are made with reasonable diligence. *Antisdel v. Chicago & Northwestern R. R. Co.*, 26 Wis. 145. *Murray v. New York Central R. R. Co.*, 4 Keyes (N. Y.), 274. *Chicago, etc., R. R. Co. v. Barrie*, 55 Ill. 226. *Lemmon v. Chicago, etc., R. R. Co.*, 32 Iowa, 151. *Illinois, etc., R. R. Co. v. Swearingen*, 33 Ill. 289. *Toledo, etc., R. R. Co. v. Daniels*, 21 Ind. 256. *Toledo, etc., R. R. Co. v. Fowler*, 22 Ind. 316. *Illinois, etc., R. R. Co. v. Dickerson*, 27 Ill. 55.

As to the liability of a railroad company for injuries to animals which have strayed upon the track by reason of the cattle guards being negligently permitted to become filled with snow. See *Hance v. Cayuga & Susquehanna R. R. Co.*, 26 N. Y. 428; *Dunnigan v. Chicago, etc., R. R. Co.*, 18 Wis. 28.

(i) *Mid. Rail. Co. v. Daykin*, 17 C. B. 129.

is no duty imposed by statute or by the common law upon railway companies to fence off from their railway their own yards and enclosures around their stations(ii); and if cattle left in their yards stray therefrom, from the want of such fences, and get on the railway, and losses arise, the company is not responsible for such losses, unless it be shown that the cattle were under the care of the company's servants, or that the delivery of them was proceeding(j), and that they had failed to take proper means to prevent the cattle from straying(k).

245 *Negligent use and management of railway stations—Insufficient lights and guards.*—It is not sufficient for the lights at the station of a railway company to be quite sufficient for the company and their own servants, who know the premises, and are perfectly conversant with the approaches. They must be enough to guide and direct strangers who are wholly unacquainted with the locality. A degree of light which will enable a person who is familiar with a place to see all about him, and understand where he is, may not be sufficient to enable a person who is unacquainted with, or has an imperfect knowledge of, the locality, to find his way or to guard against danger. "Railway companies are to light their railway," observes Maule, J., "not for their own servants alone, but for persons who have never been there before, and who may be in a great hurry to reach the train; and they are to light it so as to enable them to see their way. . . If they choose to allow people to cross the line at the last moment, they should have a person to point out to passengers who are in a hurry the right course for them to take; or if they have not a man, they might have a board pointing to the direction: for they are bound to do what is needful for the safety of their passengers." Where, therefore, the plaintiff, being on his return-journey with a return-ticket, and, having got to the wrong side of the railway, crossed the line to get to the return-train at a place where there was no proper crossing, there

(ii) *Davis v. Burlington, etc., R. R. Co.*, 26 Iowa, 549. *Blair v. Milwaukee R. R. Co.*, 20 Wis. 254. *Bennett v. Chicago, etc., R. R. Co.*, 19 Wis. 145. *Galena, etc., R. R. Co. v. Griffin*, 31 Ill. 303. *Indianapolis, etc., R. R. Co. v. Oestel*, 20 Ind. 231. But where a statute requires that cattle guards shall be constructed at all road crossings, the fact that the crossing is at or near a depot, and that to make such cattle guard there would inconvenience the company, will not excuse them from complying with the statute. *Bradley v. Buffalo, New York & Erie R. R. Co.*, 24 N. Y. 427. *Tracy v. Troy & Boston R. R. Co.*, 38 N. Y. 433. The statute applies to streets in a city or village. *Bruce v. N. Y., etc., R. R. Co.*, 27 N. Y. 269. See *Chicago, etc., R. R. Co. v. Ried*, 24 Ill. 144. A portion of a railroad is not excepted from the requirements of the statute as to fences, merely because it is within city limits. *Indianapolis, etc., R. R. Co. v. Parker*, 29 Ind. 471.

(j) *Rooth v. North-East Rwy., L. R.*, 2 Exch. 173.

(k) *Roberts v. Gt. West. Rail. Co.*, 4 C. B. 506; 27 Law J., C. P. 266. *Marfell v. South Wales Rail. Co.*, 8 C. B., N. S. 534.

being no person to point out to him the proper crossing, and fell over a switch-handle, which he could not see for want of light, it was held that the company was responsible for the injury he sustained(*l*). And so where the plaintiff, not being able to cross to the exit side of the station, by reason of the train by which he had just arrived blocking up the proper crossing for ten minutes or a quarter of an hour, crossed behind the train, and fell over a hamper(*m*).

But, in order to make out a case of negligence or of neglect of duty on the part of the company, it must be shown that they used or managed their property in such a way as to render it likely to be a source of danger to their passengers, and persons lawfully using the station(*n*). It is not enough to show that they have doors opening upon the platform, and steps leading from those doors, and that the plaintiff tumbled down the steps, without showing that the steps are more than ordinarily dangerous(*o*). There is no obligation on them, for instance, to provide hand-rails, and the steps may be tipped with brass, though possibly a different metal might be safer(*p*). Nor is it enough to show that the company had a weighing-machine on the platform, and that the plaintiff tumbled over it. In these cases it is always a question whether the mischief could reasonably have been foreseen, and whether precautions ought not to have been taken to guard against it(*q*). Where rules are promulgated by a railway company for the management of a station, and injuries are caused by the servants of the company endeavoring to carry these rules into effect, the company is responsible in damages, unless the injured party brought the mischief upon himself by his own negligence(*r*).

(*l*) *Martin v. Gt. Northern Rail. Co.*, 16 C. B. 180; 24 Law J., C. P. 209. *Birket v. Whitehaven Junc.*, 4 H. & N. 730; 28 Law J., Exch. 348.

(*m*) *Nicholson v. Lanc. & Yorkshire Rail. Co.*, 34 L. J., Exch. 84. And see *Holmes v. North East. Rwy.*, 38 L. J., Exch. 161.

(*n*) *Burgess v. Gt. West.*, 32 Law T. R. 76. Railway companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers, or those who have purchased tickets, with a view to take passage on their cars, would naturally or ordinarily be likely to go. *McDonald v. Chicago & Northwestern R. R. Co.*, 26 Iowa, 124. *Knight v. Portland & Portland R. R. Co.*, 56 Me. 505. So railroad corporations are bound, not merely to keep their platforms safe for their passengers, but for all who have rightful occasion to use them. Thus where a hackman while carrying a passenger to a railroad depot stepped into a cavity in a platform, negligently left by the company in defective condition, and was injured, it was held that the company was liable, notwithstanding the platform was within the limits of the highway. *Tobin v. Portland, Saco & Portland R. R. Co.*, 59 Me. 183.

(*o*) *Tooney v. Lond. & Br. Rail. Co.*, 3 C. B., N. S. 146; 27 Law J., C. P. 39.

(*p*) *Crafter v. Metrop. Rwy.*, L. R., 1 C. P. 300.

(*q*) *Cornman v. East. Co. Rail. Co.*, 4 H. & N. 785; 29 Law J., Exch. 94.

(*r*) *Vose v. Lanc. & York. Rail. Co.*, 2 H. & N. 728; 27 Law J., Exch. 249; *post*, ch. 5. As to the duty of railroad corporations to protect the persons and property of shippers of freight

246 *Ruinous and insecure railway bridges, viaducts and embankments.*—

Every railway company in the actual possession and occupation of its line of railway is responsible for the maintenance and preservation in a good state of repair of all its bridges, viaducts, and embankments, so that if any injuries are sustained either by persons traveling along a highway under a bridge or viaduct, or by passengers traveling along the line, from the ruinous and insecure state of such bridge or viaduct, the railway company will be responsible for the injury, whether it arose from their own neglect in not providing needful reparations, or from original faulty construction of the fabric by their engineer or contractor(s). If a railway embankment has been injured by some wholly unexpected and extraordinary flood, and the rails give way, and the passengers are injured without any neglect or default on the part of the company, the company is not responsible for the injuries that may be sustained by the passengers(*l*); but every railway company is bound to construct and maintain its embankments and earth-works in such a manner as to be capable of resisting all the violence of the weather, which may be expected at some time or another, though rarely, to occur, and if it fails in this duty it will be responsible in damages for negligence(*u*).

247 *Neglect of railway companies to erect and maintain bridges over highways.*—By 8 & 9 Vict. c. 20, s. 46, it is enacted, that if the line of railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, such bridge to be maintained “with the immediate approaches,” at the expense of the company; but it is provided that, with the consent of two or more justices in petty sessions, it shall be lawful for the company to carry the railway across any highway other than a public carriage-road on the level(*v*). Under this section the railway company is bound to keep in repair the immediate

while loading or unloading the same at or near a depot, see *Newson v. New York Central R. R. Co.*, 29 N. Y. 383; *Stinson v. New York Central R. R. Co.*, 32 N. Y. 333.

(*l*) *Ante*, pp. 201-203. *Chester v. Holyhead Rail. Co.*, 2 Exch. 251. As to bridges at stations for passengers to cross by, see *Longmore v. Gt. West. Rwy.*, 35 L. J., C. P. 135. As to how far his liability extends to injuries to employees, see *Warner v. Erie R. R. Co.*, 39 N. Y. 468.

(*t*) *Withers v. North Kent Rail. Co.*, 27 Law J., Exch. 417.

(*u*) *Gt. West. Rail. Co. of Canada v. Fawcett*, 1 Moore's P. C. C., N. S. 120. As to the liability of railroad corporations for injuries caused by the negligent and unskillful construction of a culvert, see *Pittsburg, etc., R. R. Co. v. Gilleland*, 56 Penn. St. 445; *Judson v. New York, etc., R. R. Co.*, 29 Conn. 434.

(*v*) As to the statutes of Maine, in relation to the construction of railroads across highways and streets in cities and towns, see *Veazie v. Mayo*, 45 Me. 560; Statutes of 1853, ch. 41, s. 3; R. S. 1857, ch. 51, s. 15.

approaches to the road where the road is carried over the railway(*x*), but not where it is carried under it(*y*). The railway company is also liable, under s. 58, to make good the damage done to any road during the construction of the works by carts, etc., passing along it, although such carts are not theirs, but belong to the contractor who has engaged to make the railway(*z*).

- 248 *Negligent management of railway-gates placed across public carriage-roads*.—When a railway crosses any turnpike-road, or public carriage-road on a level, the company must, unless otherwise authorized by their special Act, erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and employ proper persons to open and shut such gates, and keep them constantly closed across the road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the road shall have to cross the railway; and the gates must be of such dimensions and so constructed as, when closed, to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway (s. 47). This section does not authorize a person passing along the highway to open the gates himself, although after waiting a reasonable time no servant of the company appears to do so, and if owing to his opening the gates he sustains an injury the company is not responsible(*a*).

Wherever this section of the statute, or one of a similar import, is in force, it imposes upon the railway company governed by it the duty of closing the gates across public carriage-roads carefully against everything passing lawfully or unlawfully along the high-road. Where, therefore, the plaintiff's horses strayed from his field into the high-road, and passed from thence through an open gate, and got upon a railway, and were killed by a passing train, it was held that the railway company was responsible for the loss, as the obligation to keep the gates closed imposed upon them the duty of closing them carefully against everything passing lawfully or unlawfully along the high-road(*b*).

- 249 *Negligent management of gates placed across tramways*.—Where a railway company were the owners of a tramway which crossed their railway on a level, and which tramway they allowed the public to use

(*x*) *Leech v. North Staff. Rwy.*, 29 L. J., M. C. 150.

(*y*) *Lond. & North West. Rwy. v. Skerton*, 33 L. J., M. C. 158.

(*z*) *West Riding Rwy. v. Wakefield Board of Health*, 32 L. J., M. C. 174.

(*a*) *Wyatt v. Gt. West. Rwy.*, 34 L. J., Q. B. 204 (*diss.* Blackburn, J.).

(*b*) *Fawcett v. York & North Mid. Rail Co.*, 16 Q. B. 618.

on payment of toll, it was held that the law imposed upon the railway company the duty of taking all reasonable precautions for the protection of the public using the tramway, and where fences and gates are put up for the protection of the public, the company is responsible for the consequences resulting from their negligently leaving the gates open(c).

250 *Leaving open accommodation gates.*—By s. 75 it is further enacted, that if any person omit to shut and fasten any gate set up at either side of the railway for the accommodation of the owners or occupiers of the adjoining lands, as soon as he, and the carriage, cattle, or other animals under his care have passed through the same, he shall forfeit for every such offence a sum not exceeding forty shillings.

No duty is imposed upon railway companies to watch and keep closed gates put up for the accommodation of an adjoining landed proprietor, whose land extends along both sides of a railway. And where a railway company provides the adjoining landowners with keys for the gates, the company is not responsible for the destruction of cattle straying upon the line in consequence of the gates being left open(d) or insecurely fastened. And if the plaintiff had the means of making the gate secure, and neglected them, his own neglect in the matter will be a bar to the maintenance of an action against the railway company for the injury he has thereby sustained(e).

251 *Dangerous Canals.*—Every canal company, so long as it keeps its canal open for the public use of all who may choose to navigate it, is bound to take reasonable care that they may navigate it without danger to their lives or property(f). Every canal company is bound also to take all reasonable and proper precautions for the protection of the public, where the canal intersects public thoroughfares. In such cases

(c) *Marfell v. South Wales Rail. Co.*, 8 C. B., N. S. 535.

(d) *Ellis v. Lond. & S. W. Rail. Co.*, 2 H. & N. 429; 26 Law J., Exch., 349. See *Antisdell v. Chicago & North-Western R. R. Co.*, 26 Wisconsin. 145; *Murray v. New York Central R. R. Co.*, 4 Keyes (N. Y.), 274; *Chicago, etc. R. R. Co. v. Barrie*, 55 Ill. 226; *Lemmon v. Chicago, etc. R. R. Co.*, 32 Iowa, 151; *Illinois, etc. R. R. Co. v. Swearingen*, 33 Ill. 289; *Toledo, etc. R. R. Co. v. Daniels*, 21 Ind. 256; *Toledo, etc. R. R. Co. v. Fowler*, 22 Ind. 316; *Illinois, etc. R. R. Co. v. Dickinson*, 27 Ill. 55.

(e) *Haigh v. Lond. & North-West. Rail. Co.*, S. W. R. 6. *Illinois, etc. R. R. Co. v. McKee*, 43 Ill. 119.

(f) *Lanc. Canal Co. v. Parnaby*, 11 Ad. & E. 243. *Gibbs v. Trustees Liv. Dock*, 27 Law J., Exch. 321; 3 H. & N. 164; 35 Law J., Exch. 225; L. R., 1 App. Ca. 93. The same obligation rests upon a contractor employed by the State, pursuant to law, to keep a portion of the canals in proper condition and repair. *Robinson v. Chamberlain*, 34 N. Y. 389. *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648. But a canal company are bound only to take reasonable care that the canal maintained by them may be navigated without danger, and are not responsible for accidents which do not arise from the want of this reasonable care. They are not, like common carriers, responsible as insurers. *Exchange Fire Insurance Co. v. Delaware & Hudson Canal Co.*, 10 Bosw. (N. Y.) 180.

there is a common-law obligation on the company to make and maintain sufficient bridges with proper rails and lights, such as all persons passing along the highway can safely use(*f*). When the high-road traverses the canal by a swing-bridge, and the bridge is opened for the passage of boats and vessels, the company is bound to provide sufficient lights, or persons to watch and warn passengers, or to have some apparatus attached to the bridge itself, to protect passengers when the bridge is open, and prevent them from falling into the water(*g*). But if the canal has been demised to a lessee, who is in the actual possession and occupation of it, and who receives the toll for the use of it, it is not then the duty of the proprietors of the canal to maintain and repair the canal, unless the particular statute under which they are incorporated expressly imposes that duty upon them(*h*). A canal company is not bound, however, to fence off its canal from an adjoining thoroughfare, unless it is "so near thereto as to be dangerous to persons using the road in the line of the road"(*i*).

252 *Negligent management of docks and wharfs.*—A duty is cast upon trustees and commissioners and other persons who have the receipts of the tolls and the possession and management of a dock or wharf vested in them, to keep the entrance to the dock or wharf free from dangerous shoals and obstructions, and to forbear from having the dock or wharf open for public use when they know it cannot be navigated or used without danger, whether the tolls are received by them for their own use or in a fiduciary character; and if they keep the dock or wharf open, and allow the danger to continue, and invite vessels into peril, they will be personally responsible for any damage that may be sustained(*k*). So if a person who has lawful business on

(*f*) If a canal company under the authority of their charter, build a bridge over their canal, and at the time of its construction it is rotten or unsafe, or subsequently becomes so, it is a public nuisance, and a traveler who has in passing over it suffered a direct special injury from its defective condition is entitled to recover damages from the company. *Pennsylvania & Ohio Canal Co. v. Graham*, 63 Penn. St. 290. *Baxter v. Winski Turnpike Co.* 22 Vt. 122.

The same liability attaches to those maintaining a private canal crossed by a highway. *Inhabitants of Woburn v. Henshaw*, 101 Mass. 193.

If a canal is constructed across a private road the owner can compel the canal owners to bridge it. *Habersham v. Savannah*, etc. Canal Co., 26 Geo. 665. Where a canal company are bound to keep in repair a private bridge crossing the canal, they will not be relieved from the obligation from the fact that a railroad company have built a road on the banks of the canal where the bridge crossed, and so altered it as to increase the cost of keeping it in repair. *Ammerman v. Wyoming*, etc. Co., 40 Penn. St. 256.

(*g*) *Manley v. St. Hel. Can. & Rail. Co.*, 2 H. & N. 840; 27 Law J., Exch. 164.

(*h*) *Walker v. Goe*, 4 Exch. 350; 27 Law J., Exch. 427. As to the common law duty of the actual occupier to keep his premises in such a state as not to be a source of annoyance to his neighbors, see *ante*, p. 193.

(*i*) *Binks v. South York & River Dun*, etc., 3 B. & S. 244.

(*k*) *Gibbs v. Trust. Liv. Dock*, 27 Law J., Exch. 321; 3 H. & N. 164; 35 L. J., Exch. 225; L. R., 1 App. Ca. 93. And see *Thompson v. North East. Rail. Co.*, 2 B. & S. 106; 31 Law J., Q.

board a ship lying in dock is injured by the insufficiency of a gangway provided by and under the control of the dock company for the purpose of affording access to the ships lying in the dock, the company will be liable for such injury(l).

253 *Dangerous machinery*.—If a corporation causes baths and wash-houses, and wringing machinery, to be erected and used for hire, it is bound to take all reasonable care to prevent the machinery from being a source of danger to those who use it(m).

254 *Injuries to servants from dangerous premises or employment*.—Every master who employs servants and workmen to work upon his land, house, or premises, is bound to take all reasonable precautions for their safety, and if hidden and secret dangers exist upon his premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, that they may take precautions against them(n). If a master was to order his servant to take a lighted candle amongst packages known by him, but not known to the servant, to contain gunpowder, the master would be responsible for any injury sustained by the latter from the unknown danger and unexpected risk to which he had been exposed. So if a servant be employed to cut up diseased cattle(o). It is otherwise if the servant accepts of the employment

B. 194; 30 ib. 67; *Mersey Docks, etc. v. Penhallow*, 7 H. & N. 329; *post*, ch. 16, sect. 1. A city, being in possession of a public wharf within its limits, exercising exclusive supervision and control over it, and receiving tolls for its use, is bound to keep it in proper condition, and is liable for special injury sustained by an individual in consequence of its neglect to keep the wharf in repair. *Pittsburg City v. Grier*, 10 Harris, 54. *Jeffersonville v. Louisville, etc. Ferry Co.*, 27 Ind. 100. *Seaman v. New York*, 3 Daly (N. Y.), 147. When the right of the city to collect wharfage is transferred to another party, he assumes with the rights, all the duties and liabilities of the assignor. *Radway v. Briggs*, 37 N. Y. 256.

(l) *Smith v. Lond. Dock Co.*, L. R., 3 C. P. 326. A person entitled to receive wharfage is liable for the value of a horse, cart and load of merchandise which for want of a suitable guard has been lost by backing off a wharf into a river. *Radway v. Briggs*, 37 N. Y. 256.

(m) *Cowley v. Mayor, etc.*, of Sunderland, 6 H. & N. 565; 30 Law J., Exch. 127. *White v. Phillips, ante*, p. 209. Where shafting with cog-wheels upon it was allowed to project through a wall within two feet of the ground and in an open space near the street, and to remain entirely uncovered, so that a child at play was drawn between the wheels and injured, it was held that the owner of the mill was liable for the negligence. *Whirley v. Whiteman*, 1 Head (Tenn.), 610. See *Hayden v. Smithville, etc., Co.*, 29 Conn. 548.

(n) *Williams v. Clough*, 3 H. & N. 258; 27 Law J., Exch. 325. *Mellors v. Shaw*, 1 B. & S. 444. *Ashworth v. Stanwix*, 30 Law J., Q. B. 183. *Perry v. Marsh*, 25 Ala. 659. *Buzzell v. Laconia etc. Co.*, 48 Me. 113.

(o) *Davies v. England*, 33 L. J., Q. B. 321. So if a ship builder employs one who is neither a ship carpenter, joiner, or mechanic of any kind, and directs him to remove rubbish from beneath a scaffold upon which so great a weight of lumber is piled as to cause it to give way, the employer will be responsible for the injuries to the servant, on the ground of the presumed ignorance of the servant, and his right to rely upon the superior knowledge of his employer. *Conolly v. Poillon*, 41 Barb. (N. Y.) 366. So where a depot master directs a laborer, employed to load and unload freight cars, to couple cars, and the laborer is injured through the negligent management of the engine while obeying such orders, the railroad corporation will be liable. *Lalor v. Chicago, Burlington & Quincy R. R. Co.*, 52 Ill. 401. So where a brakeman, while in the performance of his duties, is struck and injured by an awning projecting from a

knowing of the risk he runs (see *infra*). If the danger is unknown to the master, and there is no negligence on his part, he cannot be made responsible in damages(*p*); as where a floor of a warehouse gave way and injured a workman who was thereon(*q*). So if a railway company employs workmen upon its tunnels, sidings, or stations, it is guilty of negligence if it conducts its traffic so as to expose the workmen to unexpected and unforeseen dangers, which they had no means of guarding against(*r*).

255 *Exemption of the master from liability when the danger is known to the servant.*—But the master is not responsible for the dangerous state of his premises, if those dangers are known to the servant, and the latter has accepted the employment knowing of the attendant risks, and having an opportunity of guarding against them by his own vigilance and care(*rr*). Where the plaintiff alleged that he had been hired by the defendant to perform at the defendant's theatre, and that on part of the stage there was a hole in the floor, along which the plaintiff had to pass in the discharge of his duty as a performer, and that it was the duty of the defendant to light the floor sufficiently, so as to prevent accidents to those who passed along it, it was held that no such duty was cast upon the defendant. "A person," observes Erle, J., "must make his own choice whether he will accept employment upon premises in this condition; and if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark, or carry a light. If he sustain an injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted." If the servant wishes the premises to be kept in any particular state with respect to lighting and fencing, he must provide for it by express contract(*s*).

station-house, the railroad company will be liable if they had notice of the dangerous position of the awning, and the brakeman was ignorant of the danger. *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183. So a factory girl injured by the fall of a privy attached in an insecure and dangerous manner to the factory in which she was employed, may recover damages from her employer, on the ground that the latter knew, or ought to have known, of the danger to which the former was ignorantly exposed, and, knowing, negligently failed to provide against it. *Ryan v. Fowler*, 24 N. Y. 410.

(*p*) *Potts v. Port Carlisle etc. Co.*, 2 Law T. R., N. S. 283; 8 W. R. 524. See *Wright v. New York Central R. R. Co.*, 25 N. Y. 562; *Hayden v. Smithville Manufacturing Co.*, 29 Conn. 548; *Keegan v. Western R. R. Co.*, 8 N. Y. 175.

(*q*) *Brown v. Accrington Cotton Co.*, 34 L. J., Exch. 208.

(*r*) *Vose v. Lanc. & York. Rail. Co.*, 2 H. & N. 728; 27 Law J., Exch. 249.

(*rr*) *McGlynn v. Brodie*, 31 Cal. 376.

(*s*) *Seymour v. Maddox*, 16 Q. B. 332. *Bolch v. Smith*, 7 H. & N. 736; 31 Law J., Q. B. 201. *Robertson v. Adamson*, 24 Sc. Sess. Cas. 1231. *Potts v. Plunkett*, 9 Ir. C. L. R. 290. But see *Ryan v. Fowler*, 24 N. Y. 410.

256 *Where the workman is employed in the use of dangerous machinery furnished by the employer, and is, or professes to be, acquainted with the use of the machinery, and the care necessary to be taken to guard against accident, and, notwithstanding this, sustains injury from his own want of care and caution in the use of it, he has, of course, no ground of action against the employer(t). But if an Act of Parlia-*

(t) *Dynen v. Leach*, 26 Law J., Exch. 221. *Barton's Hill Coal Co. v. Reid*, 3 Macq. 294. See *Watling v. Oastler*, L. R., 6 Exch. 73. The master is liable to his servant for an injury happening to him from the misconduct or personal negligence of the master; and this negligence may consist in the employment of unfit and incompetent servants and agents, or in the furnishing for the work to be done, or for the use of the servant, machinery or other implements and facilities improper and unsafe for the purpose to which they are to be applied. *Hayden v. Smithville Manuf. Co.*, 29 Conn. 548. *Wright v. New York Central R. R. Co.* 25 N. Y. 562. *Ryan v. Fowler*, 24 id. 410. *Keegan v. Western R. R. Co.*, 8 id. 175. *Roberts v. Smith*, 2 Hen. & Munf. 213. *Williams v. Clough*, 3 id. 257. *Griffiths v. Godson*, id. 648.

The employer does not undertake with each or any of his employees for the sufficiency and safety of the materials and implements furnished for the work; and if an injury to a servant arises from a defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same through his own negligence and want of proper care; or in other words, that he either knew or ought to have known the defects which caused the injury. *Wright v. New York Central R. R. Co.*, 25 N. Y. 562. *Hayden v. Smithville Manuf. Co.*, 29 Conn. 548. *Roberts v. Smith*, 2 Hen. & Munf. 213. *Keegan v. Western R. R. Co.*, 8 N. Y. 175. *Ryan v. Fowler*, 24 id. 410. *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411. *Noyes v. Smith*, 28 Vt. 59.

If the servant sustaining an injury through defects in the machinery or conveniences furnished by his employer, has the same knowledge or means of knowledge of the defects as his employer, he cannot sustain an action for the injury, but will be held to have voluntarily assumed all the risks of the employment incurred through the defects in the machinery used in the work. *Wright v. New York Central R. R. Co.*, 25 N. Y. 562. *Hayden v. Smithville Manuf. Co.*, 29 Conn. 548. *Griffiths v. Godson*, 3 Hen. & Munf. 213. *Williams v. Clough*, id. 257. *Keegan v. Western R. R. Co.*, 8 N. Y. 175. *Frazer v. Pennsylvania R. R. Co.*, 38 Penn. St. 104. *Mad River, etc., R. R. Co. v. Barber*, 5 Ohio St. 541, 562. *Buzzell v. Laconia Manuf. Co.*, 48 Me. 117. *Kroy v. Chicago, etc., R. R. Co.*, 32 Iowa, 357. *McGlynn v. Brodie*, 31 Cal. 376. *Combs v. New Bedford Cordage Co.*, 102 Mass. 572.

And to charge the master for injuries to his servant on the ground that the materials, implements or machinery furnished by the master to the servant were defective or insufficient, unsafe and unfit for the purpose used, the injury must have resulted from this cause. And if it was occasioned notwithstanding these defects, by the negligence of a fellow-servant, the master is not responsible. *Hayes v. Western R. R. Co.*, 3 Cush. 270. *Wright v. New York Central R. R. Co.*, 25 N. Y. 562. *Warner v. Erie R. R. Co.*, 39 id. 468. *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411. If, however, the injury in no way resulted from the negligence of the fellow-servant in the management of the machinery, but was due solely to the negligence of the master in the selection of the materials, the master will be liable. *Perry v. Ricketts*, 55 Ill. 234. And see *Chicago v. Railway Co.*, id. 492.

In *Mad River & Erie R. R. Co. v. Barber*, 5 Ohio St. 541, a railroad company was held to be liable for injuries to an employee where the defects which caused the injury were actually unknown to the company and conductor, and were not discoverable by due and ordinary care and inspection, but were such as resulted from a neglect of reasonable and ordinary care and diligence on their part either in procuring or continuing to use cars and machinery beyond the time when they could be safely used.

In *Keegan v. Western R. R. Co.*, 8 N. Y. 175, a railroad company which continued in use a defective and dangerous locomotive engine, after notice of its dangerous condition, was held liable to one of its servants engaged in running such engine for an injury sustained by him (without negligence on his part), in consequence of such defects. And in many well considered cases it has been held that a servant may maintain an action against his master for an injury caused by defective machinery, when the employer knew or ought to have known of the defect and the servant did not know it, and had not equal means of knowledge. *Hayden*

ment requires machinery to be fenced, and it is left unfenced, and the servant complains, and the master induces him to continue his work by telling him that proper protection shall be afforded, the master takes upon himself the responsibility of any accident that may occur(u).

257 *Injuries to workmen from defective hoisting-tackle in mines and insecure scaffolding and ladders.*—It has been held, in a Scotch case in the House of Lords, that the owner of a mine is bound to exercise ordinary care and vigilance to keep the shaft of the mine in a safe state, and the machinery for lifting people from the mine, and lowering them into it, in secure condition(x). And it is in all cases the master's duty to be careful that his workman be not induced to work under the notion that the tackle, scaffolding, or rope with which he works is secure, when the master knows, or has reasonable ground for believing, that it is unsafe and dangerous. If he interferes in the conduct and management of the work himself, he is bound to select sound and safe materials; and if he knowingly allows rotten timber, rotten poles, or rotten ropes to be used in the construction of a scaffold, and injury is sustained therefrom by his servants or workmen, he will be responsible in damages(y). But if he does not in any way interfere himself, and employs a competent foreman to superintend the work, and select

v. Smithville Manuf. Co., 29 Conn. 548. *Wright v. New York Central R. R. Co.*, 25 N. Y. 565. *Gibson v. Pacific R. R. Co.*, 46 Mo. 163. *Chicago & North-Western R. R. Co. v. Jackson*, 55 Ill. 492. *McGartrick v. Wason*, 4 Ohio St. 566. *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183. *Chicago & North-Western R. R. Co. v. Swett*, 45 id. 201. *Nashville, etc., R. R. Co. v. Elliott*, 1 Cold. (Tenn.) 611.

(u) *Holmes v. Clarke*, 30 Law J., Exch. 135; 31 ib. 356. *Weems v. Mathieson*, 4 Macq. H. L. C. 215. *A fortiori*, therefore, if he enters on the employment without a full knowledge of the risk he runs. *Britton v. Great Western Cotton Co.*, L. R., 7 Exch. 130. Where an action was brought against his employers by a boy fourteen years old to recover damages for injuries received, on the second day of his employment, while standing in his proper place tending a drawing machine, by accidentally allowing his fingers to be caught in the cogs of a similar machine standing in dangerous proximity, it was held, that the jury should be instructed that the defendants had a right to run their machinery without fencing or boxing it, unless by so doing they exposed persons in their employment, or other persons who came upon their premises by their procurement or invitation, to danger of which they gave no sufficient notice; that if, by the fact the cogs were in sight, and the danger from them apparent, the jury should be satisfied that the plaintiff had reasonable notice of the peril to which he was exposed, and understanding it, chose to undertake the employment which exposed him to it, he cannot recover; but that if, on the other hand, they should be satisfied that the defendant knew, or had reason to know, the peril to which he would be exposed, and did not give him any sufficient or reasonable notice of it, and if he without any negligence on his part, from inexperience or reliance on the directions given him, failed to perceive or appreciate the risk, and was injured in consequence, that the defendants would be liable. *Combs v. New Bedford Cordage Co.*, 102 Mass. 572. As to liability of owners of threshing machines under Iowa Laws, 1866, ch. 135, requiring tumbling rods of threshing machines to be boxed, see *Reynolds v. Hindman*, 32 Iowa, 146.

(x) *Brydon v. Stewart*, 2 Macq. 34.

(y) *Roberts v. Smith*, 26 Law J., Exch. 319; 2 H. & N. 213. *Senior v. Ward*, 28 Law J., Q. B. 139. *Mellors v. Shaw*, 1 B. & S. 444. *Conolly v. Poillon*, 41 Barb. (N. Y.) 366. *Buzzell v. Laconia Manuf. Co.*, 48 Me. 113.

the materials, and the foreman selects unsound and unsafe materials, or knows that those he has selected have become unsafe, which cause injury to the workmen working under the foreman's directions, the master is not responsible, as the default is not in him, but in the foreman and fellow-servant of the injured workman, and the case then ranges itself with that class of cases where it has been held, that the master is not responsible for injuries to one fellow-servant caused by the negligence of another fellow-servant in his employ(z).

258 *Injuries to guests from the dangerous state of the premises of their host.*

—A man who invites and receives visitors at his house is under the same obligation and liability as regards them, in respect of unusual and unsuspected dangers on his premises, as he is towards his own servants and members of his family, and is not responsible for injuries arising from doors badly hung, and which are dangerous and unfit to be opened, unless he was himself aware of the dangerous state of the door, and the guest was wholly ignorant of it(a). If the dangers are patent and visible, the visitor who comes to, and is received within, the house, must share those dangers in common with the other members of the family(b). But there is a distinction between a visitor who is a bare licensee, and a person coming on lawful business, as to a shop, warehouse, railway, or ship, who may recover for injuries that a visitor would not be entitled to recover for(c).

259 *Contributory negligence on the part of the plaintiff*—If the negligence of the plaintiff himself or of his servants has been the proximate cause of the injury of which he complains, he has no ground of action(d). If, therefore, the plaintiff does not take due and proper care to keep his cattle within bounds; if he or his servants leave gates open which they ought to have closed; or if he allows cattle to be driven across a railway by little boys who are unable or unlikely to exercise proper care and forethought, and in consequence thereof cattle stray on the line and get killed, he cannot recover compensation from the railway company for the loss(e). Where a railway crossed an occupation-way

(z) *Wigmore v. Jay*, 5 Exch., 358; *post*, ch. 5. *Williams v. Clough*, 3 H. & N. 258; 27 Law J., Exch. 325. *Griffiths v. Gidlow*, *id.* 404. *Farwell v. Boston, etc., Rail. Co.* 3 Macq. 316. *Ormond v. Holland*, Ell. Bl. & Ell. 105. *Scott v. Craig*, 24 Sc. Sess. Ca. 789. *Searle v. Lindsay*, 11 C. B., N. S. 429; 31 Law J., C. P. 106. *Gallagher v. Piper*, 33 Law J., C. P. 329. *Feltham v. England*, L. R., 2 Q. B. 33. See *Forsyth v. Hooper*, 11 Allen (Mass.), 419; *Hunt v. Pennsylvania R. R. Co.*, 51 Penn. St. 475; *Mercer v. Jackson*, 54 Ill. 397.

(a) And see *Collis v. Seiden*, L. R., 3 C. P. 495.

(b) *Southeote v. Stanley*, 1 H. & N. 247.

(c) *Indermaur v. Dames*, L. R., 1 C. P. 274; 2 ib. 311. *Holmer v. North-East Rail.* 38 L. J., Exch. 161; L. R. 4 Exch. 254; 6 ib. 123. *John v. Bacon*, L. R., 5 C. P. 437.

(d) *Ante*, pp. 24-28; *post*, ch. 10, s. 1.

(e) *Haigh v. Lond. & North-West. Rail. Co.*, 8 W. R. 6.

for horses and cattle, along which there was also a public foot-path, and the company, not being aware of the public foot-path, neglected to apply for the consent of justices for crossing the cattle-way on a level, but made their railway, and erected lofty gates on each side of the railway where it crossed the occupation-way, and gave keys of the gates to each of the adjoining occupiers who were entitled to use the occupation-road, and the servant of the plaintiff, one of the occupiers, who was in the habit of driving the plaintiff's cows daily backwards and forwards across the line, received a key from the company, and lost it, and after that fastened the gate by thrusting a piece of wood through the staple, and the gate being left open, two colts of the plaintiff's strayed from his field along the occupation-way, through the open gate, upon the line of railway, and were killed by the passing train, it was held to be a question for the jury whether the negligence of the plaintiff had contributed to the accident; and they being of opinion that it had, it was held that the defendant was entitled to a verdict(f).

260 *Where the plaintiff's right to recover is not defeated by his being a trespasser.*—If the plaintiff has sustained injury from man-traps or spring-guns placed on the defendant's land, or from falling into an unfenced and unguarded pit or well sunk within twenty-five yards of any public carriage-way, it is no answer to the plaintiff's claim for damages to say that he was trespassing on the defendant's land, and that the injury was caused by his own misconduct (*ante*, pp. 167, 171). If the defendant has, by putting strong-smelling meats into traps on his land, tempted the plaintiff's dogs or cats to the traps to their destruction, it is no answer to say that the animals were trespassing on the defendant's land at the time they came to grief (*ante*, p. 168).

If the defendant makes a path to his house, and places unseen and unexpected dangers in or closely adjoining to the path, it is no answer to injured parties claiming compensation to say that they had no business to come upon the land (*ante*, p. 202). So, if the defendant negligently leaves a vault or area unfenced and unguarded, so close to a street or public highway as to be dangerous to passengers, it is no answer to a claim for damages by persons who have fallen into the vault whilst endeavoring to keep to the high-road, to show that there was a narrow intervening strip of the defendant's land extending between the highway and the area, on which the plaintiff was tres-

(f) *Ellis v. Lond. & S. W. Rail. Co.*, 2 H. & N. 429; 26 Law J., Exch. 349.

passing at the time he fell into the pit(*g*). But wherever a person designedly deviates from the highway and commits a trespass, in order to make a short cut across the defendant's land, and in so doing falls into an open, unguarded vault or cellar, more than twenty-five yards distant from the highway, the defendant is not responsible for the injury(*h*). And whenever a person neglects to keep a proper watch upon his flocks and herds, and allows them to trespass on the highways and byeways and adjoining land, and the trespassing cattle get injured, the plaintiff, being himself in default, may have no remedy for the injury he sustains(*i*).

261 *Nuisances and injuries from the keeping of ferocious animals.*—Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is, *prima facie*, liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous disposition(*k*). But a man is entitled to keep a ferocious dog for the protection of his premises, and to turn it loose at night, provided the barking of the dog does not disturb the rest of the neighbors and create a nuisance (*ante*, p. 167). And, therefore, where the defendant, for the protection of his yard, kept a fierce dog, which was tied up all day and was let loose at night, and the defendant's foreman incautiously went into the yard after dark, knowing that the dog was let loose at night, and was thrown down and bitten by the dog, it was held that he was not entitled to an action for damages(*l*). But a man has no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there for a lawful purpose in the day-time may be injured by it. And so with respect to a foot-path, though it be a private one, a man has no right to put a dog with such a length of chain, and so near the path, that he could bite a person going along it(*m*).

There is a difference between beasts that are *feræ naturæ*, as lions

(*g*) *Barnes v. Ward*, 9 C. B. 392; 19 Law J., C. P. 195; *ante*, p. 202. See *R. v. Dant*, 34 L. J., M. C. 119; *Madley v. Taylor*, L. R., 1 C. P. 53; *Vale v. Bliss*, 50 Barb. (N. Y.) 358.

(*h*) *Harlicastle v. South York, etc., Rail. Co.*, 4 H. & N. 74. *Stone v. Jackson*, 16 Q. B. 199; *ante*, pp. 200, 201.

(*i*) *Ante*, pp. 37, 214, 215.

(*k*) *May v. Burdett*, 9 Q. B. 110. *Kelly v. Tilton*, 4 Keyes (N. Y.), 263.

(*l*) *Brock v. Copeland*, 1 Esp. 203. See *Loomis v. Terry*, 17 Wend. 496.

(*m*) *Tindal, C. J.*, *Sareh v. Blackburn*, 4 C. & P. 300; *M. & M.* 505. *Curtis v. Mills*, 5 C. & P. 489. *Kelly v. Tilton*, 3 Keyes (N. Y.), 263. *Loomis v. Terry*, 17 Wend. 496. *Sherfey v. Bartley*, 4 Sneed (Tenn.), 58.

and tigers, which a man must always keep chained up at his peril, and beasts that are *mansuetæ naturæ*, and break through the ordinary tameness of their nature, such as oxen and horses. In the latter case, an action lies only if the owner, whether an individual or corporation, has had notice of the mischievous nature of the beast(n). In the former case, an action lies without such notice(o).

There is no distinction between the case of the keeping of an animal which breaks through the ordinary tameness of its nature, and becomes fierce, and is known by the owner to be so, and the keeping of one which is *feræ naturæ* (p). If a dog has once bitten a man without provocation, or under circumstances which would not excite any dog of good temper to bite, and the owner has notice of it, it is his duty to chain up or muzzle the dog; and if he lets him go about, or lie at the door unmuzzled, and another person is bitten under similar circumstances, the owner of the dog will be responsible for the injury(q). It is not material whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he keeps the dog; and the harboring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support the action. As soon as a dog is known to be mischievous, it is the duty of the person whose premises the dog frequents, to send him away, or cause him to be destroyed(r). The same rule of law prevails with regard to a bull, which is known to have run at a man, and to be therefore dangerous(s).

262 *Effect of putting up a notice to beware of the dog.*—The putting up a notice to beware of the dog will not exempt the owner of the dog from liability to a person injured, if it appears that the latter could not read, or did not in fact, read the notice. If the plaintiff was lawfully in a way leading to the house, and was, in point of fact, ignorant of the

(n) *Stiles v. Cardiff Steam Navig. Co.*, 33 L. J., Q. B. 310. *Smith v. Causey*, 22 Ala. 568. *Stumps v. Kelly*, 22 Ill. 140. See *Baldwin v. Casella*, L. R., 7 Exch. 325, *post*, p. 212. This rule applies to domestic animals rightfully in the place where the injury is done. If such animals were wrongfully in the place where they did the mischief, the owner is liable without proof that the animals were vicious and the owner knew it. *Decker v. Gammon*, 44 Me. 322.

(o) *Rex v. Huggins*, 2 Ld. Raym. 1583. *Jenkins v. Turner*, 1 ib. 110. *Mason v. Keeling*, 1 ib. 608. *Scribner v. Kelley*, 38 Barb. 14.

(p) *Jackson v. Smithson*, 15 M. & W. 565; 15 Law J., Exch. 311.

(q) *Charlwood v. Greig*, 3 C. & K. 48. *Marsh v. Jones*, 21 Vt. (6 Washb.) 378. *Buckley v. Leonard*, 4 Denio, 500. *McCaskill v. Elliot*, 5 Strobb. 196. *Loomis v. Terry*, 17 Wend. 496.

(r) *McKone v. Wood*, 5 C. & P. 2. See *Smith v. Great East. Rwy.*, L. R., 2 C. P. 4; *Trammell v. Little*, 16 Ind. 251; *Smith v. Montgomery*, 52 Me. 178. See *Auchmuty v. Ham*, 1 Denio, 495; *Wilkinson v. Parrott*, 32 Cal. 102. By 34 & 35 Vict. c. 56, "The Dogs Act, 1871," stray dogs may be detained by the police, and dangerous dogs destroyed by order of justices.

(s) *Blackman v. Simmons*, 3 C. & P. 138. *Clark v. Armstrong*, 24 Sc. Sess. Cas. 1315.

notice, and of the danger from the dog at the time he was bitten by it, he will be entitled to compensation in damages(*t*).

- 263 *Dogs worrying sheep and destroying game*.—"If a man has a dog that kills sheep" (or hunts on his own account and destroys game), "the master of the dog, being ignorant of such quality, shall not be punished for this killing; but if he has notice of the quality of the dog, it is otherwise"(*u*). By 25 and 26 Vict. c. 59, s. 1, every owner of a dog in Ireland is made liable in damages for injury done to any sheep by his dog, and it is not necessary for the party seeking damages to show a previous mischievous propensity in the animal or the owner's knowledge thereof, or to prove any neglect on the part of the owner. And the law is the same now in England so far as injuries by dogs to sheep and cattle are concerned (28 & 29 Vict. c. 60, *ante*, p. 23).

The circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify a man in shooting it. To justify such a course, the animal must be actually attacking the shooter at the time he uses his gun(*x*).

- 264 *Of the keeping dogs reputed to have been bitten by a mad dog*.—If, by common report, a dog has been bitten by a mad dog, "it becomes the duty of the owner of the dog so reputed to have been bitten to be very circumspect" in the keeping of it. Whether the dog said to be mad was mad or not, may be mere matter of suspicion, and yet it is not enough for a defendant to say, "I did use a certain precaution." He ought to put it out of the animal's power to do further mischief(*y*).

- 265 *Injuries from driving ferocious animals along a public thoroughfare*.—Where the defendant's bull, which was being driven along the public streets, ran at a man with a red handkerchief round his neck and

(*t*) *Sarch v. Blackburn*, M. & M. 507; *ante*, p. 202. See *Sawyer v. Jackson*, 5 N. Y. Leg. Obs. 380.

(*u*) Vin. Arb. ACTIONS, H. pl. 3. *Fleeming v. Orr*, 2 Macq. H. L. C. 14. See *Read v. Edwards*, *ante*, p. 30. Under the Statutes of New York, the owner or possessor of any dog that has killed or wounded sheep is liable for their value without proof of knowledge on his part that the dog was mischievous or disposed to kill sheep. 1 R. S. 704, s. 9; *Auchmuty v. Ham*, 1 Denio, 495. Laws of 1867, ch. 814. 2 R. S. 682, s. 14. *Osincup v. Nichols*, 49 Barb. (N. Y.) 145. *Fish v. Skut*, 21 Barb. 333.

The same rule is in force under the statutes of Ohio. See *Swan's Stat. of 1854*, § 28; *Job v. Harlan*, 13 Ohio (N. S.) 485.

(*x*) *Morris v. Nugent*, 7 C. & P. 572. *Clark v. Webster*, 1 C. & P. 104. *Perry v. Phipps*, 10 Ired. 259. But see *Brown v. Carpenter*, 26 Vt. (3 Deane) 638; *Dunlap v. Snyder*, 17 Barb. (N. Y.) 561; *Wolf v. Chakler*, 31 Conn. 121.

(*y*) *Ld. Kenyon*, *Jones v. Perry*, 1 Esp. 483. Under the statutes of North Carolina an owner is liable in a penalty of fifty dollars for neglecting to kill his dog after it has been bitten by another dog which he has reason to believe was mad. See *Wallace v. Douglas*, 10 Ired. 79.

Any one may lawfully kill a mad dog, or one that is justly suspected of being mad, or is known to have been bitten by a dog which was mad. *Wolf v. Chakler*, 31 Conn. 121. *Putnam v. Payne*, 13 Johns. 312.

gored him, and the defendant, after the accident, was heard to say that the red handkerchief caused the mischief, as a bull would run at anything red, it was held that this was some evidence to go to a jury to show that the defendant knew that his bull was a dangerous animal. "As the circumstance of persons carrying red handkerchiefs is not uncommon," observes Pollock, C.B., "and it is reasonable to expect that in every public street persons so dressed may be met with, we think it was the duty of the defendant not to suffer such an animal to be driven in the public streets, possessing, as he did, the knowledge that if it met a person with a red garment, it was likely to run at and injure him"(z).

The following laws respecting the keeping of ferocious animals, extracted from the Roman law, are not undeserving of attention. "If an ox has a trick of pushing with his horns, and wounds any one, or causes any other damage, the master who has neglected to shut up the ox, or to give such warning that people might avoid it, shall be answerable for the harm he does."

"Those who have horses or mules which kick or bite, must either warn people of their being vicious, or take care to have them well watched, otherwise they will be made liable for the damage they may do. If a dog, who has a trick of biting, is not tied up, or if he gets loose for want of being well looked after, and wounds any one, the master of the dog will be liable to make good the damage. But if a dog or other creature bites or does any damage only because he has been provoked, he who has given occasion to the injury that has happened shall be accountable for it; and if he be the person who has sustained the injury, he is alone to blame. If the beast which has done the damage has been exasperated and stirred up by another beast, the master of the latter beast shall be accountable for the damage."

"Those who have wild beasts—such as lions, tigers, bears, and others of the like kind—ought to keep them so that they can do no harm, and they are answerable for all damage that arises from their not being safely and securely kept"(a).

(z) *Hudson v. Roberts*, 6 Exch. 699; 20 Law J., Exch. 299.

(a) *Domat*, liv. 2, tit. 8, s. 2.

SECTION II.

ABATEMENT OF NUISANCES—STATUTORY REMEDIES AND PENALTIES—
ACTIONS—PROHIBITION—INJUNCTION AND INDICTMENT.

266 *Abatement of nuisances.*—By the Nuisances Removal Acts (18 & 19 Vict. c. 121(*b*); 23 & 24 Vict. c. 77; 26 & 27 Vict. c. 117(*c*); 29 & 30 Vict. c. 90, s. 14, *et seq.*; and 31 & 32 Vict. c. 115), various provisions are made for the abatement of nuisances affecting the public health. Sect. 8 of the first-mentioned Act defines what are to be considered nuisances within its provisions(*cc*), and the second part of the statute enables summary proceedings to be taken before magistrates, who are empowered to make orders for the abatement or prohibition of the nuisance(*d*). All persons having control over the soil on which a nuisance is suffered to exist, are liable to be proceeded against under this statute(*e*). By the 22d section the local authority are required, in cases where a watercourse, etc., has become a nuisance, to construct a new sewer. They are not, however, bound to follow the course of the old watercourse, but may make the new sewer through private enclosed land, in any direction they think fit, and where no sewer existed previously(*f*). Various statutory powers for the abatement of public nuisances are also given by the Salmon Fishery Acts (24 & 25 Vict. c. 109(*g*); 28 & 29 Vict. c. 121(*h*), the Smoke Prevention Act (16 & 17 Vict. c. 128), the Burial Acts (20 & 21 Vict. c. 81, and 22

(*b*) As to the recovery of penalties, before justices, *Reg. v. Jenkins*, 3 B. & S. 116. And see 23 & 29 Vict. c. 127, *post*, p. 201.

(*c*) As to diseased meat, see *Young v. Grattridge*, L. R., 4 Q. B. 166.

(*cc*) See *Norris v. Barnes*, L. R., 7 Q. B. 537, as to nuisances arising from mines, and the smelting of ores and minerals. The Act applies only to such nuisances as are injurious to health, such as slaughter-houses, accumulation of refuse, etc., and not to mere nuisances of discomfort, such as the drip of water through a railway bridge on to a highway. *Great West. Rail. v. Bishop*, L. R., 7 Q. B. 550.

(*d*) *Ex parte Mayor, etc., of Liverpool*, 8 E. & B. 537. *Reg. v. Bateman*, 27 Law J., M. C. 95. *Amys v. Creed*, L. R., 4 Q. B. 122; 38 L. J., M. C. 22. No previous notice is necessary where proceedings are taken by an inhabitant, and not by the local authority; *Crocker v. Cardwell*, L. R., 5 Q. B. 15.

(*e*) *Draper v. Sperring*, 10 C. B., N. S. 113; 30 Law J., M. C. 225. See *Bird v. Elwes*, L. R., 3 Exch. 225; *Barnes v. Akroyd*, L. R., 7 Q. B. 474. Where several persons join in creating a nuisance, see *Brown v. Bussell*, L. R., 3 Q. B. 251.

(*f*) *Earl of Derby v. Bury Improvement Commissioners*, L. R., 4 Exch. 222; 38 Law J., Exch. 100.

(*g*) *Williams v. Blackwell*, 32 Law J., Exch. 174; *post*, p. 199.

(*h*) The appointment of commissioners and inspectors is continued by 34 & 35 Vict. c. 95. And see 33 & 34 Vict. c. 33.

Vict. c. 1)(*i*), the Public Health and Local Government Acts (21 & 22 Vict. c. 98; 23 & 24 Vict. c. 77; and 29 & 30 Vict. c. 90, ss. 35 to 55), the Sewage Utilization Acts (28 & 29 Vict. c. 75; and 29 & 30 Vict. c. 90, ss. 1 to 13(*j*)), and by the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), ss. 69 to 81, which provides for the shoring up and removal of dangerous structures situate in the metropolis and its neighborhood(*k*). The expense incurred in the removal of nuisances, the construction of sewers, etc., under many of these local Acts, is recoverable either in the county* court(*l*), or by order of justices(*m*).

A man cannot, at the common law, enter upon his neighbor's land, to prevent the commission of an apprehended nuisance, but he may justify a peaceable entry for the purpose of abating and putting a stop to an existing nuisance. Thus, where the plaintiff had set up poles on his own land, in order to build a house which, when erected, would be a nuisance to the adjoining dwelling-house of the defendant, and the latter entered upon the plaintiff's land and prostrated the poles, to prevent the nuisance, it was held that the entry was wholly unjustifiable(*n*). But if *H* builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may, after previous notice and request to remove the building, enter upon the owner's soil and pull it down, provided the whole house is a nuisance. If part only of the house obstructs my lights and creates a nuisance, I am not justified in pulling down the whole building(*o*).

Before an entry is made upon the land of another for the purpose of abating a nuisance, notice should be given to the occupier of the land of the existence of the nuisance, and he should be required to abate it himself(*p*); and the plea justifying the entry should contain an averment that notice was given to the plaintiff to abate the nuisance, and that he neglected or refused to do it, whereupon the

(*f*) See *Foster v. Dod*, L. R., 1 Q. B. 475; and 34 & 35 Vict. c. 33.

(*g*) See 30 & 31 Vict. c. 113.

(*h*) *Reg. v. Harden*, 2 Ell. & Bl. 191; *post*, ch. 21. See 32 & 33 Vict. c. 82.

(*i*) As to proof of the ownership of the premises, *Blything Un. v. Warton*, 32 Law J., M. C. 132.

(*m*) As to parties liable to pay these expenses, see *Peek v. Waterloo, etc., Local Board*, 33 L. J., M. C. 11; *Cook v. Montagu*, L. R., 7 Q. B. 418.

(*n*) *Norris v. Baker*, 1 Roll. Rep. 393, pl. 15.

(*o*) *Rex v. Rosewell*, 2 Salk. 459. A person cannot lawfully pull down a building as a nuisance, where the nuisance is not caused by the erection itself, but by the persons who resort there. *Miller v. Burch*, 32 Texas, 208. *Ely v. Supervisors of Niagara Co.*, 36 N. Y. 297. *Barclay v. Commonwealth*, 25 Penn. St. 503.

(*p*) *Perry v. Fitzh we*, 8 Q. B. 776. *Jones v. Jones*, 1 H. & C. 1; 31 Law J., Exch. 506.

defendant entered upon the plaintiff's land and abated it himself, using no more violence than was necessary for the purpose(*g*).

Where there is any immediate danger to life from the continuance of the nuisance, so as to render it unsafe to wait for its removal by the occupier, the injured party may at once enter and remove it; but the facts establishing the necessity should be set forth in the special plea(*qq*).

A distinction has been taken between nuisances of commission and nuisances of omission; and it is said that if the plaintiff was the original wrong-doer, and himself created the nuisance, it may be abated without notice; but if the nuisance was created by another, and the plaintiff succeeded to the possession of the *locus in quo* afterwards, then notice to remove it must be given and averred in the plea, in order to make out a justification(*r*). "There is no decided case," observes Best, J., "which sanctions the abatement by an individual of nuisances of omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The security of lives and property may, however, sometimes require so speedy a remedy, as not to allow time to call on the persons on whose property the mischief has arisen to remedy it; and, in such cases, an individual would be justified in abating a nuisance from an omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice"(*s*).

267 *Abatement of nuisances upon commons*.—Where an encroachment had been made on a common, and a house built which obstructed the exercise of the right of common, it was held that the commoner might, after notice and request to the wrong-doer to remove the house, pull it down, though the latter was at the time actually present in the house with his family(*t*). The commoner has a right to pull down and remove a hedge, a gate, or a wall, which obstructs or abridges the exercise of his right(*u*); but he cannot destroy beasts of warren, such

(*g*) *Davies v. Williams*, 16 Q. B. 556; qualifying *Perry v. Fitzhowe*, 8 Q. B. 757. In removing a nuisance, the party abating it is only liable to the owner for a wanton or unnecessary injury. *Indianapolis v. Miller*, 27 Ind. 394. *Gates v. Blance*, 2 Dana, 158.

(*qq*) See *Van Wormer v. Mayor of Albany*, 15 Wend. 262; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Hart v. Mayor of Albany*, 3 Paige, 213. The abatement of a nuisance by a person's own act is authorized only in cases of particular emergency, requiring a more speedy remedy than could be had by ordinary proceedings at law. *Moffett v. Brower*, 1 Iowa (Greene), 348.

(*r*) *Jones v. Williams*, 11 M. & W. 176.

(*s*) *Lonsdale v. Nelson*, 2 B. & C. 311.

(*t*) *Davies v. Williams*, 16 Q. B. 546; 20 Law J., Q. B. 330. But see *Jones v. Jones*, *ut sup*.

(*u*) *Mason v. Cæsar*, 2 Mod. 66.

as hares or rabbits, although they have increased to such an extent as to destroy all the herbage(v).

268 *Removal of ruinous buildings.*—The Metropolitan Building Act (18 & 19 Vict. c. 122) provides, as we have seen, for the removal or reparation of structures, certified by their surveyor to be in a dangerous state, and enables the Metropolitan Board of Works(w), in certain contingencies, to pull down and remove such structures, and to charge the expenses incurred in so doing upon the owner of the property, without prejudice to his right to recover the same from the lessee, or other person liable to repair. Section 3 of this statute provides that the word “owner” shall apply to every person in possession or receipt of the whole or any part of the rents or profits, or in the occupation of the tenement other than as tenant from year to year, or for any less term, or as tenant at will(x); so that, if a tenant for a term of years has sub-let from year to year, and receives rent from his sub-lessee, he is the statutable owner, and upon him the order for expenses must be made. If the occupier be a lessee for a longer term than from year to year, he is then the statutable owner(y). The 83rd to 85th sections provide for notice being given in certain cases to the proprietor of the adjoining house(z).

269 *Abatement of nuisances arising from the exercise in excess of limited rights.*—Where a person who is entitled to a limited right exercises it in excess, so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped, until means have been taken to reduce it within its proper limits. “Thus if a man,” observes Alderson, B., “has a right to send clean water through my drain, and chooses to send dirty water, every particle of the water may be stopped, because it is dirty.” So, if a man has a limited right to the use of a window, and he enlarges the window considerably, the person annoyed by the enlargement of the window may, by erecting a screen or barrier on his own land, stop up the whole of it. The person who is in that way prevented from the exercise of a limited right, because he has turned it into a larger claim, has no other resource than

(v) *Cooper v. Marshall*, *ante*, p. 131.

(w) 32 & 33 Vict. c. 82.

(x) See *Tubb v. Good*, L. R., 5 Q. B. 443.

(y) *Mourilyan v. Labalmondiere*, 1 Ell. & Ell. 533; 30 Law J., M. C. 95. *Labalmondiere v. Frost*, 1 Ell. & Ell. 527. *Labalmondiere v. Addison*, *ib.* 41; 28 Law J., M. C. 225. *Peek v. Waterloo*, etc., Local Board, *ante*, p. 234. *Caudwell v. Hanson*, L. R., 7 Q. B. 55.

(z) See *Major v. Park Lane Co.*, L. R., 2 Eq. Ca. 453.

to reduce his window to its ancient size, and then insist on his right to have it tolerated(*a*).

If a landlord has been content to allow the public a limited right of way over his lands, and across a brook, by a certain number of stepping-stones, the Commissioners of Highways have no right to widen the footpath or the stepping-stones, or do anything to increase the public accommodation, or enlarge the right of passage, without the consent of the landowner. If, therefore, the surveyor places flag-stones on the stepping-stones, so as to make a kind of rough bridge, the landowner has a right to remove them(*b*). So if a riparian proprietor having a prescriptive right to obstruct the flow of a stream with a dam or weir of a certain height, for the purpose of watering his meadows, exceeds his right by enlarging his dam or weir, to the prejudice of another riparian proprietor, the latter may, after notice, remove the enlarged portion of the structure, but cannot lawfully remove the whole dam. Thus, where the plaintiff, being possessed of land the occupiers whereof from time immemorial enjoyed the right of penning back the water of a stream, by means of a dam or weir made with a loose board kept in its place with large stones, fastened the board down with stakes driven into the bed of the stream, and the defendant, who had rights on the same stream, thinking the stakes unauthorized by the plaintiff's ancient right, pulled up both the stakes and the board, it was held that this was an unjustifiable trespass, for, assuming he had a right to remove the stakes, he had no right to remove the board also(*c*).

270 *Removal of obstructions in public thoroughfares*(*d*).—A private individual cannot, of his own authority, abate an obstruction in a public highway, unless it does him a special injury; and he can only interfere with it as far as is necessary to enable him to exercise his right of passing along the highway. He cannot, therefore, justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience(*e*). To justify a private individual in pulling down a wall or destroying a fence, on the ground of its being an obstruction in a public highway, it must be shown, not only that

(*a*) *Cawkwell v. Russell*, 26 L. J., Exch. 24. See *ante*, p. 188.

(*b*) *Sutcliffe v. Surveyors, etc. Sowerby*, 35 Law T. R., Q. B. 7.

(*c*) *Greenslade v. Halliday*, 6 Bing. 379.

(*d*) As to cattle lying in a highway, see *Lawrence v. King*, L. R., 3 Q. B. 345, decided under s. 25 of 27 & 28 Vict. c. 101, and *Golding v. Stocking*, L. R., 4 Q. B. 516; *Freestone v. Caswell*, ib. 519.

(*e*) *Dimes v. Petley*, 15 Q. B. 283. *Davies v. Mann*, 10 M. & W. 546. *Mayor of Colchester v. Brook*, 7 Q. B. 377.

the wall or fence encroached upon the public thoroughfare, but that the defendant was unable to enjoy his right of passing along the road without the removal of the obstruction(*f*). The placing of a gate across a public carriage road, where no gate existed before, is, as we have seen, a nuisance, so that any one having occasion to pass along the thoroughfare, may cut down and destroy the gate(*g*).

271 *The removal of obstructions in watercourses* on the land of a third person, by those who have a right to the watercourse, and conversely the stoppage, on another's land, of a watercourse which would otherwise flow wrongfully on to the land of the person who stops it, must be effected with the least possible damage to the owner of the servient tenement, whether the method adopted (if there be alternative methods of affecting the object) be more onerous to the wrong-doer or not(*h*).

272 *Removal of obstructions to the navigation of navigable rivers*.—To justify a private individual in breaking down a weir or sluice, or removing an obstruction in the channel of a navigable river, it must be shown that the obstruction was of such a nature as to prevent him from passing up and down the river. If there were sufficient space left for him to pass with reasonable safety, he cannot justify the removal of the obstruction(*i*). The 4th statute of 25 Ed. 3, c. 4, reciting that the common passage of boats and ships in the "great rivers" of England is oftentimes annoyed by the setting up of gorges, mills, weirs, stauks, stakes, and kiddles, provides for the destruction of all such as have been levied and set up in the time of Edward I. and after. It directs writs to be sent to the sheriffs, to survey, and inquire, and do execution thereof. The effect of this statute appears to be to legalize weirs which can be shown to have been erected prior to the time of Edward I., although, from changes in the bed of the river, they may have the effect of totally preventing the navigation of the stream(*j*). But this and the subsequent statutes on the subject apply only to navigable rivers(*k*). The 2 Hen. 6, c. 15, prohibits not only the use of nets which are permanently fixed day and night, but also those which are fixed for intervals of time only, if they obstruct the navigation of the river and the passage of the fish(*l*).

(*f*) *Bateman v. Bluck*, 18 Q. B. 876; 21 Law J., Q. B. 406.

(*g*) *James v. Hayward*, *ante*, p. 207.

(*h*) *Roberts v. Rose*, 33 L. J., Exch. 1; *ib.* 241; *S. C.* (in error), L. R., 1 Exch. 82.

(*i*) *Ante*, p. 208. *East. Co. Rail. Co. v. Dorling*, 5 C. B., N. S. 821; 28 Law J., C. P. 202. See *Selman v. Wolfe*, 27 Texas, 68.

(*j*) *Williams v. Wilcox*, 8 Ad. & E. 329. See *ante*, pp. 88, 89.

(*k*) *Rolle v. Whyte*, L. R., 3 Q. B. 286.

(*l*) *Holford v. George*, L. R., 3 Q. B. 639.

Penalties have been imposed by statute upon all persons having charge of vessels who shall throw any ballast, gravel, earth, rubbish, or filth, into any navigable river, so as to tend to the injury or obstruction thereof; and the person having charge of the vessel will be responsible for the acts of the crew, and may be convicted of the offence and fined, though he was not on board at the time it was committed(*m*).

273 *Obstructions to fishing*.—Under the Salmon Fishery Acts (24 & 25 Vict. c. 109, and 28 & 29 Vict. c. 121), *ante*, p. 233, obstructions to the free passage of salmon may be removed by order of the Commissioners(*n*), subject to an appeal to the Court of Queen's Bench(*o*). It has been held under these statutes, that a user for forty-five years, previous to the passing of the first of them, of putchers and stop nets (which are “fixed engines” within the meaning of the statutes(*p*), and therefore forbidden unless used by virtue of a grant, charter, or immemorial usage), does not raise a conclusive presumption of law that such putchers and nets have been used from time immemorial(*q*); nor does the user of fixed engines for a very long period raise such a presumption, where, owing to changes in the bed of the river, the actual user has been in places different from the site of the ancient user, although such user would be evidence of a right to have such engines in reasonable places with reference to the changing bed of the river(*r*). The power of the Commissioners to order a fish gap to be made in existing weirs only extends to cases where the weir extends more than half-way across the stream(*s*).

274 *Pulling down ruinous houses adjoining a public thoroughfare*.—The Metropolitan Building Act (18 & 19 Vict. c. 122, ss. 69–81(*t*)) authorizes the pulling down, shoring up, etc., of ruinous buildings under certain circumstances and contingencies, and provides (s. 97) for payment of the expenses by the owner immediately entitled in possession to such premises(*u*), or the occupier.

(*m*) 54 Geo. 3, c. 159, s. 11. See *Michell v. Brown*, 28 Law J., M. C. 53.

(*n*) See *Garnett v. Backhouse*, L. R., 3 Q. B. 30, 699.

(*o*) *Rolle v. Whyte*, *supra*.

(*p*) *Gore v. English Fisheries Commissioners*, L. R., 6 Q. B. 561.

(*q*) *Holford v. George*, *supra*. See *State v. Franklin Falls Co.*, 49 N. H. 240. As to fishing without a license from the Board of Conservators, *Lynce v. Leonard*, L. R., 3 Q. B. 156. And see *Watts v. Lucas*, L. R., 6 Q. B. 226.

(*r*) *Rawstorne v. Backhouse*, L. R., 3 C. P. 67.

(*s*) *Rolle v. Whyte*, *supra*.

(*t*) See 32 & 33 Vict. c. 82.

(*u*) See *Overseers of Saffron Hill (ex parte)*, 24 Law J., M. C. 56, decided under the 7 & 8 Vict. c. 84, the greater part of which Act is repealed by the above-mentioned statute.

275 *Statutory remedies and penalties in respect of nuisances from gas-works.*

—By the statute 10 & 11 Vict. c. 15, for comprising in one general Act sundry provisions to be contained in Acts of Parliament thereafter passed, authorizing the construction of gas-works for supplying towns with gas, penalties are imposed (s. 11) upon persons authorized by statute to construct gas-works, for delays in making good broken ground, and re-instating roads broken up by them, and removing rubbish; and, in case of delay, the persons having the control or management of the street, etc., may do what is necessary to be done, and recover their expenses from the persons authorized to construct the gas-works. A penalty of 200*l.* is also imposed (s. 21) upon such persons, and upon gas companies, for corrupting streams, ponds, and drains with the refuse or filth of gas-works. It is recoverable for each offence, with full costs of suit in any of the superior courts (s. 22) by the person whose water has been fouled by the gas-washings or refuse, provided the action is brought during the continuance of the offence, or within six months after it shall have ceased. In addition to this penalty of 200*l.*, a sum of 20*l.*, to be recovered in like manner, is to be paid for each day during which gas-washing or refuse is allowed to flow into and foul the water, after the expiration of twenty-four hours from the time when notice of the offence (s. 23) shall have been served by the person whose water has been fouled; and such penalty is to be paid to the latter. And whenever any water within the limits of the special Act is fouled by the gas, a sum of 20*l.* is forfeited for every such offence (s. 25) and 10*l.* a day for every day during which the offence shall continue, after twenty-four hours' notice of the offence. The object of the Legislature appears to have been to make the company insurers, at all events, against any contamination of the water in the neighborhood by the access to it of the residuum of their gas-works(*v*). By s. 29 of this statute, it is enacted that nothing in this or the special Act contained shall prevent the undertakers (the persons authorized to construct the gas-works and make gas) from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas. The ordinary remedy by action for damages, therefore, is maintainable for a nuisance arising from gas-works, notwithstanding the existence of the penal clauses in this statute(*w*).

(*v*) *Hipkins v. Birm. etc., Gas Light Co.* 6 H. & N. 250; 30 Law J., Exch., 60; 29 ib. 169.

(*w*) *Willes, J., Broadbent v. Imp. Gas Light Co.*, 26 Law J., Ch. 280.

276 *Penalties for fouling water* in any well, fountain, or pump, are imposed by 23 & 24 Vict. c. 77, s. 8.

277 *Penalties for the non-consumption of smoke* are imposed by divers Acts of Parliament upon manufacturers and proprietors of steam-boats(x) and railway companies(y). By the Small Penalties Act, 1865 (28 & 29 Vict. c. 127), persons convicted in a summary manner in any penalty not exceeding 5*l.*, may, in case of non-payment, be imprisoned without any warrant of distress for the periods—not exceeding two months—mentioned in the Act.

278 *By-laws for the suppression of nuisances* made by town councils of boroughs under s. 90 of the Municipal Corporation Act, must, as we have seen, be confined to the suppression of such acts as are nuisances in themselves, and cannot be extended to an act which may, or may not be a nuisance according to circumstances(z).

279 *Actions for nuisances—Private injuries from a public nuisance.*—Whenever a special or particular damage is sustained by a private individual from a public nuisance, an action for damages is maintainable(a). It has been held that the prevention of customers from coming to a colliery by obstructing a public highway(b), *per quod* the benefit of the colliery was lost, and the coals dug up depreciated in value, was such a special and particular damage as would enable the owner of the colliery to maintain an action for the private injury resulting from the public nuisance(c). But no one can have an action for a nuisance or obstruction in a common highway without assigning some particular damage to himself individually, independent of the general inconvenience to himself as one of the public(d),

(x) 16 & 17 Vict. c. 128; 19 & 20 Vict. c. 107. *Walker v. Evans*, 29 Law J., M. C. 22.

(y) *Manchester, Sheff. etc. Rail. Co. v. Wood*, 29 Law J., M. C. 29.

(z) *Everett v. Grapes*, *ante*, p. 46.

(a) *Soltau v. De Held*, 2 Sim. N. S. 145; 21 Law J., Ch. 159. *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396. *Yolo Co. v. Sacramento*, 36 Cal. 193. *Francis v. Schoellkopf*, 53 N. Y. 153. *Selman v. Wolfe*, 27 Texas, 68. *Gerrish v. Brown*, 51 Me. 256. *Brown v. Watson*, 47 Me. 161. *Cole v. Sprowl*, 35 Me. 161. Mayor etc. of *Baltimore v. Marriott*, 9 Md. 160. *Crommelin v. Cox*, 30 Ala. 318. *Bruning v. New Orleans Canal and Banking Co.*, 12 La. An. 541.

(b) Which is a local action. *Richardson v. Locklin*, 34 L. J., Q. B. 225.

(c) *Iveson v. Moore*, 1 Ld. Raym. 486; 1 Salk. 15; Carth. 451. *Green v. Lond. Gen. Omnib. Co.*, *ante*, p. 207.

(d) *Chichester v. Lethbridge*, Willes, 73. *Baxter v. Winooski Turnpike Co.*, 22 Vt. 142. *Blanc v. Klumpke*, 29 Cal. 156. *Houck v. Wachter*, 34 Md. 265. *Lansing v. Wiswall*, 5 Denio, 213. And, though one person may suffer more inconvenience than others from the obstruction, by reason of his proximity to the highway, that will not entitle him to maintain the action. *Pierce v. Dart*, 7 Cow. 609. The damage must be different, not merely in degree but different in kind from that suffered in common. *Stetson v. Faxon*, 19 Pick. 147. *Thayer v. Boston*, 19 Pick. 511-514. *Quincy Canal Co. v. Newcomb*, 4 Metc. 283. *Houck v. Wachter*, 34 Md. 265. And see *Hatch v. Vermont Central R. R. Co.*, 28 Vt. 114; *McLaughlin v. Charlotte and South Carolina R. R. Co.*, 5 Rich. 583. It was held in Maine, that an injury to a private person by a common nuisance, however inconsiderable, will entitle him to maintain an ac-

and the expense of removing the obstruction is not such damage(e).

Where the plaintiff, in an action for damages from an obstruction in a public navigable tidal river, declared that he carried on the business of an innkeeper in a house abutting upon the river, and that the defendant placed beams and spars in the water which floated backwards and forwards with the tide, and obstructed the access to the house at certain periods, whereby the plaintiff's customers were prevented from coming to his house to take refreshments, it was held that this was a specific particular damage resulting to the plaintiff from the public nuisance, which entitled him to an action for damages(f). And so where the plaintiff was navigating a public navigable river with his barges laden with goods, and the barges were impeded in their progress by a vessel which the defendant had wrongfully moored across the stream, and the plaintiff, in consequence of the obstruction, was compelled to unload his barges and carry his goods by land to their place of destination, it was held that the plaintiff was entitled to recover from the defendant all the expenses of the land carriage of the merchandise(g).

280 *When a notice to abate or discontinue a nuisance shall be given before commencing an action.*—If an action is brought against the originator of a nuisance, it is not necessary to demand the abatement or discontinuance of the nuisance before commencing the action. But if the action is brought against the mere continuer of a pre-existing nuisance, a request to remove the nuisance must be made before the action is commenced(h). A notice to abate or remove a nuisance, delivered at the premises to which it relates, to the occupier for the time being, will bind a subsequent occupier(i).

tion; and that where a person was returning home with a loaded wagon, and was stopped by obstructions placed in the highway, and compelled to take a more circuitous route, he was entitled to recover damages from the person who placed the obstruction there. *Brown v. Watson*, 47 Me. 161. But in a similar case in Maryland, it was held that merely being obliged to proceed by a more circuitous route, in consequence of an obstruction, was not such a special damage as would maintain an action. *Houck v. Wachter*, 34 Md. 265.

(e) *Winterbottom v. Lord Derby*, L. R., 2 Exch. 316. But see *Pierce v. Dart*, 7 Cow. 609.

(f) *Rose v. Groves*, 6 Sc. N. R. 653; 5 M. & G. R. 613.

(g) *Rose v. Miles*, 4 M. & S. 101.

(h) *Penruddock's case*, 5 Co. 100b. *Winsmore v. Greenbank*, Willes, 583. *West v. Louisville, etc.*, R. R. Co., 8 Bush. (Ky.) 404. *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396. *Thorn-ton v. Smith*, 11 Minn. 15. *Ray v. Sellers*, 1 Duvall (Ky.), 254. *McDonough v. Gilman*, 3 Allen (Mass.), 264. *Cromelin v. Cox*, 30 Ala. 318. *Hubbard v. Russell*, 24 Barb. (N. Y.) 404. *Beavers v. Trimmer*, 1 Dutch. (N. J.) 97. But see *Brown v. Cayuga & Susquehanna R. R. Co.*, 12 N. Y. 486; *Conhocton Stone Co. v. Buffalo, etc., R. R. Co.*, 52 Barb. (N. Y.) 390; *Irvin v. Wood*, 4 Rob. (N. Y.) 138.

(i) *Salmon v. Bensley*, R. & M. 189.

If a man commits a nuisance, and afterwards does away with it, and with all the effects of it, before action brought, the cause of action is extinguished(*k*); but the abatement of the nuisance is no defense in point of law against a complaint for an antecedent injury. If damage has been sustained, the defendant is not the less bound to compensate for that, because he has promptly and properly repaired his fault(*l*).

281 *Continuing nuisances*.—The continuance of the nuisance is a fresh injury, for which another action may be brought, and so, *toties quoties*, until the obstruction is removed(*m*), or the wrongful act done away with(*n*). Persons may be liable for the continuance of a nuisance which they themselves originally created, although they are not in possession of, or interested in, the soil on which the nuisance exists at the time of action brought; and although they have no right to enter thereon for the purpose of abating the nuisance(*o*).

282 *Parties to be made plaintiffs*.—The actual occupier of lands and buildings incommoded and prejudiced by a nuisance is, in general, the proper person to maintain an action for damages. If the injured property is in the occupation of tenants to whom it has been demised, the landlord or reversioner has no right of action, unless the nuisance is of a permanent character, and necessarily inflicts a lasting injury upon the inheritance. It has been held, for example, that the reversioner is not entitled to maintain an action for damages arising from the erection of a noisy workshop, or a furnace and smoky chimney, in close contiguity to dwelling-houses in the occupation of his tenants, although the noise and the smoke render the houses uninhabitable, and the tenants give notice to leave; for the occupiers of the workshop and the furnace may be compelled, by proceedings on the part of the tenants, to discontinue the nuisance. "The action," observes Bramwell, B., "should be brought by the tenant. It is said that the noises diminished the value of the premises. I do not agree to that. If the tenant is damaged by them to the value of 10%, he will get 10% com-

(*k*) Bro. Abr., pl. 2. *King v. Morris & Essex R. R. Co.*, 3 Greene (N. J.), 397.

(*l*) *Bell v. Twentymen*, 1 Q. B. 774. An action on the case for a nuisance will not be barred by a subsequent abatement of the nuisance by the plaintiff. *Call v. Buttrick*, 4 Cush. 345. *Gleason v. Gary*, 4 Conn. 418.

(*m*) *Shadwell v. Hutchinson*, 4 C. & P. 333. *Conhocton Stone Co. v. Buffalo, etc., R. R. Co.*, 52 Barb. 390. *Beckwith v. Griswold*, 29 Barb. (N. Y.) 291. *Pillsbury v. Moore*, 44 Me. 154. *Grady v. Wolsner*, 46 Ala. 381. A failure to remove a nuisance, erected by another, does not of itself constitute a continuance of it. To constitute a continuance there must be some positive act done evidencing its adoption. *Walter v. Wicomico County*, 35 Md. 385. See *Barling v. Commonwealth*, 2 Duval (Ky.), 95.

(*n*) *Whitehouse v. Fellowes*, 10 C. B., N. S. 765; 30 Law J., C. P. 305.

(*o*) *Thompson v. Gibson*, 7 M. & W. 460. *Dorman v. Ames*, 12 Minn. 451.

pensation." "In order to give a right of action to the reversioner," further observes Pollock, C.B., "the injury must be of a permanent nature. Here the hammering and noises may be stopped and the nuisance removed at any time"(p). If, however, the tenant actually leaves the premises, and the reversioner comes into possession, then an immediate injury accrues to him, in respect of which he has an immediate right of action.

Where, on the other hand, a building was erected, the roof and eaves of which overhung the plaintiff's land, and discharged rain-water thereon, and the plaintiff brought his action for an injury to his reversion, the land being in the occupation of his tenants, it was held that he was entitled to recover, as the very existence of the building was a nuisance and permanent injury to the property, and would, if allowed to continue, impose a servitude thereon(q).

When several persons have a joint interest in property injured by a nuisance, they ought all to be made plaintiffs in an action for the injury. Tenants in common also, should join in an action for a nuisance done to their land(r).

283 Parties to be made defendants.—We have seen that the occupier of lands is in general responsible for the continuance of a nuisance upon them; and so is the landlord, if the nuisance existed at the time he demised them, or re-let them or continued the tenancy after he had the power of determining it(s). Every person who does, or directs the doing of, an act which cannot be done at all without constituting and creating a nuisance, is personally responsible, whether he was acting for himself, or for or on behalf, or for the benefit, of another,

(p) *Mumford v. Oxld., Worc. & Wolv. Rail. Co.*, 1 H. & N. 35. *Simpson v. Savage*, 1 C. B., N. S. 347; 26 Law J., C. P. 50. A reversioner occupying land of the tenant for life under a parol agreement, may maintain an action for injury to the land from the stoppage of a water-course. *Ashley v. Ashley*, 4 Gray (Mass.), 197. And the owner of land may maintain an action against parties flowing the land, although it has been leased by parol to several tenants, for the purpose of pasture. *Noyes v. Stillman*, 24 Conn. 15. The owner of a water power may maintain an action for any disturbance which is in its existing form injurious to the possession, and which, without further interference, would, in the ordinary course of things, continue to be so to the termination of the tenancy. *Beavers v. Trimmer*, 1 Dutch. (N. J.) 97; *Tinsman v. Railroad Co.*, 1 Dutch. (N. J.) 255. It is no bar to an action by the reversioner that the act constituting the nuisance is also an injury to the tenant; nor that the cause of the injury may possibly be removed before the expiration of the tenancy; nor that the reversioner has suffered no loss by diminution of rent, or the sale of the premises at a depreciated price. Id.

(q) *Tucker v. Newman*, 11 Ad. & E. 40.

(r) *Bac. Abr., JOINT TENANTS*, etc., K; *ante*, p. 85; *post*, ch. 20.

(s) *Ante*, pp. 193, 197. *Bishop v. Trustees of Bedford Charity*, 1 Ell. & Ell. 697; 28 Law J., Q. B. 215. *Gandy v. Jubber*, *ante*, pp. 147, 165. *Grady v. Wolsner*, 46 Ala. 381. *Owings v. Jones*, 9 Md. 108. *Pickard v. Collins*, 23 Barb. (N. Y.) 444. *Durant v. Palmer*, 5 Dutch. (N. J.) 544. A municipal corporation is liable for the continuance of a nuisance which it has created. *Pennoyer v. Saganaw*, 8 Mich. 534.

and whether he is a principal and employer, or a mere servant carrying into effect the orders of his master(*t*). But a steward, manager, or agent, who merely hires laborers for his master, and takes no part in the immediate creation of the nuisance, is not answerable for the nuisance(*u*). If the landlord of a house, under a contract with his tenant to whom he has demised the house, employs workmen to repair the house, the landlord is responsible for a nuisance in the house occasioned by the negligence of his own workmen, although the repairs are done at the instance and for the benefit of the tenant, and are, when executed, to be paid for by him(*x*).

When a defendant is sought to be made responsible for a nuisance, not on the ground of his being the owner or the occupier of the land or premises on which the nuisance exists, but because he has ordered or directed the doing of an act in a public thoroughfare, or a navigable river, or on the land of the plaintiff himself, which has created a nuisance, it must be shown that the relationship of master and servant exists between the defendant and the workmen who have personally done the act complained of, or that the workmen were acting under his immediate control and direction. If the execution of repairs to a dwelling-house, or the construction of a drain, is entrusted to a builder or contractor, who exercises an independent employment, and selects his own servants and workmen, and has the immediate control and superintendence of the work, the owner of the house, who employs the contractor, is not responsible for the creation of nuisances in the public thoroughfare, by the negligence of the contractor's servants, if he was ignorant of their unlawful proceedings, and had no knowledge of the probable consequences of their acts(*y*).

If any excavations or constructions of any kind are authorized to be made over or across a public thoroughfare, by private individuals or a public company, or by commissioners, and the works are lawful in themselves, and can be done without injury to individuals, and without creating any nuisance, and the persons directing the works to be executed employ a contractor to do the work, who selects the workmen, and has the entire conduct and management of the work, the persons so employing the contractor, and authorizing the execution of the works, are not themselves responsible for nuisances or injuries arising

(*t*) *Wilson v. Peto*, 6 Moore, 49. *Witte v. Hague*, 2 D. & R. 33.

(*u*) *Stone v. Cartwright*, 6 T. R. 412.

(*x*) *Leslie v. Pounds*, 4 Taunt. 648.

(*y*) *Peachey v. Rowland*, 13 C. B. 185. *Blake v. Ferris*, 5 N. Y. 48. And see *Easton v. European & Northern R. R. Co.*, 59 Me. 520.

from the incompetence of the contractor, or for the negligent execution of the works by him, his servants, or agents, or for damage from things done by the contractor or his workmen, which were never authorized or ordered to be done by the company or commissioners(z).

Where commissioners, appointed under an Act of Parliament for the improvement of the navigation of a canal, agreed with a contractor for the performance of certain works for draining and carrying off the surplus waters of the canal, and the contractor, in the exercise of the powers conferred on the commissioners by the Legislature, constructed a drain through the land of the plaintiff for the purpose of carrying off the waste water, and the plaintiff's land was flooded in consequence of the defective and negligent construction of the drain, it was held that the contractor, and not the commissioners, was responsible for the nuisance, as the contractor was not the servant of the company, but occupied an independent position, having the selection and entire control of the workmen, and the sole management of the works(a).

In this case the defective drain, causing the overflow of the water and creating the nuisance, was on the plaintiff's own land. Had the nuisance arisen upon the land of the defendants, they would have been responsible for it (*ante*, pp. 192, 193). Where the defendants have employed a contractor to do an act which is unlawful in itself, or which cannot be done without creating a nuisance, then the act done by the contractor is in substance their act, and they as well as he are responsible for the consequences which naturally result from it(b).

The action may be brought against all the persons doing, or ordering the doing of, the wrongful act, as well as against the occupier of the land on which the nuisance exists; but, instead of bringing his action against all jointly, the plaintiff may, as we have seen, sue one or more of them at his election(c).

(z) *Gray v. Pullen*, 32 Law J., Q. B. 169. *Knight v. Fox*, 5 Exch. 725; 20 Law J., Exch. 9. *Overton v. Freeman*, 11 C. B. 867; 21 Law J., C. P. 52. *Peachey v. Rowland*, 13 C. B. 182; 22 Law J., C. P. 81, qualifying *Bush v. Steinman*, 1 B. & P. 404. *Cuff v. Newark & New York R. R. Co.*, 9 Am. Law Reg. N. S. 541. *Pawlet v. Rutland & Washington R. R. Co.*, 28 Vt. 297. And see *post*, ch. 8 s. 2, CONTRACTOR AND SUB-CONTRACTOR.

(a) *Allen v. Hayward*, 7 Q. B. 960; 15 Law J., Q. B. 99. See *Eaton v. European & Northern R. R. Co.*, 59 Me. 520.

(b) *Ellis v. Sheff. Gas Co.*, 2 Ell. & Bl. 757; 23 Law J., Q. B. 42. *Hole v. Sittingbourne, etc.*, Rail. Co., 6 H. & N. 500. *Blake v. Thirst*, 32 Law J., Exch. 138. *Brownlow v. Met. Bd. of Works*, 33 L. J., C. P. 233. And see *post*, ch. 8, s. 2; ch. 21.

(c) *Ante*, pp. 85, 175; *post*, ch. 20. *Irvine v. Wood*, 61 N. Y. 224. *Rogers v. Stewart*, 5 Vt. 115.

§ 84 *Declarations for nuisances.*—If the plaintiff complains of smoke or noisome smells and exhalations, or noises emanating from the defendant's land, the declaration should set forth the plaintiff's possession of certain tenements adjoining other tenements in the occupation of the defendant, and the creation and continuance by the defendant of the nuisance on the land and tenements in his occupation, setting forth the nature of the nuisance, and alleging that the plaintiff was thereby disturbed and annoyed in the occupation and enjoyment of his property, and the property itself was deteriorated in value. If the plaintiff has been impeded in the exercise of his trade or profession, or any special damage has been sustained, it should be stated as a consequence of the wrong done and the declaration should conclude with a claim of a specific sum for damages(*d*).

If the injury of which the plaintiff complains arises from the fall of chimneys from the defendant's premises upon the plaintiff's house, or from filth and rubbish being allowed to run down from the defendant's premises upon the plaintiff's land, the plaintiff may declare for a trespass upon his land, alleging that the defendant cast thereon large quantities of stones, bricks, and rubbish, night-soil, filth, or manure, as the case may be(*e*), and flooded the plaintiff's premises, and disturbed him in the occupation and enjoyment of his dwelling-house, or he may declare for the consequential injury arising from acts of commission or omission by the defendant on his own land. We have seen that the duty of cleansing and repairing drains used by the occupier of a house devolves upon such occupier, and not upon the landlord. A declaration, therefore, which merely alleges that the defendant is the owner and proprietor of the drains or the houses, and seeks to cast upon him, as such owner, a legal obligation to make good the damage ensuing to his neighbor from their foul or dangerous condition, is bad on general demurrer, unless it shows some special ground for making the defendant liable as owner(*f*).

Where the plaintiff declared that he was possessed of a cellar contiguous to the defendant's privy, and parted by a wall, part of the defendant's house, which the defendant "*debut, et solebat reparare,*" and that, for want of repair, the filth of the privy ran into the cellar, it was moved, in arrest of judgment, that this being a charge laid

(*d*) *Ante*, p. 89; *post*, ch. 21. See *Rowand v. Bellinger*, 2 Strobb. 373; *Hart v. Evans*, 8 Barr, 13.

(*e*) *Gregory v. Piper*, 9 B & C. 591. *Tenant v. Golding*, 1 Salk. 21. *Pickering v. Rudd*, 1 Stark. 58.

(*f*) *Russell v. Shenton*, 3 Q. B. 457. *Chauntler v. Robinson*, 4 Exch. 169.

upon the occupier of the adjoining land, the plaintiff should have showed a title by prescription to have the wall kept in repair for his benefit, "*sed non allocatur*;" for it is a charge laid on the defendant of common right, which by law he is subject to. As one is bound to keep his cattle from trespassing on his neighbor's ground, so he must a heap of dung if he erects it. "*Sic utere tuo ut alienum non lædas*"(g).

A declaration setting forth the plaintiff's possession of a messuage and land, and the defendant's possession of an adjoining brew house, and that the defendant caused water to be conveyed from a certain spring through leaden pipes placed near the foundations of the plaintiff's house, and took so little care of the pipes, or so negligently used and managed them, that the water escaped from the pipes, and flooded the plaintiff's house, and injured the foundations thereof, and caused the walls of the house to crack and give way, etc., discloses a good cause of action(h).

When the plaintiff complains of the pollution of a stream, he should show that he was in the actual enjoyment of pure water, or that, by reason of his possession of a messuage or land, he had the right to the flow of a stream of water through his premises in its natural purity (*ante*, pp. 86, 175, 177), and that the defendant polluted it. If the injury has resulted from negligence on the part of the defendant, in not having properly fenced or guarded a hole or cellar or dangerous excavation on his premises, the declaration should show that the defendant was the occupier of the cellar and premises; that the cellar closely adjoined a public footway, and opened thereon, so as to be dangerous to persons passing along it, or that the hole or excavation was within twenty-five yards of a public highway; and that the defendant wrongfully suffered the hole to remain unfenced and unguarded; and that the plaintiff, whilst he was passing along the highway, or along the open unenclosed land adjoining the highway, and within twenty-five yards thereof, fell into the hole and was injured, and prevented from attending to his business, and was obliged to expend money in surgical attendance and advice(i).

It is not necessary to state in the declaration that it was the duty of the defendant to do the act which he is alleged to have neglected to do, but the facts creating the obligation to perform the duty should be

(g) *Tenant v. Golding*, 1 Salk. 21. *Hodgkinson v. Ennor*, 32 Law J., Q. B. 221.

(h) *Hoare v. Dickinson*, 2 Ld. Raym. 1569.

(i) *Bishop v. Trustees of Bedford Charity*, *ante*, p. 197.

set forth. The allegation of duty is useless where the declaration is insufficient, and superfluous where it is sufficient(k).

A declaration alleging that the defendant was the proprietor of a building called, etc., used by the defendant for purposes of gain, that the plaintiff entered and paid for his admission, and that the defendant, not regarding his duty in that behalf, did not carefully and skillfully, and with proper strength and materials, construct and maintain the building and the staircase thereof, so as to be, for the purposes aforesaid, safely and securely used, and that, by reason thereof, whilst the plaintiff was in the building, the staircase fell, and the plaintiff was violently thrown down and injured, discloses a good cause of action(l).

If the grantor of a private way is bound, by express stipulation or prescription, to repair it, it is sufficient, in an action against him for neglecting to do so, to allege generally in the declaration that he, by reason of his possession of the close in which the way is, ought to repair it and the special matter of the obligation may be given in evidence(m).

When the plaintiff complains of an injury to his reversionary estate, the declaration should allege that, at the time of the committing the grievance of which he complains, certain messuages, tenements, and land, with the appurtenances, were in the occupation of certain persons, as tenants thereof to the plaintiff, the respective reversions in the said messuages, etc., being in the plaintiff, and that the plaintiff and his tenants, by reason of their interest in, and possession of, the said messuages or tenements, and land, of right ought to enjoy the use of the water of a certain well and pump, and that the defendant erected a cesspool so near the well and pump that the water therein was contaminated and rendered useless by the oozing out of the soil and filth from the cesspool into the well(n).

285 *Declarations for injuries from the keeping of ferocious animals.*—In actions for injuries from keeping ferocious animals, the plaintiff must

(k) *Metcalfe v. Hetherington*, 11 Exch. 270. *Seymour v. Maddox*, 16 Q. B. 331. *Southcote v. Stanley*, 1 H. & N. 247; 25 Law J., Exch. 247. *Gibbs v. Trust. Liv. Docks*, 3 H. & N. 164. *City of Buffalo v. Holloway*, 7 N. Y. 493. *Congreve v. Morgan*, 4 Duer, 439. *Taylor v. Atlantic Mut. Ins. Co.*, 2 Bosw. (N. Y.) 106.

(l) *Brazier v. Polytechnic Institution*, Q. B. 1859. See *Collia v. Selden*, L. R., 3 C. P. 495, ante, p. 226.

(m) *Rider v. Smith*, 3 T. R. 766.

(n) *Metrop. Assoc. v. Petch*, 5 C. B., N. S. 504; 27 Law J., C. P. 330. The declaration must show an injury of such a permanent nature as to be necessarily injurious to the reversion or must explicitly allege that the act was done to the injury of the reversion. *Beavers v. Trimmer*, 1 Dutch. (N. J.) 97. *Tinsman v. Railroad Co.*, 1 Dutch. (N. J.) 255. And see *Noyes v. Stillman*, 24 Conn. 15.

set forth in his declaration the mischievous propensity of the animal, the keeping of it by the defendant, with knowledge of such propensity, and the injury to the plaintiff; but the plaintiff need not tie himself down to any allegation of the particular habits of the animal, and of the defendant's knowledge of those habits. He may allege, generally, that the animal was of a ferocious nature, and unsafe to be left at large, and that the defendant knew it, and that he nevertheless permitted the animal to be at large(*c*). It is usual, however, to allege that the animal was of a ferocious disposition, and accustomed to attack or bite mankind, or sheep and animals, the subject of private property(*p*). It is not necessary to allege or prove any negligence or want of care in the keeping of the animal by the defendant(*g*). The injurious consequences to the plaintiff should be stated; and if any special damage has been sustained, it should be set forth on the face of the declaration.

286 *Plea of not guilty*.—In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house(*r*). In an action for forming a cesspool near a well, and thereby contaminating the water of the well, it was held that the plea of not guilty put in issue both the fact of the erection of the cesspool, and that the water was thereby contaminated(*s*). In actions for injuries from acts of omission, the fact that the injury was occasioned by negligence and misconduct on the part of the plaintiff, as well as by neglect of duty on the part of the defendant, is also admissible under the plea of not guilty(*t*). In actions for injuries resulting from the keeping of ferocious animals, with knowledge of their dangerous propensity, the plea of not guilty puts in issue both the fact of the

(*c*) *Hartley v. Harriman*, 1 B. & Ald. 624. In an action for injuries committed by an animal presumptively harmless the declaration must allege that the owner had notice or knowledge of the habit of the animal to commit such injuries. *Vrooman v. Lawyer*, 13 Johns. 339. *Tift v. Tift*, 4 Denio, 175. *Buckley v. Leonard*, 4 Denio, 500. *Earl v. Van Alstine*, 8 Barb. 630. But when the animal is of a savage species no averment of knowledge is necessary. *Van Leuven v. Lyke*, 1 N. Y. 615. *Scribner v. Kelley*, 38 Barb. 14. And no averment of knowledge is necessary where the animal committed the injury while trespassing. *Fairchild v. Bentley*, 30 Barb. 147. *Van Leuven v. Lyke*, 1 N. Y. 515. And generally it is necessary to allege the viciousness of an animal in committing an injury only where but for the vice of such animal the owner would be free from fault. *Dickson v. McCoy*, 39 N. Y. 400.

(*p*) *Jenkins v. Turner*, 2 Salk. 661.

(*g*) *May v. Burdett*, 9 Q. B. 111; 16 Law J., Q. B. 64.

(*r*) Reg. Gen. 16 Vict. 1 Ell. & Bl., App. lxxxii.

(*s*) *Norton v. Scholefield*, 9 M. & W. 665.

(*t*) *Holden v. Liv. Gas Co.*, 3 C. B. 1.

ferocity of the animal and the defendant's knowledge of it; those two matters forming the substance of the wrongful act(*u*).

287 *Pleas justifying the fouling of the water of a stream under a prescriptive right to discharge into it the refuse of dye-houses and manufactories, and the washings of mines.*—When the plaintiff complains of the fouling and sending rubbish down a natural stream of water running through the plaintiff's land, it is a good defence to plead that the defendant, at the time of the committing of the alleged injury, was the occupier of land, and of a tin-mine situate thereon, and abutting upon the stream, and that the defendant and all other occupiers for the time being of the land and tin-mine, for the period of twenty years next before the commencement of the action, enjoyed as of right, and without interruption(*x*), the privilege of using the water of the stream for the purpose of working the tin-mine, and mining and washing tin-ore, and of fouling the water of the stream with sandstones and rubble and the washings of the tin-mine; and that the defendant, being the occupier of the land and tin-mine, did, in working the mine, and mining and washing the tin-ore, necessarily discharge into the stream sandstones and rubble, and did necessarily foul the water of the stream, and obstruct the channel and bed thereof(*y*). A plea of this sort sets up a prescriptive right to the use of the water of the stream for the necessary working of the mine; but it is doubtful whether a plea which merely alleges a user as of right to throw cinders, scorix, coal dust, and the refuse of the ash-pit of a steam-engine into a running stream, so as to obstruct the channel and bed thereof, is a good plea, as it does not appear to set up a claim which might lawfully be made at the common law by custom, prescription, or grant, to an easement or watercourse, or use of water within the meaning of the Prescription Act(*z*).

288 *Pleas justifying the obstruction of a watercourse*, on the ground that water was wrongfully discharged therefrom on the defendant's land, should allege that the defendant in abating the nuisance did no unnecessary damage to the plaintiff(*a*).

289 *Pleas justifying the poisoning of the atmosphere with noxious smells and exhalations under a prescriptive right to carry on an offensive trade*, should set forth that the defendant and his predecessors, occupiers for the

(*u*) *Card v. Case*, 5 C. B. 622.

(*x*) *Ante*, pp. 142, 160.

(*y*) *Carlyon v. Lovering*, 1 H. & N. 789; 26 Law J., Exch. 251.

(*z*) *Murgatroyd v. Robinson*, 2 Ell. & Bl. 391; 26 Law J., Q. B. 233. See *McCallum v. Germantown Water Co.*, 54 Penn. St. 40.

(*a*) *Roberts v. Rose*, *ante*, p. 238.

time being of the house and premises and ground in the declaration mentioned, exercised and enjoyed for the full period of twenty years next before the commencement of the action, as of right and without interruption, the trade of, etc., in and upon the said premises, and thereby, during all that time, divers noisome smells unavoidably arose from the said premises, and extended themselves to the plaintiff's land, and created smells thereon, and that the grievance complained of by the plaintiff was a user by the defendant of his premises for the purposes of such trade(b).

290 *Evidence at the trial*—*Proof on the part of the plaintiff* should be directed to the establishment of all the material allegations in the declaration in the order in which they are set forth, *i.e.* the plaintiff's possession of a certain tenement adjoining another tenement in the occupation of the defendant, and the existence of a nuisance on the last-named tenement. When the plaintiff sues for a temporary nuisance (*ante*, pp. 193, 244), he must show that he is the actual occupier of the property injured by the nuisance. When he sues as the landlord or reversioner of the property injured, he must prove that the nuisance was of a permanent character, damaging the marketable value of the property (*ante*, pp. 85, 91, 173). The nature and character of the nuisance will have to be proved (*ante*, pp. 193–232); and it must be shown either that it disturbed and annoyed the plaintiff in the occupation and enjoyment of the property, or that the property was deteriorated in value (*ante*, p. 85).

In order to make the defendant responsible for the nuisance, it must be proved, either that he was the actual occupier of the land or tenement on which the nuisance existed(c), or that he had authorized or directed the doing of the thing which created the nuisance. Proof of the exercise of acts of ownership over the tenement on which the nuisance exists, such as paying the wages of workmen employed there(d), locking the doors, or chaining the gates at night, or giving orders that it should be done, posting bills in the windows, or paying a woman to open the shutters and air the house, will be sufficient *primâ facie* evidence of actual or constructive occupation; and any declarations or admissions by the defendant tending to show that the tenement on which the nuisance exists belonged to him, or was under

(b) *Flight v. Thomas*, 10 Ad. & E. 590; 1 Smith's L. C. 261, 6th ed. *Cooper v. Hubback*, *ante*, p. 140. As to the sufficiency of such a plea see *Commonwealth v. Upton*, 6 Gray (Mass.), 473; *Ashbrook v. Commonwealth*, 1 Bush. (Ky.) 139; *House v. Metcalf*, 27 Conn. 631.

(c) *Robbins v. Jones*, *ante*, p. 211.

(d) *Jarvis v. Dean*, 11 Moore, 359.

his control, will, of course, be evidence against him^(e). Proof that the defendant has received rent for the use of a wall, building, or pavement, and has previously repaired it when it required repairs, has been held sufficient to render the defendant responsible for a nuisance existing thereon^(f).

If the plaintiff complains of a nuisance arising from the non-repair of drains and sewers, it must be shown that the defendant had the use and occupation of the drain and sewer. Proof that the defendant occupies the land through which the sewer runs does not cast upon the defendant the duty of cleaning out the sewer or repairing it, or preventing it from becoming a nuisance. It does not follow, from his being the occupier of the land through which the sewer runs, that he has the occupation and use of the sewer. He may never have used it or occupied it, and may have no power to touch it, or interfere with it in any way^(g). The persons who have a right to use the sewer, and who exercise that right, are in general bound to cleanse the sewer and repair it, and prevent it from becoming a nuisance, unless the duty of so doing is imposed on others by express legislative enactment.

If the defendant is not in the actual occupation of the premises on which the nuisance exists, but it is sought to make him liable, on the ground that he demised the premises with the nuisance existing upon them, it must be proved that the nuisance was in existence at the time of the demise (*ante*, pp. 196, 197). If it is sought to make him liable for injuries arising from dangerous excavations, pits, or holes, on premises demised by him, or from the fall of ruinous buildings in the occupation of his tenant, it must be shown that the holes and excavations existed, and that the buildings were ruinous and dangerous to the public at the time he let them. If the action is brought against the occupier of ruinous buildings, which have fallen down and injured the plaintiff, a *primâ facie* case will be established against the defendant, merely by proving that he was in the actual or constructive occupation of the property at the time of the injury; and it will be for the defendant to show, if he can, that he was a mere tenant-at-will, and had no knowledge of its ruinous or dangerous condition; or that before the buildings fell he ceased to occupy them, and gave up possession to the landlord (*ante*, pp. 210, 211).

(e) *Sybray v. White*, 1 M. & W. 440.

(f) *Bishop v. Trustees of Bedford Charity*, 1 Ell. & Ell. 697; 28 Law J., Q. B. 215. *Payne v. Rogers*, 2 H. Bl. 349.

(g) *Post*, ch. 6.

If the defendant is charged with acts of omission, non-feasance, and neglect of duty, the facts creating the duty must be proved, and the defendant's neglect established. If the injury arises from the non-repair of party-walls or fences, it must be shown that the defendant was bound by contract, prescription, or statute, to repair or fence (*ante*, pp. 148, 214). If it arises from the negligent use and management of buildings, stations, or railways (*ante*, pp. 210–221), or canals or docks (*ante*, pp. 221, 222), it must be shown that the defendants were in the occupation of the property upon which the dangerous nuisance existed, and had dominion and control over it. If the injury arose from the dangerous state of premises on which the plaintiff was employed as a workman, it must be shown that the danger was latent and unknown to the workman, but well known to the employer (*ante*, pp. 222–224). If it arose from defective hoisting-tackle in mines, or insecure ladders, it must be shown that the defendant ordered or selected the tackle, or knew that it was insecure and unfit to be used, and that the plaintiff had no knowledge of the danger he incurred by using it (*ante*, pp. 224–226). If the plaintiff complains of injuries from the dangerous state of premises in the occupation of the defendant, to which he had come on the invitation of the defendant as a guest, he must show that the danger was of an unusual and unexpected character, the existence of which was wholly unknown to the plaintiff, but was well known to the defendant (*ante*, pp. 222–227).

In actions for injuries for keeping ferocious animals, the plaintiff must prove that he has been bitten or hurt, or has sustained some actual damage from the ferocity of the animal, and that the defendant kept or harbored the animal with knowledge of its savage disposition; but it is not necessary to allege or prove any negligence or want of care in the keeping of it (*ante*, pp. 229, 230). If the plaintiff has not, by his declaration, tied himself down to proof of some particular mischievous propensity on the part of the animal, it is sufficient for him to prove, generally, that the animal was of a ferocious nature, and given to bite, and that the defendant knew it^(h); and if this be proved, it is not necessary to prove that anybody before the plaintiff had in fact been bitten⁽ⁱ⁾. Where a dog was proved to be of a savage disposition, and the defendant had warned a person to beware of the dog, lest he should be bitten, it was held that this was evidence for a jury of the defendant's knowledge of the nature of the

(h) *Hartley v. Halliwell*, 2 Stark. 212.

(i) *Worth v. Gilling*, L. R., 2 C. P. 1.

beast(*j*). And where the wife of the defendant, who occasionally assisted him in his business as a milkman, had a complaint made to her of the savage nature of a dog kept on the premises, for the purpose of communicating it to her husband, this was held evidence of the husband's knowledge(*k*). If it can be shown that a dog has been guilty, to the knowledge of the owner, of a single act of ferocity, that is sufficient to impose upon the owner the duty of watching and securing the animal, and will render the master responsible in damages if the dog is guilty of another ferocious act(*l*).

Proof of an offer on the part of the defendant to make compensation to the plaintiff is some, but very slight, evidence against the defendant, as the offer may have been made purely from charitable and praiseworthy motives, and not as admitting any consciousness of wrong or of legal liability in the matter(*m*); and it has been held that such an offer is no evidence at all of the scienter(*n*).

291 Evidence for the defence.—Where the plaintiff sues for a nuisance, arising from the exercise by the defendant of a noxious trade in the vicinity of the plaintiff's dwelling, and the defendant has put a plea of justification on the record, he must prove the material averment of his plea, and show how his right to create the nuisance arises. Under the plea of not guilty, the defendant may, as we have seen, show that the injury was occasioned by the plaintiff's negligence and misconduct, as well as by the default of the defendant, and so defeat the plaintiff's claim for damages(*o*). If it be shown that the defendant was a wilful trespasser upon the land of the plaintiff, and must have known that he had no right to be there at the time he sustained the injury of which he complains, his claim for damages will, in general, be defeated.

292 Damages recoverable.—For every nuisance, the continuance of which would inflict permanent injury upon premises demised to a tenant, and diminish their value in the market, damages are recoverable by the reversioner in respect of the injury to the inheritance, as well as by the tenant, in respect of the immediate residential injury. Thus, where the subject of complaint was, that the defendant had fixed a

(*j*) *Judge v. Cox*, 1 Stark. 285.

(*k*) *Gladman v. Johnson*, 36 L. J., C. P. 153. It has been held also that if the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master. *Baldwin v. Casella*, L. R., 7 Exch. 325.

(*l*) *Fleeming v. Orr*, 2 Macq. Sc. A. 25. Proof that the defendant kept the dog without proof that he was the owner, will support the action. *Wilson v. Parrott*, 32 Cal. 102.

(*m*) *Thomas v. Morgan*, 2 C. M. & R. 502.

(*n*) *Beck v. Dyson*, 4 Campb. 198, per Lord Ellenborough, C.J. See *post*, ch. 22.

(*o*) *Ante*, pp. 24, 251; *post*, ch. 8, s. 1.

spout to the eaves of his house, which poured rain-water into the plaintiff's yard and made it damp, it was held that this was an injury of a permanent nature, which entitled the plaintiff to damages, although the yard was in the occupation of a tenant(*p*). But where an action is brought by a reversioner to recover damages in respect of an injury to his reversionary estate in certain lands and premises, by reason of a nuisance committed by the defendant, the diminution in the saleable value of the premises is not the true criterion of damage, because every day that the defendant persists in continuing the nuisance, he renders himself liable to another action. Nominal damages are generally given in the first action; and then, if the defendant persists in continuing the nuisance, and another action is brought, and the verdict is obtained against him for continuing the nuisance, the jury generally give exemplary damages, to compel an abatement of the nuisance(*q*). If, however, the jury choose to give substantial damages in the first instance, there is nothing to prevent them from so doing(*r*).

Wherever the nuisance was, in its commencement, an injury to the reversion, on any ground whatever, the continuance of the nuisance must be so likewise, and an action is maintainable by the reversioner, *toties quoties*, until the nuisance is abated(*s*). In all cases of continuing nuisances, the jury cannot lawfully give damages in respect of any injury subsequent to the day of the commencement of the action; for every day that the nuisance continues there is a fresh cause of action, in respect of which further damages are recoverable(*t*).

If the plaintiff's house has been thrown down by reason of the negligence of the defendant or his servants in pulling down an adjoining house, the jury ought not to give as much in damages as would be sufficient to build a new house, but should make a reasonable and proper allowance for the benefit which the plaintiff would receive by having a new house instead of an old one. Lord Kenyon likened a

(*p*) *Tucker v. Newman*, 11 Ad. & E. 41.

(*q*) *Battishill v. Reed*, 18 C. B. 714; 25 Law J., C. P. 290. In an action on the case by a reversioner for injuries to the premises, the measure of damages is the amount of injury to the reversionary estate. *Dutro v. Wilson*, 4 Ohio (N. S.) 101.

(*r*) *Cresswell, J.*, 18 C. B. 712. As a general rule exemplary damages will not be given in an action for nuisance if the defendant exercised due care, and the damage was occasioned by the neglect of his workmen to follow his directions. *Morford v. Woodworth*, 7 Ind. 83.

(*s*) *Shadwell v. Hutchinson*, 2 B. & Ad. 97.

(*t*) See *Goldsmid v. Tunbridge Wells Commissioners*, *post*, pp. 215, 216; *Dorman v. Ames*, 12 Minn. 451; *Thayer v. Brooks*, 17 Ohio, 489. And in a second action the plaintiff can recover only for damages since the commencement of the former suit. *Beckwith v. Griswold* 29 Barb. (N. Y.) 291. The measure of damages in an action for a nuisance which renders the adjoining premises disagreeable and uncomfortable, is the difference in the rental value, free from the effects of the nuisance, and subject to it. *Francis v. Schoellkopf*, 53 N. Y. 152.

case of this sort to the case of marine insurances, where an allowance of one-third new for old was always made(*u*).

In actions for injuries from keeping ferocious animals (*ante*, p. 229), the plaintiff is entitled to recover substantial damages in respect of any bodily anguish he has endured, together with the expenses of surgical attendance, and all such expenses as have been reasonably and necessarily incurred by him in consequence of the injury, and have been claimed in the plaintiff's declaration. If, in consequence of a bite from a ferocious dog, knowingly kept and harbored by the defendant, the plaintiff has been obliged, under medical advice, to undergo a surgical operation to guard against hydrophobia, this will be a ground for increasing the damages(*x*).

SECTION III.

PREVENTION OF NUISANCES BY INJUNCTION AND INDICTMENT.

293 *Injunction*.—Both the courts of common law(*y*) and Chancery will, by injunction, prevent the continuance of a nuisance on one man's land to the injury or annoyance of another(*z*). An injunction will be granted, in certain cases, to prevent the fouling of a stream by pouring into it the contents of sewers, and the refuse of dry-houses and manufactories(*a*); or to prevent the fouling of a canal by taking water

(*u*) *Lukin v. Goodsall*, 2 Peake, 15.

(*x*) *Post*, ch. 22.

(*y*) As to injunction at common law, see *post*, ch. 23.

(*z*) *Oldacre v. Hunt*, 19 Beav. 489. *Inchbald v. Robinson*, and *Inchbald v. Barrington*, L. R., 4 Ch. App. 388. To entitle a party to a remedy by injunction in cases of private nuisance, the right must be clear, and the injury such as cannot be adequately compensated by damages, or such as by its long continuance may occasion a constantly recurring grievance, which can only be prevented by injunction. *Middleton v. Franklin*, 3 Cal. 238. *Burnham v. Kempton*, 44 N. H. 78. *Wolcott v. Melick*, 3 Stoc. (N. J.) 204. *Holsman v. Boiling Spring*, etc. Co. 1 McCarter (N. J.), 335. *Parker v. Winnipiseogee Lake etc. Co.*, 1 Clifford, 247. *Thebault v. Canova*, 11 Florida, 143.

As a general rule, the existence of the nuisance must be admitted or established at law before the court will grant equitable relief. *Frizzle v. Patrick*, 6 Jones Eq. (N. C.) 354. *Dunning v. Aurora*, 40 Ill. 481.

If the apprehended nuisance is doubtful or contingent, the complainant will be left to his remedy at law. *Ellison v. Commissioners*, 5 Jones Eq. (N. C.) 57. *Grey v. Ohio and Pennsylvania R. R. Co.*, 1 Grant's Cases (Penn.) 412. *Ross v. Butler*, 4 Green (N. J.) 294. *Duncan v. Hayes*, 22 N. J. Eq. 25.

(*a*) *Wood v. Sutcliffe*, 2 Sim. N. S. 163. *Att.-Gen v. Borough of Birmingham*, 4 K. & J. 528. *Davis v. Lamberton*, 56 Barb. (N. Y.) 480. *Mayor of New York v. Baumberger*, 7 Rob. (N. Y.) 219. *Hudson River R. R. Co. v. Loeb*, id. 418.

from a stream polluted by sewage, although the pollution of the stream was not caused by the proprietors of the canal(*b*); also to prevent the burning of bricks(*c*), the erection of coke-ovens(*d*), and densely-smoking chimneys(*e*), and the carrying on of gas-making or any noisome trade, so as seriously and materially to interfere with the ordinary comfort and enjoyment of a neighboring dwelling-house, or to injure the trees or vegetation of the neighboring fields(*f*). When the nuisance is of a permanent character, such as a nuisance caused by the erection of a building which obstructs the passage of light and air to ancient windows, the courts will interfere to protect the proprietary interests of the reversioner, as well as to protect the enjoyment by the tenant or occupier(*g*). But where the injury is of a temporary nature, not likely to last long, nor to deteriorate the marketable value of the property, the reversioner has no claim to the equitable interference of the court(*h*); nor will the court interfere in any case, unless some serious inconvenience has been sustained, or some actual damage done or threatened(*i*); nor where the injury, in itself trifling, will shortly

(*b*) *Att.-Gen. v. Bradford Canal*, L. R., 2 Eq. Ca. 71. And see *Att.-Gen. v. Richmond*, *ibid.* 306.

(*c*) *Walter v. Selve*, *ante*, p. 192.

(*d*) *Semple v. Lond. & Birm. Rail. Co.*, 1 Rail. Ca. 120.

(*e*) *Sampson v. Smith*, 8 Sim. 272.

(*f*) *Imp. Gas, etc., Co. v. Broadbent*, 7 H. L. C. 600. *Haines v. Taylor*, 10 Beav. 75. *Crump v. Lambert*, L. R., 3 Eq. Ca. 409. *Att.-Gen. v. Cleaver*, 18 Ves. 211, *ante*, p. 194. *Mulligan v. Elias*, 12 Abb. (N. Y.) N. S. 259. *Wolcott v. Melick*, 3 Stoct. (N. J.) 204. But to justify an injunction against the erection of a building for manufacturing purposes, as a nuisance to an adjoining dwelling-house, a strong case must be made. The mere anticipation of noise, smoke, cinders, and increased danger from fire will not be such a case. *Id.* *Rhodes v. Dunbar*, 57 Penn. St. 274. *Duncan v. Hayes*, 22 N. J. Eq. 25. And where a locality has lost its character as a place of residence, and has become essentially a manufacturing neighborhood, a court of equity will not restrain the carrying on of a manufacturing business, even though it renders an adjoining building unfit for a dwelling. *Gilbert v. Showerman*, 23 Mich. 448; 2 Mich. N. P. 158. The exercise of an offensive trade in the vicinity of a vacant lot intended for a house lot, will not be restrained on the ground that its value will be decreased, as the owner has an adequate remedy at law. *Thebaut v. Canova*, 11 Florida, 143. *Dana v. Valentine*, 5 Met. 8.

In addition to the cases stated in the text, a court of equity will restrain the continued use of a slaughter-house to the annoyance of the inmates of an adjoining dwelling. *Bishop v. Banks*, 33 Conn. 118. The flowing of impure and offensive water from a brewery in front of a dwelling-house. *Smith v. Fitzgerald*, 24 Ind. 316. The keeping and standing of jacks and stallions within full view and hearing of a dwelling-house. *Hayden v. Tucker*, 37 Mo. 214.

(*g*) *Wilson v. Townend*, 30 Law J., Ch. 25. *Herz v. Un. Bank*, 2 Giff. 686. But see *Cunningham v. Dorsey*, 4 W. Va. 293; *Gwin v. Melmoth*, 1 Freem. Ch. 505. Where a party builds a house, and, at the same time, owns the adjoining lot, and afterwards sells the house, an injunction will lie to restrain him or his grantees from so building on the vacant lot as to obstruct the windows of the house conveyed. *Lampman v. Milks*, 21 N. Y. 505. *Story v. Odin*, 12 Mass. 157. *Hubbard v. Town*, 33 Vt. 295.

(*h*) *Cleeve v. Mahany*, 9 W. R. 882.

(*i*) *Wandsworth Board, etc., v. Lond. & S. W. R.*, *ante*, p. 92. As to prospective damage, see *Golsmid v. Tunbridge Wells Commissioners*, L. R., 1 Ch. App. 349, *ante*, p. 256. *Parker v. Winnipiseogee Lake, etc., Co.*, 1 Clifford, 247. *Duncan v. Hayes*, 22 N. J. Eq. 25. *Mohawk Bridge Co. v. Utica and Schenectady R. R. Co.*, 6 Paige, 554.

be abated by the operation of an Act of Parliament(*j*). If the injury be accidental or occasional only, and not likely to become more frequent, or to be exceptional in amount, such as arises from the storage of inflammable materials, the person complaining will be left to his action at law(*k*). It is no answer that the removal of the nuisance is a task of great difficulty, though that may be ground for suspending its operation for a period(*l*). The injunction will be enforced by sequestration, if necessary(*m*).

294 *Acquiescence precluding equitable relief*.—In some cases it has been held to be the duty of a person seeing a nuisance in progress, and having the power of abating it and stopping it, to give notice to the person erecting the nuisance of his intention to object; and it is clear that a person may so encourage that which he afterwards complains of as a nuisance, as to preclude him from any claim in equity to an injunction(*n*). If a person sees a building in progress of erection which, when completed, must necessarily darken his windows, and nevertheless allows the building to be completed, and finished, and decorated, at great expense, without making any protest or complaint, or taking any proceedings against the wrong-doer, the Court of Chancery will not interfere by injunction to compel the pulling down of the building, but will leave the complainant to his remedy at law(*o*). But acquiescence in the erection of injurious buildings, or of noxious works, while they produce little injury, will not deprive the person so acquiescing of his right to an injunction if the nuisance is increased and becomes productive of more serious damage(*oo*); otherwise it would follow that a partial obscuration of ancient lights might be followed by their total destruction, and that an easement assented to might be increased at the pleasure of the grantee, provided it could be shown that the increase was only a probable and natural consequence of the use of the easement. Nor can a prescriptive right be claimed, it

(*j*) *Att.-Gen. v. Gee*, L. R., 10 Eq. Ca. 131. Nor where the party erecting the nuisance shows an intention to discontinue it, and is proceeding with all possible haste and diligence to abate it. *King v. Morris, etc.*, R. R. Co. 3 Green (N. J.) 397.

(*k*) *Cooke v. Forbes*, L. R., 5 Eq. Ca. 166.

(*l*) *Att.-Gen. v. Colney Hatch Asylum*, L. R., 4 Ch. App. 146.

(*m*) *Spokes v. Banbury Board of Health*, L. R., 1 Eq. Ca. 42.

(*n*) *Williams v. Earl of Jersey*, 1 Cr. & Ph. 97. See *Exeter (Corporation of) v. Devon (Earl of)*, L. R., 10 Eq. Ca. 232. *Big Mountain Improvement Co.'s appeal*, 54 Penn. St. 361. *Bassett v. Salisbury, etc., Co.*, 47 N. H. 426. *Southard v. Morris Canal, Saxton*, 518. *Binney's Case*, 2 Bland, 99. *Sprague v. Steere*, 1 R. I. 247.

(*o*) *Cooper v. Hubback*, 30 Beav. 160; 81 Law J., Ch. 123. *Cotching v. Bassett*, 32 Law J., Ch. 286.

(*oo*) *Hulme v. Shreve*, 3 Green. Ch. 116.

seems, in such a case—at all events unless there has been a continuance of sensible damage for the requisite period(*p*).

If a person has acquiesced in the erection of chemical or smelting works, in ignorance of the nuisance that will arise from them when they are put into operation, the acquiescence in the erection is no acquiescence in the nuisance arising from them, and will not preclude him from the remedy by injunction(*q*). And if the person injured has refrained from taking any active steps to abate or put an end to a nuisance in consequence of assurances he has received from the persons creating the nuisance that measures would be taken to put a stop to it, there is no *laches* on his part, and no such acquiescence as will deprive him of his right to an injunction(*r*). Nor will the fact that the plaintiff has purchased the land with full knowledge of the nuisance, disentitle him to relief(*s*). Nor the fact that the plaintiff is much more injured by many other people, provided a definite injury can be traced to the defendant(*t*).

295 *Injunction to prevent the continuance of noisy nuisances*.—If a belfry is erected so near to the dwelling-house of the plaintiff, that the bells when rung prevent people from being heard whilst talking in the house, or disturb the rest of the inmates at night, this is such an invasion of the domestic comfort and enjoyment of a man's home as entitles him to an injunction to prevent the nuisance(*u*).

296 *Prevention of public nuisances*.—Writs of prohibition were formerly issued by courts of common law to prevent the continuance of a public nuisance, such as the bowling alley near St. Dunstan's Church; the rope-dancer's stage at Charing Cross; and the play-house in Little Lincoln's Inn Fields(*v*); and courts of equity will interfere by injunc-

(*p*) *Goldsmid v. Tunbridge Wells*, L. R., 1 Eq. Ca. 161; *S. C.* 1 Ch. App. 349. *Crossley v. Lightowler*, *infra*. But see *Dana v. Valentine*, 5 Met. 8.

(*q*) *Bankart v. Houghton*, 27 Beav. 431; 28 Law J., Ch. 473.

(*r*) *Atty.-Gen. v. Birmingham*, 4 Kay & J. 546. *Davies v. Marshall*, 31 Law J., C. P. 61.

(*s*) *Tipping v. St. Helen's Smelting Co.*, L. R., 1 Ch. App. 66. *King v. Morris, etc.*, R. R. Co., 3 Green (N. J.), 397. But where one person purchases land of another, after being informed that it is the vendor's intention to erect a barn on his own land near the land conveyed, the purchaser cannot afterwards enjoin the erection of the barn on the ground that it would be a nuisance and lessen the value of his property. *Curtis v. Winslow*, 38 Vt. 690.

(*t*) *Crossley v. Lightowler*, L. R., 3 Eq. Ca. 279. *Rogers v. Stewart*, 5 Vt. 215. *Douglass v. State*, 4 Wis. 387.

(*u*) *Soltan v. De Held*, 2 Sim. N. S. 133. So a party may be enjoined from holding public exhibitions or entertainments upon his premises, which call together a noisy and disorderly crowd; and it has been held that the playing of a powerful band of music, twice a week, for several hours continuously, within one hundred yards of a dwelling house, is a nuisance which a court of equity will restrain. *Walker v. Brewster*, L. R., 5 Eq. Cas. 25. So where a lawful business is carried on at unreasonable hours, to the annoyance and discomfort of neighbors, a court of equity will restrain it. *Dennis v. Eckhardt*, 3 Grant (Penn.), 390.

(*v*) *Hall's case*, 1 Mod. 76. *Rex v. Betterton*, 5 Mod. 142; *Skin*, 625, 627. *Rex v. Dorset Justices*, 15 East, 594.

tion to prevent public nuisances(*w*), such as nuisances to public rivers, and public harbors(*x*), and public roads(*y*); and magistrates, boards of health, and commissioners of public works, may be restrained from exercising their statutory powers, so as to create or occasion a public nuisance(*yy*).

Where, by an Act of Parliament, a corporation were directed to cause a piece of land to be drained and leveled, and kept in a proper condition, for purposes of public recreation, the court restrained the corporation from using it for the holding of a cattle fair(*z*). In informations and proceedings for the prevention of public nuisances, the ordinary course is for the Attorney-General to sue, as representing the public; but individuals may come forward and invoke the assistance of the court when they have themselves individually sustained damage, and the interposition of the court is required for the protection of their property(*a*), or the preservation of the beneficial use, occupation, and enjoyment of it(*b*).

The same principles of law guide the interference of the court whether the nuisance be a public or a private nuisance(*c*). However,

(*w*) *Columbus v. Jaques*, 30 Ga. 506. *People v. Vanderbilt*, 28 N. Y. 396. *Parrish v. Stephens*, 1 Oregon, 73. *Hamilton v. Whiteridge*, 11 Md. 128. *Walker v. Shepardson*, 2 Wis. 384. *Rowe v. Granite Bridge Co.*, 21 Pick. 344. *Bradsher v. Lea*, 3 Fred. Ch. 301. *State v. Mayor of Mobile*, 5 Porter, 279.

(*x*) *People v. Vanderbilt*, 26 N. Y. 287. *Attorney-General v. Hudson R. R. Co.*, 1 Stock. (N. J.) 526.

(*y*) *Green v. Oakes*, 17 Ill. 249. *Fort v. Groves*, 29 Md. 188. *Ewell v. Greenwood*, 26 Iowa, 377.

(*yy*) *Atty.-Gen. v. Forbes*, 2 Myl. & Cr. 133. See *post*, ch. 16, s. 3.

(*z*) *Atty.-Gen. v. Corp. of Southampton*, 29 Law J., Ch. 282; 1 Giff. 363. *People v. Vanderbilt*, 28 N. Y. 396. *Sparhawk v. Union Passenger R. R. Co.*, 54 Penn. St. 401.

(*a*) *Crowder v. Tinkler*, 19 Ves. 621. *Atty.-Gen. v. Forbes*, 2 Myl. & Cr. 129. *Spencer v. Lond. & Birm. Rail. Co.*, 1 Rail. C. 159; 8 Sim. 193. *Sampson v. Smith*, 8 Sim. 272. *Hepburn v. Lordan*, 34 L. J., Ch. 293. *Parrish v. Stephens*, 1 Oregon, 73. *Milbau v. Sharp*, 27 N. Y. 611. *Zabriskie v. Jersey, etc., R. R. Co.*, 2 Beasley (N. J.), 314. *Corning v. Lowerre*, 6 Johns. Ch. 439. *Rosser v. Randolph*, 7 Porter, 238. *Walker v. Shepardson*, 2 Wis. 384. *Green v. Oakes*, 17 Ill. 249.

But to entitle a private individual to invoke the interposition of a court of equity to restrain a public nuisance, he must show special damage apprehended or sustained peculiar to himself and distinct from that suffered by the public at large. *Allen v. Board of Freeholders*, 2 Beasley (N. J.), 68. *Hinchman v. Patterson Horse R. R. Co.*, 2 Green (N. J.), 75. *Hartshorn v. South Reading*, 3 Allen (Mass.), 501. *Bechtel v. Carslake*, 3 Stock. (N. J.) 500. *Bigelow v. Hartford Bridge Co.* 14 Conn. 565. *Delaware & Maryland R. R. Co. v. Stump*, 8 Gill. & J. 479. *Beveridge v. Lacey*, 3 Rand. 63. *Black v. Philadelphia, etc., R. R. Co.*, 58 Penn. St. 249. The injury must be different, not merely greater in degree. *Hartshorn v. South Reading*, 3 Allen (Mass.), 501. The injury must also be one for which the law does not afford adequate relief. *Mayor of Georgetown v. Alexandria Canal Co.*, 12 Peters, 91. *Vanwinkle v. Curtis*, 2 Green Ch. 422. *Rosser v. Randolph*, 7 Porter, 238. *Water Commissioners v. Hudson*, 2 Beasley (N. J.), 420. *Fort v. Groves*, 29 Md. 188. *Finley v. Thayer*, 42 Ill. 350. *Attorney-General v. Heishon*, 2 Green (N. J.), 410. *New Boston Coal, etc., Co. v. Pottsville Water Co.*, 54 Penn. St. 164. *Camp v. Matheson*, 30 Ga. 170. *Banks v. Bussey*, 34 Md. 437.

(*b*) *Soltan v. De Held*, *supra*.

(*c*) *Att.-Gen. v. Sheff. Gas. Co.*, 3 DeGex, M. & G. 315; 22 Law J., Ch. 812.

in the former case, where the public injury purports to be asserted, it is not immaterial, at least upon an interlocutory application, *e.g.*, for an injunction to restrain a nuisance, to look into the motives from which the case is brought forward(*d*).

The court will not grant an interlocutory injunction before the hearing of the cause, unless it is necessary for the protection of property, or the prevention of some threatened injury thereto(*e*); nor will it interfere in any case, as we have seen, to protect a dry legal right or title, merely because the legal right is infringed(*f*).

297 Prevention of public nuisances by indictment.—In the case of public nuisances, such as obstructions in public thoroughfares or navigable rivers, or suffering boughs of trees to overhang highways, or ditches adjoining them to become foul and choked up, or buildings by the side of public thoroughfares to become ruinous, the remedy is by indictment in respect of the public injury(*g*), and by action in respect of any particular or special damage sustained by individuals(*h*).

The following nuisances have been held indictable:—The overcrowding of houses with poor people in time of infection of plague, and thereby endangering the health of the neighborhood(*i*); the carrying of people infected with contagious disorders along public thoroughfares in such a way as to endanger the health of the passengers(*j*); or the exposure for sale in a public place of a horse affected with glanders(*k*); the keeping of large quantities of gunpowder in dangerous proximity to populous neighborhoods(*l*); the carrying on of noxious and offensive manufactures in public places, or adjoining public thoroughfares, so as seriously to incommode and annoy large numbers of persons(*m*); holding out inducements to people to collect together in large crowds, to the obstruction of public thoroughfares, the tread-

(*d*) *Att.-Gen. v. Cambridge Gas Co.*, L. R., 4 Ch. App. 71.

(*e*) *Att. Gen. v. United King. Elect. Tel. Co.*, *ante*, p. 93.

(*f*) *Wandsworth Board v. Lond. & S. W. R.*, *ante*, p. 92. *Bassett v. Salisbury, etc., Co.*, 47 N. H. 426.

(*g*) *Rex v. Russell*, 6 East, 427. *Rex v. Cross*, 3 Campb. 226. *Rex v. Jones*, 3 Campb. 230. *Reg. v. Watson*, 2 Ld. Raym. 856. *Weld v. Hornby*, 7 East, 195. *Reg. v. Leech*, 6 Mod. 145. *Gerrish v. Brown*, 51 Me. 256. *State v. Freeport*, 43 Me. 198. *Harvey v. Dewoody*, 18 Ark. 252. *Rowe v. Granite Bridge Co.*, 21 Pick. 344.

(*h*) *Ante*, p. 242. *Rex v. Dewsnap*, 16 East, 196. *Gerrish v. Brown*, 51 Me. 256. *Harvey v. Dewoody*, 18 Ark. 252.

(*i*) 2 Roll. Abr. 139, pl. 3. See *Meeker v. Van Rensselaer*, 15 Wend. 397; *State v. Purse*, 4 McCord, 472.

(*j*) *Rex v. Vantandillo*, 4 M. & S. 73.

(*k*) *Reg. v. Henson*, 1 Dears. C. C. 24.

(*l*) *Rex v. Taylor*, 2 Str. 1167. *Biggs v. Mitchell*, 31 Law J., M. C. 163. See *Cheatham v. Shearon*, 1 Swan (Tenn.), 213; *People v. Sands*, 1 Johns. 78.

(*m*) *Rex v. White*, 1 Burr. 335. *Rex v. Pappineau*, 2 Str. 686. *Rex v. Neil*, 2 C. & P. 485. *State v. Wetherall*, 5 Harring. (Del.) 487.

ing down the grass of the neighboring meadows, the destruction of fences, or the creation of alarm and disturbance in the surrounding neighborhood(*n*); the making of a great noise in the night with a speaking trumpet; to the disturbance of divers householders(*o*); sawing of logs of timber in a public street, and incumbering a road or foot-path with barrels of beer(*p*); the opening of new coal-holes, and unloading coals in a public thoroughfare, in places where no coal-hole previously existed, and where the highway was not originally dedicated subject to the use of it for domestic coaling(*q*); making excavations and openings in the soil of a highway, or in the pavement of a public street, for water, gas, sewerage, or other purposes, without parliamentary authority(*r*); the use on a highway of a traction steam-engine, which, by its noise and appearance, frightens horses, and makes the highway dangerous to persons riding or driving(*s*); mixing of large quantities of alum and deleterious and prohibited ingredients in bread, intended for the use and consumption of the public(*t*); keeping of a disorderly house, gaming-house, or bawdy-house(*u*); indecent bathing(*x*), and the indecent exposure of the person in any public place within view of persons resorting there, or within view of the inhabitants of a dwelling-house(*y*); and a place may be a public place,

(*n*) *Rex v. Moore*, 3 B. & Ad. 184. One who collects a large crowd in the public highways and streets of a city by addressing violent and indecent language to persons passing along the highway, is indictable for committing a common nuisance. *Barker v. Commonwealth*, 19 Penn. (7 Harris) 412. A way acquired by a town by grant is a private way, and a nuisance on it will not be indictable. *Commonwealth v. Low*, 3 Pick. 408.

(*o*) *Rex v. Higginson*, 2 Burr. 1233. See *Commonwealth v. Smith*, 6 Cush. 80.

(*p*) *Rex v. Jones*, 3 Campb. 229. *State v. Atkinson*, 24 Vt. 448. The making of a fence across a public highway is a public nuisance under the statutes of Indiana, and indictable as such. *State v. Miskimmons*, 2 Carter, 440.

(*q*) Cockburn, C. J., 29 Law J., M. C. 123.

(*r*) *Reg. v. Longton Gas Co.*, 29 Law J., M. C. 119. A person may be indicted for cutting a canal for mill purposes across a highway; and so may persons continuing the nuisance. *State v. Yarrell*, 12 Ired. 130. So a person may be indicted for so building a mill dam as to overflow a highway. *State v. Phipps*, 4 Ind. 515.

(*s*) *Watkins v. Redden*, *ante*, p. 204.

(*t*) *Rex v. Dixon*, 3 M. & S. 11. Or adulterating milk, *Commonwealth v. Nichols*, 10 Allen (Mass.), 199. *Commonwealth v. Farren*, 9 Allen (Mass.), 489. *People v. Faerberuck*, 5 Pick. 311. Or selling unwholesome provisions, *State v. Smith*, 3 Hawks, 378. See 35 & 36 Viet. c. 74, against the adulteration of food; c. 94, ss. 19-22, against the adulteration of liquor. See 6 & 7 Wm. IV., c. 37, s. 8, *Core v. James*, L. R., 7 Q. B. 135.

(*u*) *Rex v. Smith*, 2 Str. 704. *Reg. v. Rogier*, 1 B. & C. 272. *Reg. v. Williams*, 1 Salk. 383. As to the meaning of the word "keeping," see *Reg. v. Stannard*, 33 L. J., M. C. 61. See also *Garrett v. Messenger*, L. R., 2 C. P. 583; *State v. Bertheol*, 6 Blackf. 474; *State v. Buckley*, 5 Harring. (Del.) 508; *State v. Bailey*, 1 Foster (N. H.), 343; *State v. Haines*, 30 Me. 65; *Bloomhuff v. State*, 8 Blackf. 205; *Smith v. Commonwealth*, 6 B. Mon. 21. One who demises a house with the intent that it shall be kept for purposes of prostitution, may be indicted as a keeper of a bawdy house, and his lessee may be joined with him in the indictment. *People v. Erwin*, 4 Denio, 129. One who keeps a house in such a manner as to disturb the neighborhood, and to tend to corrupt the public morals, may be indicted. *People v. Carey*, 4 Park. 238.

(*x*) *Rex v. Crunden*, *ante*, p. 47.

(*y*) *Sidley's case*, 1 Sid. 168. *Holmes' case*, Dears. Cr. C. 207.

although it is not a highway or place of public resort^(z). But the exposure must be in the presence or within view of more persons than one, in order to render it a public nuisance^(a), and it must be a wilful and indecent exposure, and not such an exposure as may be made in a public urinal^(b), or under the pressure of paramount necessity^(bb).

It is no defence to an indictment for a public nuisance to show that the public generally are benefited by it, though a portion of the public may be inconvenienced, "for if the violation of rights which belong to any part of the public is to be vindicated by the benefit which may arise to another part of the public elsewhere, inquiries would be introduced of a most vague and unsatisfactory nature, and speculations entered into which no jury could be expected properly to decide"^(c).

298 *Nuisances in public highways*.—"Highway is the genus of all public ways, as well cart, horse, and foot-ways, and an indictment lies for any one of these ways, if they be common to all the Queen's subjects having occasion to pass there; that is, if it be a foot-way only, common to them all, or a horse-way and a prime-way; and these are not *altæ regię viæ*, for that is the great highway common to cart, horse, and foot, that please to use it"^(d).

299 *Indictment against a corporation*.—A corporation or a railway company is as much amenable to an indictment for obstructing a public thoroughfare as any private person is^(dd). "It is as easy," observes Lord Den-

(z) Reg. v. Thallman, 33 L. J., M. C. 58.

(a) Reg. v. Watson, 2 Cox, Cr. C. 376. Webb's case, 1 Den. Cr. C. 338; 2 C. & K. 933. Elliot's case, Leigh & Cave, C. C. R. 103.

(b) Reg. v. Orchard, 3 Cox, Cr. C. 248. But see Reg. v. Harris, L. R., 1 C. C. R. 282.

(bb) A common scold may be indicted as a nuisance. Commonwealth v. Mohn, 52 Penn. St. 243. Profane cursing and swearing in public is indictable as a common nuisance. State v. Graham, 3 Sneed (Tenn.), 134. Unless it be in North Carolina, where one may curse and swear so loudly at a tavern as to break up a singing school near by, and yet commit no nuisance. State v. Baldwin, 1 Dev. & Bat. 195. A constable obstructing a street by a sale, may be indicted as a nuisance. Commonwealth v. Milliman 13 Serg. & R. 403. Reckless driving through the streets of a populous city in a manner to endanger the safety of the inhabitants, is also an indictable offence. United States v. Hart, Pet. C. C. 390. The keeping of a house in a negligent and filthy state, to the annoyance of the neighborhood and community, may be an indictable offence. State v. Purse, 4 McCord, 472. So letting a stallion to mares on the public street of a town and in view of the inhabitants, is indictable as a nuisance. Crane v. State, 3 Ind. 193.

(c) Ld. Denman, C.J., Rex v. Ward, 4 Ad. & E. 460. Rex v. Tindall, 6 Ad. & E. 143. Hegingbotham v. East. & Cont. St. Packet Co., ante, p. 194. Reg. v. Train, 31 Law J., M. C. 169; Q. B. 179, overruling on this point Rex v. Russell, 6 B. & C. 566. Respublica v. Caldwell, 1 Dall. 150. So it is no defence to an indictment for a nuisance that at the time it was created no inhabitants dwelt in the neighborhood; nor that at the time of the action other erections of a similar character are equally injurious to the public health. Douglas v. State, 4 Wis. 387. Nor is it any defence to an indictment for carrying on a noxious trade in a public place, that the proper officers have neglected to exercise their statutory powers in assigning a place for the exercise of the trade. State v. Hart, 34 Me. 36.

(d) Reg. v. Saintiff, 6 Mod. 256.

(dd) Louisville, etc., R. R. Co. v. State, 3 Head (Tenn.), 523. See State v. Vermont Central R. R. Co., 30 Vt. 108.

man, C.J., "to charge a body corporate (by indictment) with erecting a bar across a public road as with the non-repair of it, and they may as well be compelled to pay a fine for the act as for the omission"(e).

300 *Proof of dedication of way to the public.*—If the owner of the soil makes and throws open a foot-way or carriage-way leading from one part of a public thoroughfare to another part of a public thoroughfare, and neither marks by chain or bar, or visible distinction, that he means to preserve all his rights over it, nor exclude persons from passing through it by positive prohibition, and the public notoriously use the way for a number of years (see *post*, p. 268), it is presumed to be dedicated to the use of the public, and becomes a public highway, which cannot lawfully be interrupted, though it was originally opened and intended for private convenience(f). The user and enjoyment of the way by the public must have been had under circumstances from which an intention on the part of the owner of the soil to dedicate the way may fairly be inferred(ff). If therefore, the passage of the public

(e) *Reg. v. Gt. North of Eng. Rail. Co.*, 9 Q. B. 325. *Reg. v. Birm. & Glouc. Rail. Co.*, 3 Q. B. 223.

(f) *Rex v. Lloyd*, 1 Campb. 260. *Roberts v. Carr*, ib. 263. *Rex v. Barr*, 4 ib. 16. *Ewell v. Greenwood*, 26 Iowa, 377. *Stevens v. Nashua*, 46 N. H. 192. *Conway v. Jefferson*, id. 521. *Little v. Denn*, 34 N. Y. 452. *Day v. Allender*, 22 Md. 511. *Grube v. Nichols*, 36 Ill. 92. *Onstott v. Murray*, 22 Iowa, 457. *Keys v. Tait*, 19 Iowa, 123. *Gentleman v. Soule*, 32 Ill. 271. *Lewiston v. Proctor*, 27 Ill. 414. *Compton's Petition*, 41 N. H. 197. *Hart v. Trustees, etc.*, 15 Ind. 226. *Commonwealth v. Cole*, 26 Penn. St. 187.

Such use is said to be conclusive proof of dedication. *Lemon v. Hayden*, 13 Wis. 159. *Wyman v. State*, id. 663. *Johnson v. Stayton*, 5 Harring. (Del.) 448. *Green v. Oakes*, 17 Ill. 249. *Smith v. State*, 3 Zab. 130. See *Williams v. Cummington*, 18 Pick. 312; *State v. Hunter*, 5 Ired. 369. But a highway cannot be established by prescription if the consent of the owner of the soil was given by mistake. *State v. Crow*, 30 Iowa, 258. And it has also been held that no length of user by the public will of itself establish a public road. *Kelly's case*, 8 Gratt. 632.

(ff) See *Gentleman v. Soule*, 32 Ill. 271; *Robertson v. Wellsville*, 1 Bond, 81; *Morrison v. Marquardt*, 24 Iowa, 35; *Marcy v. Taylor*, 19 Ill. 634; *People v. Jones*, 6 Mich. 176; *Holdane v. Coldspring*, 21 N. Y. 474; *Dodge v. Stacey*, 39 Vt. 558; *Fulton Village v. Mehrenfield*, 8 Ohio (N. S.), 440.

Not only must there be an intention on the part of the owner to dedicate a portion of his land for the purposes of a highway and an act amounting to dedication, but there must be also an acceptance on the part of the public. *Id. State v. Wilson*, 42 Me. 9.

At common law, if the intention of the owner to dedicate a road to the public is evident, no formal or official acceptance is necessary, but travel by the public to such an extent and for such a length of time as to show that public convenience and accommodation require the road is sufficient for the purpose. *Buchanan v. Curtis*, 25 Wis. 99. *Hanson v. Taylor*, 23 Wis. 547. *Guthrie v. New Haven*, 31 Conn. 308. *Green v. Canaan*, 29 Conn. 157.

Acceptance may be conclusively evidenced by twenty years' use of the land as a highway. *Stevens v. Nashua*, 46 N. H. 192. *Haywood v. Charlestown* 34 N. H. 23. *Jennings v. Inhabitants of Tisbury*, 5 Gray (Mass.), 73. So it may be evidenced by proof of the express vote of the proper officers, or by any act recognizing an obligation to repair. *State v. Otherton*, 16 N. H. 203. *Alvord v. Ashley*, 17 Ill. 363.

Where there has been no public user, acceptance of a city street must be manifested by some act of the lawful authorities, either formally confirming the dedication, or exercising authority over the property dedicated. *People v. Jones*, 6 Mich. 176. *State v. Wilson*, 42 Me. 9.

And user of a city street by the public does not of itself constitute acceptance, but is merely evidence tending to prove acceptance. *Detroit v. Detroit, etc.*, R. R. Co., 23 Mich. 173.

was allowed under some special agreement or license of the owner of the soil, the conditional and permitted user will not establish the public right. Thus, where the owner of land agreed with an iron company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land in such hamlet should be open to carriages, that the company should pay him five shillings a year, and find cinders to repair the road, and that the inhabitants of the parish should lay down and spread the cinders, and the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time a dispute arising, and the road being left unrepaired, the owner of the land stopped up the road, it was held that there had been no dedication of the road to the public, but only a license to use it on certain terms and conditions, which license might be withdrawn on the condition not being complied with(*g*).

Where an ancient highway was illegally stopped and the public deviated on to the adjoining land, which was an open down, forming a track nearly parallel with the old road, which track they continued to use for about twenty years, when it was stopped, and the old road was re-opened to the public, it was held that the deviating track had not become a public highway, as it had never been used by the public except when they had been shut out from the old road, and the user, being referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stopped the highway(*h*), would not establish any permanent dedication of the deviating track to the use of the public, so as to make it a permanent public thoroughfare(*i*).

301 *User of a way by the public is by no means conclusive of the way being a public way*; it is evidence only to be weighed in connection with surrounding circumstances. Where, therefore, there was a wood, and divers paths or tracks through it leading in different directions, and people wandered where they pleased through the wood and made tracks, but the tracks were used only in dry weather, and were hardly

(*g*) *Barraclough v. Johnson*, 8 Ad. & E. 99; 3 N. & P. 233. It has, however, been held, that where one owner of land dedicated a strip of land twenty-five feet wide for a public street on condition that an adjoining owner should dedicate a like strip for the same purpose and make a street fifty feet wide, the immediate opening of the first mentioned strip for a street and its use by the public for eighteen years, will constitute a waiver of the condition and make the dedication absolute even though the neighbor should refuse to dedicate his part of the street. *Lloyd v. Hulbert*, 1 Cinc. (Ohio) 228. See *Robertson v. Wellsville*, 1 Bond, 81; *Lownsdale v. Portland*, Deady 1.

(*h*) *Absor v. French*, 2 Show. 28. *Steel v. Prickett*, 2 Stark. 463.

(*i*) *Dawes v. Hawkins*, 8 C. B., N. S. 857. And see *Pound v. Plumstead Board of Works*, L. R., 7 Q. B. 183.

passable after rain, and led to no public place which could not be reached by a more convenient thoroughfare, it was held that this was a mere permissive user of the wood for purposes of recreation and pleasure, and that there was no dedication of a way to the public to be used "as of right"(*k*).

The right to the use of a public foot-way includes the right of bringing on to it all the ordinary accompaniments of a foot-passenger, not being of a size to obstruct the way and interfere with the use of it by other passengers(*l*).

302 *Proof of animus dedicandi*.—There must be on the part of the owner of the soil an *animus dedicandi*, of which the user by the public is evidence and no more, so that a single act of interruption by the owner of the soil is of much more weight upon the question of intention than many acts of enjoyment(*m*). But the question of dedication does not depend upon what a man says, but upon his acts. "A man may say that he does not mean to dedicate a way to the public, and yet, if he has allowed them to pass every day for a length of time, his declaration alone would not be regarded. The facts may warrant a jury in believing that the way was dedicated, though he has said that he did not so intend; and if his intention be insisted upon, it may be answered that he should have shown it by putting up a gate, or by some other act"(*n*). If the owner of the soil shuts up the way one day in the year, that is sufficient to show that he does not intend to dedicate, but gives a license only(*o*).

(*k*) *Schuringe v. Dowell*, 2 F. & F. 848. *Chapman v. Cripps*, ib. 867. *Mildred v. Weaver*, ib. 33. See *State v. Thomas*, 4 Harring. 568; *Harding v. Jasper*, 14 Cal. 642; *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 84; *Hutts v. Tindall*, 6 Rich. 393.

(*l*) *Reg. v. Mathias*, ib. 570.

(*m*) *Parke, B., Poole v. Huskinson*, 11 M. & W. 830.

(*n*) *Littledale, J., Barraclough v. Johnson*, 8 Ad. & E. 105. *Surrey Canal Co. v. Hall*, 1 Sc. N. R. 264; *M. & Gr.* 403.

(*o*) *Trustees of British Museum v. Finnis*, 5 C. & P. 465. The law requires not only an intention to dedicate, but an act manifesting such intention; and an expression of an intention without an act to effectuate it, does not constitute a valid dedication. *Robertson v. Wellsville*, 1 Bond, 81. *Fulton Village v. Mehrenfeld*, 8 Ohio (N. S.), 440. This intention may be manifested in writing, by declarations, or by acts. *Id.* *Gentleman v. Soule*, 32 Ill. 271. A dedication by parol is valid, and may be established by proof of the verbal declarations of the owner. *Chapin v. State*, 24 Conn. 236. *Robertson v. Wellsville*, 1 Bond, 81. So it may be established without proof of any act of dedication, by presumption arising from continued use for a considerable time with the knowledge of the owner and without objection on his part. *Id.* *Holcraft v. King*, 25 Ired. 352. See *ante*, note *f*.

If there be no written evidence of the intent to dedicate, the acts and circumstances relied on to establish it must be unequivocal and convincing. *Morrison v. Marquardt*, 24 Iowa, 35. All the acts of the owner bearing on the question of intent must be considered together; and one act may be explained and qualified by another. *Harding v. Jasper*, 14 Cal. 642. *People v. Jones*, 6 Mich. 176. The mere act of leaving land adjoining the highway uninclosed is no proof of dedication. *Morse v. Ranno*, 32 Vt. 600. But the sale of lots described as bounded on certain streets is sufficient evidence of dedication. *Shenley v. Common*

Where the owner of the soil had placed and maintained a gate across a foot-way, with a view of preventing a public right of passage, and the gate went to decay, and for twelve years there was no gate at all, and then the owner of the soil put up a new gate, at the place where the old gate formerly stood, it was held to be a question for the jury whether the owner of the soil, from suffering the gate to be down so long, and permitting the public to use the way without obstruction for so many years, had completely dedicated the way to the public, so that the gate could not be replaced(*p*). Where a bar, placed across a bridge, was kept locked, and opened only in times of flood, when the ford hard by was dangerous or impassable, it was held that this was conclusive to show that there was no general right of passage(*q*).

If there has been a public uninterrupted user of a road for such a length of time as to satisfy a jury that the owner of the soil, whoever he might be, intended to dedicate the road to the public, this is sufficient to prove the existence of a highway, though it cannot be ascertained who was the owner of the soil of the road during the time it was so used(*r*). The open user by the public of a way as of right raises a *primâ facie* presumption of the existence of the public right, and when such user is proved, the onus lies on the person who seeks to deny the inference from such user to show that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed(*s*). There is nothing in the nature of a sea wall or embankment erected to protect land against the encroachment of the sea, inconsistent with the existence of a public right of way along it, except so far as the necessary repairs of the wall might make a temporary stoppage of the way necessary(*t*).

If an owner of land lets land on building leases, and houses are built which require a way to them, and a way is made, and used by carts and carriages going to these houses, and which can go nowhere else, there is nothing from these facts alone to establish a dedication of the way to the public(*u*).

wealth, 36 Penn. St. 29. Bissell v. New York, etc., R. R. Co. 23 N. Y. 61. Oswald v. Grenet, 22 Texas, 94. Preston v. Navasotee, 34 id. 684. Burthe v. Fortier, 15 La. An. 9.

(*p*) Lethbridge v. Winter, 1 Campb. 263. See Carpenter v. Gynn, 35 Barb. (N. Y.) 395.

(*q*) Rex v. Marquis of Buckingham, 4 Campb. 190. See Green v. Bethea, 30 Ga. 896.

(*r*) Reg. v. East Mark, 11 Q. B. 877. Williams, J., Dawes v. Hawkins, 8 C. B., N. S. 887; 20 Law J., C. P. 343. See Dimon v. People, 17 Ill. 383; Holt v. Sargent, 15 Gray (Mass.), 97.

(*s*) Reg. v. Petrie, 4 Ell. & Bl. 737.

(*t*) Greenwich Board of Works v. Maudslay, L. R., 5 Q. B. 397.

(*u*) Woodyer v. Hadden, 5 Taunt. 140. But see Bateman v. Bluck, *infra*. A person may, for his own convenience and the convenience of his tenants occupying houses on either side, construct and maintain a way opening into a public street, and leave the same open to public

303 *Occupation roads*, laid out through an estate for the use and convenience of the occupiers, are not thereby dedicated to the public(v).

304 *No particular time of enjoyment is necessary for evidence of dedication(w)*; it is not, like a grant, presumed from length of time. If the act of dedication be unequivocal, it may take place immediately(w); for instance, if a man builds a double row of houses, opening into an ancient street at each end, making a new street, and sells or lets the houses, that is instantly a highway, and although the new street may terminate in a *cul de sac*, it may nevertheless be a public place, accessible to all(ww). But if a bar or rope, or the slightest obstruction, is put up, showing that the owner of the soil does not intend to give a general and unreserved right of passage, that will prevent a dedication. And to support anything like a dedication, the street or road must be finished as a perfect street; for if the foot-ways are not completed, or paving has to be done, or fences to be put up, the evidence of an intention to dedicate is insufficient(x), unless the way has been used in its unfinished state as a public thoroughfare for a considerable number of years(y).

305 *There may be a highway by dedication to the public, where there is no thoroughfare.*—Where there was a public street, and at the side of it a passage leading to a court consisting of fifteen houses, all of which belonged to the plaintiff, but the court had been freely used by the public for many years without restriction, it was held that this was evidence from which a jury might find a dedication to the public, although the court and thoroughfare had originally been made for the use of the occupiers of the houses, and led only to their dwellings(z). A highway, therefore, may exist, though it is not a thoroughfare(zz). But if a road be made for the accommodation of particular persons only, it is not a public

travel for more than twenty years without interruption, and yet not dedicate the land to the public if there is some sign maintained showing the intent of the owner to maintain only a private way. *Durgin v. Lowell*, 3 Allen (Mass.), 398. *Hall v. McLeod*, 2 Met. (Ky.) 98. See *People v. Jackson*, 7 Mich. 432.

(v) *Selby v. Cryst. Pal. Distr. Gas Co.*, 31 Law J., Ch. 595.

(w) *Parrish v. Stephens*, 1 Oregon, 59. *State v. Marble*, 4 Ired. 318. *State v. Trask*, 6 Vt. 355.

(x) *Jersey City v. Morris Canal, etc., Co.*, 1 Beasley (N. J.), 547. *Trustees of Jordan v. Otis*, 37 Barb. 50.

But to establish a dedication by a single act, the act must be of such an unequivocal character as to render the presumption of dedication from lapse of time or user unnecessary. *Logansport v. Dunn*, 8 Ind. 378.

(ww) *People v. Kingman*, 24 N. Y. 559. *People v. Van Alstyne*, 3 Keyes (N. Y.), 35. *Stone v. Brooks*, 35 Cal. 489.

(x) *Woodyer v. Hadden*, 5 Taunt. 140.

(y) *Jarvis v. Dean*, 3 Bingham, 447.

(z) *Bateman v. Bluck*, 21 Law J., Q. B. 407.

(zz) *People v. Kingman*, 24 N. Y. 559.

road, and there is no reason why the inhabitants in a street which is not a thoroughfare should not put up a fence at the end of it, and exclude the public(a).

306 *Who may dedicate*—*A mere tenant or lessee has no power to throw open land to the public, and create a public thoroughfare in derogation of the rights of the landlord or reversioner.* There cannot be a public way by dedication, unless there be some evidence to show that the owner of the soil has consented to such user. The consent of the lessee is not sufficient for that purpose, because it cannot bind the owner of the inheritance(b). But if the acts of user are notorious, and go on for a great length of time, and notwithstanding a frequent change of tenants, it may be presumed that the owner has been made aware of them, and that the way was used with his concurrence(c).

307 *"Commissioners of public works have no power to dedicate to the use of the public, as a highway, land which they have been intrusted with the ownership of for a special purpose, and for which special purpose the land may at some future period be required. As all the King's subjects are presumed to know Acts of Parliament, they, when they used the road, must be presumed to have known that, in point of law, it could not be so dedicated, and that it could only be used as a way of permission and sufferance; and they cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by Parliament, and which, therefore, could not be infringed upon"(d).*

308 *Limited dedication.*—There may be a dedication of a way for a limited purpose, as for a foot-way, horse-way, or drift-way, but there cannot be a dedication to a limited part of the public, as to the inhabitants of a particular parish. Such a dedication would be simply void(e). A way may be dedicated to the use of the public for all purposes except that of carrying coals, so that persons carrying coals may be prevented from passing along it(f). Where there was a strip of open uninclosed land between a public carriage-road and a paved footpath, and the owners of the houses by the side of the paved foot-

(a) *Best, J., Wood v. Veal*, 5 B. & Ald. 457. See *Hall v. McLeod*, 2 Met. (Ky.) 98.

(b) *Wood v. Veal*, 5 B. & Ald. 454. *Harper v. Charlesworth*, 4 B. & C. 591. See *Lownsdale v. Portland, Deady*, 1. Dedication of land for a highway can be made by the owner only or his duly authorized agent. *Bushnell v. Scott*, 21 Wis. 451. It cannot be made by a squatter on government lands. *Gentleman v. Soule*, 32 Ill. 271. Nor by a mortgagor to the prejudice of the rights of the mortgagee. *McMannis v. Butler*, 49 Barb. (N. Y.) 176.

(c) *Davies v. Stephens*, 7 C. & P. 570.

(d) *Littledale, J., Rex v. Leake*, 5 B. & Ad. 485.

(e) *Bermondsey Vestry v. Brown*, L. R., 1 Eq. Ca. 204.

(f) *Marquis of Stafford v. Coyney*, 7 B. & C. 257.

way had always, by permission of the owner of the soil, used the space between the foot and carriage-way for purposes connected with their occupations, whenever they had occasion, and such use as the public had of it was of a limited and uncertain character, and was subject to the use of it made by such occupiers, it was held that the dedication to the public of the use of the intermediate space was subject to the use so made of it by the landlord and his tenants(*g*).

A highway may also, as we have seen, be dedicated to the public, subject to the existence of steps, cellar-flaps, and obstructions rendering the way dangerous, so that the public must take the way subject to these inconveniences (*ante*, pp. 205, 206).

309 *Gates across a highway*.—When a way has been dedicated to the use of the public subject to a gate across it, the public can only take the way subject to the inconvenience of the gate; but when the way has been dedicated without a gate, the owner of the soil cannot lawfully obstruct the road with a gate(*h*).

310 *There can be no dedication for a limited time, certain or uncertain*. If dedicated at all, the way is dedicated in perpetuity. Hence the maxim “once a highway, always a highway”—for the public cannot release their right, and there is no extinguishment of the public right by presumption or prescription(*i*).

311 *Common highway of necessity*.—“If there be but one road to a place, and no other way of going, that is a way of necessity; if the jury find this, we take it to be a common highway by necessity”(*k*). If a vill be erected, and a way laid out to it, if there be no other way but that to the vill, it is not material *quo animo* it was laid out, it shall be deemed a public way(*l*).

312 *Proof of highway by proof of parish repairs*.—The fact of a road having been repaired by a parish “as far back as living memory can go,” is a strong fact in favor of the road being a public road, but it is not conclusive(*m*).

313 *Indictable obstructions in public thoroughfares*.—A highway may, as we have seen, be dedicated to the public subject to a pre-existing

(*g*) *Le Neve v. Vestry of Mile End, etc.*, 8 Ell. & Bl. 1054; 27 Law J., Q. B. 208.

(*h*) *James v. Hayward, ante*, p. 207. *Green v. Bethea*, 30 Ga. 896.

(*i*) *Byles, J., Dawes v. Hawkins*, 8 C. B., N. S. 857; 29 Law J., C. P. 343. A dedication once made is irrevocable. *Proctor v. Lewiston*, 25 Ill. 153. *Oswald v. Grenet*, 22 Texas, 94. By the laws of New York (laws of 1861, ch. 311,) all highways that have ceased to be traveled or used as such for six years cease to be highways. See *Amsbry v. Hinds*, 48 N. Y. 57.

(*k*) *Chichester v. Lethridge, Willes*, 72.

(*l*) *Reg. v. Inhab. of Hornsey*, 10 Mod. 150.

(*m*) *Reg. v. Hawkhurst*, 11 W. R. 9; 7 Law T. R., N. S. 268. See *Daniels v. People*, 21 Ill.

easement, such as a right vested in the owners of adjoining land, of depositing goods thereon in certain places(*n*).

In the case of an ordinary highway running between fences, the right of way or passage, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the whole of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and passengers. It is an indictable offence, therefore, to place posts on greensward and open places extending between the metalled part of the road and the fence, dividing the road from the adjoining land, although the posts do not in point of fact offer any injurious obstruction to the public traffic. It is enough that they stand in the way of those who may wish to traverse the whole space between the fences(*o*), and neither vestry trustees nor commissioners of highways can authorize the placing of anything on a highway which constitutes a public nuisance; and it is no answer to an indictment for obstructing a thoroughfare to show that the obstruction, such as a tramway, though an annoyance to some passengers, is a great convenience to others, for "you cannot, for the advantage of one part of the public, commit acts which are a nuisance to another part"(*p*). If, instead of an indictment at common law, an injunction in Chancery is applied for, it must be in the name of the Attorney-General(*q*).

By the 27 & 28 Vict. c. 101, s. 51, penalties are imposed upon any one encroaching on the soil of a highway by placing any building, fence, etc., or manure, rubbish, etc., on the sides of any carriage or cart-way, within fifteen feet of the centre thereof, or by removing the turf, etc., from the side of the road, and the expense of removing the obstruction is to be levied by order of justices on the persons offending(*r*). This Act extends to any land which has been dedicated as

(*n*) *Morant v. Chamberlain*, *ante*, p. 206. *Le Neve v. Mile End Vestry*, etc., *supra*.

(*o*) *Reg. v. Un. King. Tel. Co.*, 31 Law J., M. C. 167. *Rex v. Wright*, 3 B. & Ad. 683. *Turner v. Ringwood Highway Board*, *post*, p. 309. See *Harrower v. Ritson*, 37 Barb. (N. Y.) 301; *Dickey v. Maine Telegraph Co.*, 46 Me. 483.

(*p*) *Reg. v. Train*, 31 Law J., M. C. 169. *Rex v. Ward*, *Rex v. Tindall*, *ante*, p. 264. See "The Tramways Act, 1870;" 33 & 34 Vict. c. 78. See ss. 40, 55, & 62.

(*q*) *Bermondsey Vestry v. Brown*, *ante*, p. 270.

(*r*) As to cattle straying on highways, see s. 25, *ante*, p. 237 *in notis*; on a turnpike road, 34 & 35 Vict. c. 115, s. 20. The statutes of New York and Michigan fixing a penalty for encroachments upon highways, apply to highways laid out as provided by law, and not to those established by public use. *Doughty v. Brill*, 3 Keyes (N. Y.), 612. *Parker v. People*, 22 Mich. 93. For the statutory penalty fixed by the laws of Wisconsin, see Revised Statutes of 1868, ch. 19, ss. 101-103. See, also, *Wyman v. State*, 13 Wis. 663.

and forms part of the highway, though not metalled, but not to land on the side of the road, which has not been so dedicated(s).

314 *Indictable obstructions in navigable rivers*.—An erection in a port or navigable river is not to be deemed a nuisance, simply because it infringes on the water-way. It is not every building below the high water mark, nor every building below the low water mark, that is *ipso facto* in law a nuisance, for that would destroy all the quays in all the ports of England. Whether a building in or near the water, be a nuisance or not, is a question of fact, to be determined by a jury, on evidence, and not a question of law(t). “Where the navigation of a river has become obstructed by a vessel which has sunk, and been lost to the owner, without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity, in addition to his share of a public inconvenience; and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil. Lord Kenyon held that the owner of a ship sunk in the Thames by accident and misfortune, without his default or misconduct, was not liable to an indictment for not removing the obstruction. It was contended for the prosecution, in this case, that although the defendant was not punishable for causing the nuisance, it having arisen from accident, it was his duty to remove it; but the learned judge answered, that perhaps the expense of removal might have amounted to more than the whole value of the property”(u).

315 *Repair of highways, sea-banks(v), and sewers*.—The Highway Act, 1835, 5 & 6 Wm. 4, c. 50, requires (s. 23) three months’ notice to be given to the surveyor of highways of the intention to dedicate any road or occupation way, made by private persons, bodies politic or corporate, or any private drift-way and horse-path, set out in any award of commissioners under an inclosure Act, describing its situation and extent, and also the certificate of two justices in petty sessions that it has been made in a substantial manner, and of the width required by the Act before any such road, etc., shall be deemed to be a highway, which the inhabitants of the parish shall be compellable to repair, but in all other respects as regards the right of the public to use it, it remains a highway(w).

(s) *Easton v. Richmond Highway Board*, L. R., 7 Q. B. 69.

(t) *Hale, De Portibus Maris Hagr. Tracts*, p. 85. *Rex. v. Russell*, 6 B. & C. 572.

(u) *The King v. Watts*, 2 Esp. 675. *Brown v. Mallet*, 5 C. B. 619. *White v. Crisp*, *ante*, p. 209.

(v) See *post*, pp. 276, 279.

(w) *Roberts v. Hunt*, 15 Q. B. 17.

If a highway is washed away and totally destroyed by the sea, so that there is no longer anything left to repair, and nothing that can be effectually restored, the parish is released from its liability to repair(*x*).

316 *Liability to repair ratione clausuræ*.—Where a defendant is sought to be made responsible for the non-repair of a highway, on the ground that he has enclosed vacant spaces of ground adjoining the highway, and encroached on land used for passage when the beaten track was foundrous, it must be proved, first, that the highway has been used immemorially as a highway; secondly, that the land inclosed has been used for passage when the beaten track was foundrous; thirdly, that the defendant is the occupier of the enclosed land taken from the public thoroughfare, for there is neither precedent nor authority for charging the owner not in possession(*y*).

The parish of common right ought to repair their highway(*z*), unless by order of the magistrates they have been relieved from their liability(*a*). Where, indeed, there are several townships in one parish, a particular township may, by immemorial usage, be liable to repair its own roads distinct from the parish at large(*b*). But it lies upon the township to establish its exemption from the ordinary rule(*c*), and it is not sufficient for this purpose to show that it has never been assessed to the highway rates of its own parish, but has always been treated as part of an adjoining parish, and rates levied upon it by such parish until recently, when, by arrangement with such parish, the occupiers repaired the highways themselves, without any rate being made; for the proper inference from such facts is, not that it is a township repairing its own roads, but that, by some old arrangement made for mutual convenience, it was considered part of the adjoining parish for the purposes of repair, and on the termination of that arrangement all parties are remitted to their original rights and liabilities(*d*). Where to an indictment for the non-repair of a highway in parish *A* the defendants pleaded that from time immemorial the inhabitants of parish *B*, in consideration of levying and receiving rates on certain lands in parish *A*, had repaired such highway, it was held that such

(*x*) *Reg. v. Hornsea*, 23 Law J., M. C. 59.

(*y*) *Reg. v. Ramsden*, Ell. Bl. & Ell. 949; 27 Law J., M. C. 296.

(*z*) *Rex v. Bagley*, 12 Mod. 409, per Holt, C. J. See *Hirst v. Halifax Local Board*, L. R., 6 Q. B. 181.

(*a*) See *Reg. v. Justices of Surrey*, L. R., 5 Q. B. 466.

(*b*) *Rex v. Ecclesfield*, 1 B. & Ald. 348.

(*c*) *Freeman v. Read*, 4 B. & S. 174.

(*d*) *Dawson v. Willoughby-with-Sloothby*, 34 L. J., M. C. 37.

a liability, if it could exist at all, which was very doubtful, could only arise on sufficient consideration, and that the consideration stated, viz., an immemorial custom to levy rates, was clearly not sufficient, for the power to levy rates existed by statute only, and arose long after the time of legal memory. Any arrangement, therefore, made by adjoining parishes as to mutual repair can be put an end to at any time(e).

317 *Repair by District Highway Board.*—By the 25 & 26 Vict. c. 61, the formation of district highway boards is authorized. By the 17th section, such board is directed to maintain the highways within their district, and they are to have the same powers, to be subject to the same liabilities, and to perform the same duties as the parish surveyor would have performed or been liable to if the Act had not been passed. By the 18th section provision is made for the issue of a summons by a justice of the peace if the highway is out of repair, and for the making of an order at petty sessions for such repair, which order is removable into the Court of Queen's Bench, in the same way as an order of general or quarter sessions. If the liability to repair is disputed, the justices are to order an indictment against the parish or person charged with the repair (s. 19). But this section only applies to admitted highways, and does not apply where the liability to repair, if the highway is one, is admitted, but it is denied that it is a highway at all(f). When any private person or body politic, liable to repair a highway, *ratione tenuræ*, or otherwise, omits to repair such highway, the district board may repair it, and recover the expenses from the party liable (s. 34). Such person or body politic, however, or the district board, may apply by summons before justices to have such highway made repairable by the parish, on payment of such a sum to the highway board as the justices think fit (s. 35)(g). If the parish wish to undertake the repair of a private road in return for its use, and the owner and occupier is willing, on application to justices in petty sessions, they may declare it repairable by the parish (s. 36). No person is to become liable for the repair of a highway by erecting fences between the highway and the adjoining land, if the fences have been erected with the consent of the district board, or other authority having jurisdiction over the highway (s. 46). By the 27 & 28 Vict. c. 101, s. 22, the district board may contract for three years with any person liable to repair a highway, to repair it themselves, and *vice versâ*.

(e) *Reg. v. Ashby Folville*, L. R., 1 Q. B. 213. *Dawson v. Willoughby-with-Sloothby*, *supra*.

(f) *Reg. v. Farrer*, L. R., 1 Q. B. 558; 35 L. J., M. C. 210.

(g) These sections are amended by 27 & 28 Vict. c. 101, ss. 23, 24.

318 *Ditches of turnpike roads*.—By the General Turnpike Act, 3 Geo. 4, c. 126, s. 113, the duty of cleansing, scouring, and keeping open ditches and watercourses for the purpose of keeping turnpike roads dry, is cast upon the trustees, and not upon the owners of the adjoining lands(*h*).

Where a person owning land adjoining the sea is liable *ratione tenuræ* to repair the sea banks as a defence against the irruption of the water, the Commissioners of Sewers, under 23 Hen. 8, c. 5, s. 3, have power to do the repairs, and to fine such owner for the amount expended, without giving him any notice; and for such a purpose the mortgagor, who is in receipt of the rents and profits of the land by his tenant, is the owner(*i*).

By the common law the repair of public sewers is either by prescription *ratione tenuræ*, or is imposed upon the land that is benefited or preserved from damage by them(*k*).

(*h*) *Merivale v. Trustees of Exeter Turnpike Road*, L. R., 3 Q. B. 149; 37 L. J., M. C. 40.

(*i*) *Reg. v. Baker*, L. R., 2 Q. B. 621. Who is "owner" under a building agreement for the purpose of recouping the District Board of Works in London money expended in paving, see *Lady Holland v. Kensington Vestry*, L. R., 2 C. P. 565. As to paving expenses under the Public Health Act (11 & 12 Vict. c. 63, s. 69), see *Cook v. Ipswich Local Board*, L. R., 6 Q. B. 451. Who is "owner" under that Act, *Bowditch v. Wakefield Local Board*, ib. 567.

(*k*) See *Biglin v. Wylie*, 36 L. J., Q. B. 307.

CHAPTER V.

OF INJURIES TO LANDS AND TENEMENTS FROM WASTE, NEGLIGENCE AND FIRE.

SECTION I.—*Of injuries to realty from waste, etc.*—Commissive and permissive waste—Waste by lessees, tenants for term of years, tenant-at-will, and tenant for life—Waste in trees and woods—Decaying timber—Equitable waste, where tenant for life holds without impeachment of waste—Ecclesiastical dilapidations—Waste by copyholders and tenants in common—Waste from the removal of things attached to the freehold—Landlord's fixtures—Tenant's fixtures—Ornamental and trade fixtures—Fixtures removable by custom—Abandonment of the right to disannex and remove fixtures—Right of purchasers and mortgagees to enter and remove fixtures—Waste by strangers upon lands demised to tenants—License to commit waste—Injuries from fire—Fire spreading from blast-furnaces, steam-engines, and railways—Fires occasioned by the negligence of servants—Injuries from gunpowder and explosive substances.

SECTION II.—*Of remedies for injuries to lands from waste, negligence, and fire.*—Actions for waste—Actions by owners of insured premises—Parties, pleadings, defences, and evidence—Assessment of damages.

SECTION III.—*Of injunction to prevent waste.*—Parties liable to an injunction—Effect of acquiescence in the commission of waste—Laches or delay in seeking a remedy.

SECTION I.

OF INJURIES TO LANDS AND TENEMENTS FROM WASTE, NEGLIGENCE, AND FIRE.

319 “*Waste*,” observes Blackstone, “is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion. It is either voluntary, which is a crime of commission, as by pulling down a house, or it is permissive, which is a matter of omission only, as by suffering it to

fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance, is waste. Tenant for life or term of years was not by the common law responsible for waste, nor was waste punishable," observes Blackstone, "in any tenant, excepting guardian in chivalry, tenant in dower, and tenant by the curtesy. And the reason of the diversity was, that the estate of these three tenants was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee: and if he did not, it was his own fault"(a). But, for the benefit of reversioners, it was provided by the statutes of Marlbridge, 52 Hen. 3, c. 23, and of Gloucester, 6 Ed. 1, c. 5, that every man from thenceforth should have a writ of waste in the chancery against him that holdeth for term of life or years, or a woman in dower. And for waste made in the time of wardship it shall be done as is contained in the great charter, etc. Since the passing of these statutes, therefore, all tenants for life or term of years have been liable in damages for waste, unless their leases have been made to them without impeachment of waste. All tenants, whatever their term or interest, are liable for commissive waste; but a mere tenant-at-will, or from year to year, is not responsible for permissive waste(b).

320 *Commissive and permissive waste*.—Commissive, or, as it is more frequently termed, wilful waste, consists, amongst other things, in the doing by a tenant of some wilful injury to the premises demised to him, such as pulling down houses and buildings, prostrating walls, removing landlord's fixtures, breaking windows, or tiles and slates, and uncovering the roofs of houses. Permissive waste is where the tenant remains a passive spectator of decay and ruin, doing nothing to accelerate, and making no effort to retard the evil.

321 *Permissive waste by lessees for terms of years*.—A tenant for term of years is responsible for permissive as well as commissive waste(c), but where he has not obliged himself by covenant to do repairs, he is not bound to rebuild; for if the subject of occupation perishes from time and natural decay, the landlord is the person to provide a new one, if

(a) 2 Bl. Com. ch. 18, s. 6. Waste has been defined as a lasting damage to the reversion caused by the destruction, by the tenant for life or for years, of such things on the land as are not included in its temporary profits. *Proffit v. Henderson*, 29 Mo. (8 Jones) 325.

(b) *Harnett v. Maitland*, 16 M. & W. 257. *Redfern v. Smith*, 1 Bing. 382. Tenants for life are liable for injuries to the inheritance, whether committed by themselves or a stranger, or by one of several life tenants. *Wood v. Griffin*, 46 N. H. 230.

(c) *Yellowly v. Gower*, 11 Exch. 294; 24 Law J., Exch. 299.

he think fit(*d*.) A tenant for years must not suffer the roof of a house to remain uncovered, so as to let the timbers rot, and must use all reasonable endeavors to keep the buildings wind and water-tight; but he is not bound to repair the principal timbers of the roof, nor to replace old materials with new, except where the expense is of a trifling character, and the mischief, if neglected and left unrepaired, would operate to the lasting injury of the inheritance. If a roof is blown off by tempest, he is not bound to put on a new roof, but if a few tiles only are stripped off, he is bound to replace them, or adopt means to keep out the wet. The extent of the liability of a lessee, not holding under a covenant or agreement to repair, for permitting buildings demised to him to go to decay and ruin, will depend upon the age and general state and condition of the buildings at the time he took possession of them, the nature and extent of the repairs required for their preservation, and the duration of his own term and interest in the property; for a tenant-at-will, or a tenant from year to year, cannot be expected to do as much for the preservation of the property as a tenant for a long term of years. If a house is burnt by negligence, this, as we shall presently see, is waste(*dd*); and if sea-walls and river-banks are destroyed from want of timely reparation, this will be waste; but if they receive the usual and customary repairs, and are destroyed by a great tempest or a violent inundation, the lessee is not responsible for waste if he fails to rebuild them(*e*).

322 *Commissive waste by tenants for terms of years*—Whenever a tenant or lessee makes material changes in the nature of the premises demised to him, which have the effect of converting them into something substantially different from what they were at the time they were placed in his hands, he is guilty of commissive waste, and is responsible in damages for infringing upon the proprietary rights of the landlord. The tenant by the lease has the use, not the dominion of the property demised to him, and cannot make permanent changes and alterations in the property without the consent of the landlord, although such changes and alterations may greatly enhance the value of it; for the owner has a right to have his houses and lands kept in an unaltered state, surrounded by all their old features, landmarks, and associations(*f*). Therefore an action is maintainable by the reversioner pending the term against the tenant for inclosing

d) Bayley, J., *Wise v. Metcalfe*, 10 B. & C. 314.

dd) *Cook v. Champlain Transportation Co.*, 1 Denio, 81.

e) 2 Roll. Abr. WASTE (C.)

f) *Smyth v. Carter*, 18 Beav. 78.

and cultivating waste land included in the demise, and for continuing the grievance(*g*); also for the pulling down of an old building, and the substitution in lieu thereof of tenements of greater value(*h*), and for removing a partition-wall in a house and enlarging a chamber(*i*).

323 Where a lessee opened a new door in a house, whereby the house was not in any respect weakened or injured, it was held to be a question for the jury whether there was or was not any injury to the rights of the reversioner(*k*). But, if there is any substantial alteration in the form and arrangement of the house, the house is no longer the same house, and there is an invasion of the proprietary rights of the landlord or reversioner. It is no answer to an action for the infringement of these rights to say that the defendant might, before the expiration of the lease, restore the premises to their former plight, and surrender them up to the landlord in their original condition(*l*).

324 A lessor may sue for commissive waste, although the lease contains a covenant upon which the lessor might maintain an action for the same wrong. It is no answer for the lessee to say that an action of covenant may also be maintained against him in respect of the same cause of action, for the lessor may have either remedy(*m*).

(*g*) *Provost, etc., of Queen's College v. Hallett*, 14 East, 489.

(*h*) *Cole v. Green*, 1 Lev. 309.

(*i*) 2 Roll. Abr. 815, pl. 9.

(*k*) *Young v. Spencer*, 10 B. & C. 145. Alterations in a house demised are not waste unless prejudicial to the lessor. *Jackson v. Tibbits*, 3 Wend. 341.

(*l*) *Provost, etc., of Queen's College v. Hallett*, 14 East, 489. *Cole v. Forth, infra*.

(*m*) *Kinlyside v. Thornton*, 2 W. Bl. 1111. *Torriano v. Young*, 6 C. & P. 8. *Marker v. Kenrick*, 13 C. B. 198. The common law doctrine of waste is not, in its strictness, applicable to the condition of things in this country. It is waste, here as in England, to make material alterations in a dwelling house, as by changing it into a warehouse, and thereby produce a permanent injury to the building. *Douglas v. Wiggins*, 1 Johns. Ch. 435. But it is not waste to erect a new edifice upon demised premises without destroying or materially injuring the buildings or improvements already thereon. *Winship v. Pitts*, 3 Paige, 259. In this country no act of a tenant amounts to waste unless it is or may be prejudicial to the inheritance or to those who are entitled to the reversion or remainder. *Pyncheon v. Stearns*, 11 Met. 304. A tenant does not commit waste by erecting houses on the demised land, and digging cellars for them, and raising the ground about them, provided the cost of restoring the premises to their original state would be small, and the land as valuable for agricultural purposes as if it had not been built upon. *Id.* The erection of a new out-house in the place of one which had become ruinous, although constructed of timber from the farm, is not waste. *Sarles v. Sarles*, 3 Sandf. Ch. R. 601.

The cutting of trees and timber without leave or license is waste, if such cutting will work permanent injury to the freehold or inheritance. *McCoy v. Wait*, 51 Barb. (N. Y.) 225. *Van Deusen v. Young*, 29 N. Y. 9. *McGregor v. Brown*, 10 N. Y. 114. *Jackson v. Brownson*, 7 Johns. 227. And it has been held that the cutting of a single timber tree for sale is waste. *Sarles v. Sarles*, 3 Sandf. Ch. 601. But it has also been held that it is not waste for the tenant to cut down timber trees for the purpose of repairs, or to sell them to purchase boards for repairs, if the latter is the most economical mode. *Loomis v. Wilbur*, 5 Mason, 13. And it may not be waste for the tenant to remove trees thrown down by a tempest. *Houghton v. Cooper*,

325 The lessee of a water-mill, worked by a head of water penned back under a prescriptive right to pen back water for the purpose of working the mill, has no right to alter the height of the tumbling-bay, or transpose or alter the old permanent water-marks, as it tends to destroy the landlord's evidence of title to the head of water, and goes to the destruction of the thing granted. The lessee of house-property must not remove wainscots or floors, or pull down and rebuild, or open new windows and doors, and change the form and arrangement of the house, without the consent of the owner. He cannot convert one species of edifice into another, such as a corn-mill into a fulling-mill, or malt-mill, or a water-mill into a wind-mill, though the conversion be to the pecuniary advantage of the landlord, as well as to the benefit of the tenant(n). He must not fell timber-trees (except for the necessary repairs of a house he has covenanted to repair), nor destroy spring-woods or young plants destined to become trees; but he may cut willows, maples, beeches (see *post*, p. 284), and thorns, if they do not shelter a dwelling-house or sustain a bank, or afford shelter to cat-

6 B. Mon. 281. Whether the cutting and sale of timber by the tenant is waste or not may depend on the character of the land demised, the purposes of the lease, and the quantity of timber felled. Thus if a farm, consisting mainly of woodland, be leased for agricultural purposes, the lessee may fell sufficient timber to fit the land for cultivation, leaving a sufficient quantity for the purposes of the farm, without committing waste. *Kidd v. Dennison*, 6 Barb. (N. Y.) 9. *Jackson v. Brownson*, 7 Johns. 227. *Adams v. Brereton*, 3 Har. & J. 124. See *Dickinson v. Jones*, 36 Ga. 97. But the tenant must not cut down all the timber to the permanent injury of the inheritance. *Jackson v. Brownson*, 7 Johns. 227. Nor must he cut trees merely for the purposes of sale and not for the purpose of preparing the land for cultivation. *Kidd v. Dennison*, 6 Barb. 9. And to what extent wood and timber may be cut on land leased for agricultural purposes, without waste, is a question of fact for the jury. *Jackson v. Brownson*, 7 Johns. 227. *Drown v. Smith*, 52 Me. 141. In deciding the question the condition of the land must be taken into consideration, and whether good husbandry requires that the land should be cleared or the trees felled and marketed. *Id.* *Morehouse v. Cothel*, 2 N. J. 521. *Woodward v. Gates*, 38 Ga. 205. If the jury find that the clearing of land was bad husbandry, the tenant is liable for waste. *Chase v. Hazelton*, 7 N. H. 171. If a farm is let as a dairy farm, and with a covenant against waste, the clearing of woodland will be clearly an act of waste. *McGregor v. Brown*, 10 N. Y. 114.

The opening of a way over meadow land and the digging of drains by its side, or the carrying on of earth for the purpose of making the way passable, is not waste if the cost of restoring the premises to their former condition is not great, and the land has not been rendered less valuable for agricultural purposes. *Pyncheon v. Stearns*, 11 Met. 304. And it is not waste to convert meadow and pasture land into plough land. *Crockett v. Crockett*, 2 Ohio (N. S.), 180. Unless the change is detrimental to the inheritance or contrary to the usual course of good husbandry. *Clemence v. Clemence*, 1 R. I. 272. Nor is it waste to fill in and break up low, wet lands for the purpose of cultivation. *Pyncheon v. Stearns*, 11 Met. 304. It may be waste, however, to impoverish fields by constant tillage from year to year. *Sarles v. Sarles*, 3 Sandf. Ch. 601. Or to suffer pastures to be overgrown with brush where ordinary prudence would require the land to be kept cleared. *Clemence v. Clemence*, 1 R. I. 272. But if a tenant for life allows pasture land to become woodland, it may be waste to cut the timber trees thereon, if not for the use of the estate, even though it be done to restore the land to its original condition, and though it would be good husbandry in an owner of the fee to so restore it. *Clark v. Holden*, 7 Gray (Mass.), 8. Mere ill husbandry will not support the action of waste. *Richards v. Torbert*, 3 Houst. (Del.) 172.

(n) *Bac. Abr. (WASTE)*. *Cole v. Forth*, 1 Mod. 94; *Co. Litt.* 53a, 53b.

tile, and the cutting of them is not prejudicial to the inheritance. He may also cut oaks and ashes where they are usually cut as underwood, and are in due course to grow up again from the stumps, and the cutting is warranted by local custom and usage. He must not dig for gravel, lime, clay, brick-earth, stone, or the like, except for the necessary repair and improvement of the demised premises, in fulfilment of the covenants of his lease(*nn*). He must not remove virgin soil(*o*), nor open quarries or mines of metal or coal, for the purpose of selling the produce thereof; but he may work mines and quarries which were open and in existence at the time of the demise, as they then form part of the annual profits of the land(*oo*). He must not convert arable land into pasture, or pasture into arable land, or plough up a warren, or stub up a wood to make it pasture, or divert the courses of streams, nor dry up ancient pools or fish-ponds, nor destroy fences, nor put land under water, nor destroy the stock or breed of anything. He must not take all the fish out of a fish-pond, or the doves from a dove-cote, or the deer from a park, or the rabbits and conies from a warren, or the game from preserves; but he is entitled to the reasonable use and enjoyment of them, leaving as many in store for the landlord when he goes out as he found when he was intrusted with the possession and use of the property(*p*).

Waste may be committed by removing glass annexed to windows, for it is parcel of the house; and although the lessee himself, at his own cost, put the glass in the windows, yet, being once parcel of the house, he cannot take it away or waste it. Wainscot also, whether annexed to the house by the lessor or the lessee, is parcel of the house, and cannot be removed, unless it is purely of an ornamental character (*post*, p. 297); and there is no difference in law if it be fastened by great nails, or little nails, or by screws or irons put through the posts or walls(*q*), for every chattel affixed to the soil of another becomes a part of the soil, and belongs to the owner of the land, unless it is shown to have been affixed there in the necessary enjoyment of an easement by the person entitled to the easement, in which case it will belong to the latter, and not to the owner of the soil(*r*).

326 *Waste by tenant from year to year*.—Tenant from year to year is not

(*nn*) *Livingston v. Reynolds*, 26 Wend. 115.

(*o*) *Higgon v. Mortimer*, 6 C. & P. 616.

(*oo*) *Owings v. Emery*, 6 Gill. 260. *Lynn's Appeal*, 31 Penn. St. 44.

(*p*) *D'Arcy (Id.) v. Askwith*, Hob. 234. *Phillips v. Smith*, 14 M. & W. 593; *Bac. Abr.* (WASTE), Litt. s. 71.

(*q*) *Herlakenden's case*, 4 Co. 63b. *Wilde v. Waters*, 16 C. B. 637.

(*r*) *Lancaster v. Eve*, 5 C. B., N. S. 717.

responsible for permissive waste. Where an action on the case was brought by a lessor against a lessee holding from year to year, for suffering a house demised to him to go to ruin for want of repairs to the roof and windows, it was held that such an action was not maintainable. "There is no doubt," observes Mansfield, C.J., "but that an action on the case may be maintained for wilful waste; but, at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable against tenant from year to year, such an action might be brought against a tenant-at-will who omitted to repair a broken window. I think this action is an innovation, and I am not disposed to encourage it"(s). But every tenant from year to year is bound to take all due and reasonable care of the premises demised to him, and if windows are broken by the wind or hail, and the rain gets in, he is liable for the non-repair of them, if the consequences of his neglect would be damage to the building from the rain.

327 Tenant-at-will.—"If a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for term of years is tied. But if tenant-at-will commit voluntary waste, as in pulling down of houses or felling trees, the lessor shall have an action of trespass against him," for this amounts to a determination of the will, and the tenant so acting is a mere trespasser(t).

328 Tenant for life.—Tenant for life not made unimpeachable for waste by the person creating the tenancy is, by the statute of Gloucester (*ante*, p. 278), put upon the same footing, with regard to waste, as tenant for a term of years, and is responsible for permissive as well as commissive waste, so that if he fails to keep up and maintain buildings, walls, and fences, he will be liable to an action for dilapidations(tt). If the roofs of houses are uncovered by the wind, he must, in convenient time, repair them; but if the buildings are blown down by a violent tempest, or destroyed by lightning, he is not bound to rebuild. And if a house was uncovered and ruinous when he came into possession of it, it is then no waste to suffer it to fall down, as he is not bound to keep

(s) *Gibson v. Wells*, 1 B. & P., N. R. 290. *Herne v. Benlow*, 4 Taunt. 764. *Martin v. Gilham*, 7 Ad. & E. 543.

(t) Litt. s. 71; Co. Litt. 57a. *Harnett v. Maitland*, 16 M. & W. 262.

(tt) In the matter of *Steele*, 4 Green (N. J.), 120. But the tenant is only required to use ordinary care to keep the buildings on the life estate from going to decay. He is not required to expend extraordinary sums. *Wilson v. Edmonds*, 4 Foster (N. H.), 517. And he may defer repairs until a decline in the price of materials and labor, provided the estate suffer no immediate and permanent injury thereby. *Harvey v. Harvey*, 41 Vt. 373. But he must pay the taxes assessed upon the estate, and if he neglects to do so, and thereby subjects the estate to a sale, it is waste. *Stetson v. Day*, 51 Me. 434.

up and maintain a mere ruin(*u*). He is entitled to all such trees felled by the wind as he would have been entitled himself to fell, and also to all proper thinnings of plantations, etc., as well as to all coppices and osier beds cut in the nature of crops, but it seems to be doubted whether he has a right to cut poles(*x*). He may properly work an open mine, *i.e.*, a mine which has been worked within a few years of his coming into possession, but he cannot open a new mine and search for and carry away minerals(*y*).

329 *Waste in trees and woods* may be committed in Buckinghamshire by the cutting of beeches, because there, by the custom of the country, they are the best timber; and the same may be said of birches in Berkshire(*z*). If the tenant suffer the young germins to be destroyed, either by stubbing them up, or suffering a wood to be open, by which beasts enter and eat them off, it will be waste, though they grow up again, for after such destruction they will never be great trees, but shrubs. But the cutting down of seasonable underwood, of hazel, willows, maple, or oak, in a husbandlike manner, at the usual seasons, and of the usual growth, in accordance with the custom of the country, is not, as we have seen, waste (*ante*, p. 281); nor, if it is the custom to cut ashes from ten years to ten years, is it waste so to cut them; but it is, in general, waste to cut down young trees of that growth fit for great timber(*a*). But the tenant is, in general, entitled to take sufficient wood for necessary repairs to buildings and fences, to enable him to keep them up in the same state as he found them, but not for the purpose of making new fences, etc., where none before existed(*b*)

(*u*) 2 Roll. Abr. WASTE (C). Co. Litt. 53. Bac. Abr. (WASTE). *Clemence v. Steere*, 1 R. I. 272.

(*x*) *Bateman v. Hotchkin*, 32 Law J., Ch. 6. Cutting hoop-poles is waste, unless it is the ordinary mode of managing the farm. *Clemence v. Steere*, 1 R. I. 272.

(*y*) *Bagot v. Bagot*, 33 Law J., Ch. 116. *Coats v. Cheever*, 1 Cowen, 450. *Irwin v. Covode*, 24 Penn. St. 162. *Lynn's Appeal*, 31 Penn. St. 44. *Neel v. Neel*, 19 Penn. (7 Harris) 323. So of opened sand pit. *Reed v. Reed*, 1 Green (N. J.), 248.

(*z*) *Aubrey v. Fisher*, 10 East, 446.

(*a*) 2 Roll. Abr. 815, 817. *Gage v. Smith*, Goodb. 210, pl. 298; 1 Inst. 53a. In this country the test whether a tenant for life has been guilty of waste in cutting timber trees is the inquiry: "Did good husbandry, considered with reference to the custom of the country, require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed?" *Woodward v. Gates*, 38 Ga. 205. *Davis v. Gilliam*, 5 Ired. Eq. 308. *McCullough v. Irvine*, 13 Penn. St. 438. The same test may be applied to determine whether an omission to keep pasture land clear of underbrush is waste. *Clemence v. Steere*, 1 R. I. 272.

(*b*) 1 Inst. 53b. *Foley v. Wilson*, 11 East, 56. A tenant for life may cut timber trees and sell them, and purchase boards with the proceeds for the purpose of making necessary repairs provided this is the most economical mode of making repairs. *Loomis v. Wilbur*, 5 Mason, 13. But it would be waste to cut and sell timber trees in exchange for fire wood. *Padelford v. Padelford*, 7 Pick. 152. So it would be waste to sell fire wood to pay for cutting and carting the fire wood, necessary for the proper enjoyment of the life estate. *Johnson v. Johnson*, 18 N. H. 594.

330 *Where timber is decaying* from age, and requires cutting to prevent its deterioration, or its injuring other timber, the Court of Chancery will order the timber to be cut and sold, and the proceeds of the sale invested, and the interest thereof paid to the tenant for life, and the capital paid over after his death to the person entitled to the inheritance, unless the timber, though decaying, is for the defence and shelter, or ornament, of a mansion-house(c). But it is not sufficient, it seems, that the timber is merely ripe; it must be for the benefit of the remainderman that it be cut, otherwise no order will be made(d). Where timber fit to be cut is felled by tenant for life for the benefit of the estate, the person next in remainder may elect to treat the timber as lawfully cut, and require the value of it to be invested in land, and held as part of the estate, the tenant for life taking the interest of the fund, and the first owner of the inheritance, or tenant for life without impeachment for waste, taking the capital(e). If the tenant for life treats the money produced by the sale of timber as his own, that is a wrongful act, and the Statute of Limitations will run from the date of its conversion, and not from the death of the tenant for life(f).

331 *Waste by taming and reclaiming deer*.—In the old books, the feeding of deer is declared to be waste where the deer have always been kept on the estate in a wild state, for wild deer go with the land to the heir-at-law, whereas, if they are fed and reclaimed, they cease to be animals *feræ naturæ*, and become personal property, and are severed from the freehold, and go to the executor; and it is this alteration in the nature of the property which makes the taming of the wild animal waste. But wild deer which have never been fed are seldom to be met with in England at the present day(g).

332 *Equitable waste*.—Where tenant for life holds without impeachment for waste he may nevertheless be restrained from committing what is termed equitable waste, which consists in doing acts of destructive injury to the property, to the detriment of the persons entitled in remainder. The term “without impeachment of waste,” contained in a deed or will creating a life estate in land, does not enable the life

(c) *Burges v. Lamb*, 16 Ves. 182. *Bewick v. Whitfield*, 3 P. Wms. 267. *Field v. Brown*, 27 Beav. 90.

(d) *Seagram v. Knight*, L. R., 2 Ch. App. 628.

(e) *Phillips v. Barlow*, 14 Sim. 283. *Gent v. Harrison*, Johns. & H. 519; 29 Law J., Ch. 68. *Bagot v. Bagot*, *supra*. As to the liability of the tenant for life to account for wood or timber trees wrongfully cut, see *Phillips v. Allen*, 7 Allen (Mass.), 116; *Porch v. Frees*, 3 Green (N. J.), 204.

(f) *Seagram v. Knight*, L. R., 3 Eq. Ca. 398; *S. C.* 2 Ch. App. 628. *Higginbotham v. Hawkins*, L. R., 7 Ch. App. 676.

(g) *Ford v. Tynte*, 31 Law J., Ch. 177.

tenant to deal with the property as if he was the absolute owner thereof in fee simple. He may cut down timber and growing trees fit for timber(*h*), and convert them to his own use(*i*), and open new mines, and work them for his own benefit, but he cannot dig and carry off brick-earth, and destroy a field, to the prejudice of the inheritance(*j*); and he will be restrained from committing wanton and malicious waste, such as damaging and destroying buildings, pulling down ancient boundary walls and fences(*k*), and cutting down thriving wood unfit for timber, and the felling of which would be destructive to the property(*l*); also from cutting down trees which were either planted or left standing for the shelter or ornament of a mansion-house(*m*). But he is not responsible, even in equity, although he allows a mansion-house and buildings to go to wreck and ruin for want of timely repairs to the roofs and windows (*n*), nor if he pulls down a ruinous structure, and uses up the materials in rebuilding it(*o*).

333 *Tenant in fee simple subject to an executory devise over*, will also be restrained from committing that sort of destructive injury to property which is called equitable or malicious waste, but he is entitled to commit ordinary waste, such as cutting timber, not being ornamental timber, unless he is restrained by the will creating his estate from cutting down timber of any kind(*p*).

334 *Lessee for term of years without impeachment of waste* may be restrained at the instance of the reversioner from digging and carrying away brick-earth, as it destroys the field and causes lasting injury to the inheritance(*q*).

The words "*without impeachment of waste*," as applied to trustees of a term for special purposes, has a very different sense from the same words annexed to a tenancy for life. The Court of Chancery will not permit trustees so holding to execute their trust by cutting down

(*h*) *Smythe v. Smythe*, 2 Swanst. 251. *Gordon v. Woodford*, 29 Law J., Ch. 222.

(*i*) *Pyne v. Dor*, 1 T. R. 56.

(*j*) *London (Bishop of) v. Web*, 1 P. Wms. 528.

(*k*) *Aston v. Aston*, 1 Ves. sen. 265. *Vane v. Lord Barnard*, 2 Vern. 739; Co. Litt. 220a. *Duke of Leeds v. Ld Amherst*, 14 Sim. 357.

(*l*) *Chamberlayne v. Dummer*, 1 Bro. Ch. C. 160; 3 ib. 548.

(*m*) *Micklethwaite v. Micklethwaite*, 26 Law J., Ch. 721. *Wellesley v. Wellesley*, 6 Sim. 497. *Burges v. Lamb*, 16 Ves. 174. See *Bubb v. Yelverton*, L. R., 10 Eq. Ca. 465.

(*n*) *Powys v. Blagrove*, 4 De G. M. & G. 448. *Lansdowne v. Lansdowne*, 1 Jac. & Walk. 522, overruling *Parteriche v. Powlett*, 2 Atk. 383.

(*o*) *Morris v. Morris*, 3 De Gex & J. 323.

(*p*) *Blake v. Peters*, 31 Law J., Ch. 889. *Turner v. Wright*, 29 ib. 470; *Johns*, 740; 2 De G. F. & J. 234.

(*q*) *Bishop of London v. Web*, *supra*.

timber; but, at common law, trustees without impeachment of waste, cannot be made responsible for cutting timber(r).

335 *Waste by trustees.*—The Court of Chancery will grant an injunction to prevent trustees from cutting down ornamental timber; and, if trees are felled by their orders, without the consent of the persons interested in the property, the trustees are bound to show that the cutting of them was absolutely necessary(s).

336 *Persons having only an equitable interest in land.*—When the legal estate in land is vested in trustees, and the equitable tenant for life is in possession of the land, it is the duty of the trustees to exercise their legal powers for the prevention of waste(t), but the Court of Chancery never holds trustees responsible for suffering permissive waste for want of repairs. “I can foresee,” observes Wood, V.-C., “no end to the demand which would be made upon trustees by remainder-men coming into possession of the trust property who might not think it sufficiently repaired, if they might say to the trustees, ‘It was your duty to look after the tenant for life; you had the legal estate, and it was your business to see that he was doing all necessary repairs; and, as you have not done so, we shall fix you with the liability’”(u).

The Court of Chancery does not in general interfere to prevent permissive waste; it will not compel tenant for life to repair, but an account for dilapidations will be decreed against an incumbent(x).

337 *Ecclesiastical dilapidations.*—By the common law, the incumbent of a living is bound not only to repair the buildings belonging to his benefice, but also to restore and rebuild them when necessary, for the revenues of the benefice are given as a provision not merely for the clergyman himself personally, but for keeping up a suitable residence for the incumbent, and also for the maintenance of the chancel; and if by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund for obtaining the means of replacing them. But the liability of the incumbent to repair and rebuild extends only to that which is useful; he is not bound to restore or replace anything in the nature of ornament, such as whitewashing, papering, and painting, except where painting is necessary to preserve exposed timbers from decay. His liability, therefore, in respect of the preservation and maintenance of

(r) *Marquis of Devonshire v. Lady Sandys*, 6 Ves. 115.

(s) *Campbell v. Allgood*, 17 Beav. 627.

(t) *Pugh v. Vaughn*, 12 Beav. 517.

(u) *Powys v. Blagrove*, Kay, 508; 4 De G. M. & G. 448.

(x) *Powys v. Blagrove*, Kay, 499.

buildings, extends further than that of a tenant for a term of years, who is not bound, as we have seen, to rebuild where he does not hold under a covenant to repair(y).

His power and dominion over the property, also, extends further than that of tenant for a term of years; for an action for dilapidations cannot be maintained against him for pulling down old buildings, and erecting new structures, provided they are found by a jury to be more convenient and beneficial to the living, and it appears that the evidence of title is in nowise impaired, and no increased burthen is imposed upon the property(z).

As regards the cultivation and management of the glebe land of the living, that which would be waste when committed by tenant for life, or lessee for term of years, will not be so considered in the case of the incumbent of a living; for if you apply to a parson's glebe the same law that prevails between lessor and lessee, and tenant for life and reversioner, the course of husbandry and cultivation must remain the same for all time. What is once arable or pasture must always continue so; and no rector or vicar could effect agricultural improvements by employing any part of his glebe in any other manner than he found it employed. The court, therefore, will not restrain an incumbent from ploughing up meadow land when it is shown that a great improvement would be thereby effected, and the permanent value of the rectory, in a pecuniary point of view, be thereby increased(a).

A rector may cut down timber for the repairs of the parsonage-house or the chancel, but not for any common purpose. If it is the custom of the country he may cut down underwood for any purpose, but if he grubs it up, except in furtherance of a manifest improvement, it is waste. He may cut down timber, likewise, for repairing any old pews that belong to the rectory; and he is also entitled to botes for repairing barns and outhouses belonging to the parsonage, but he cannot cut down timber except in these instances(b); nor can he open mines without the consent of the patron and ordinary(c); but he may work mines which were open and in existence at the time he came into possession of the property, and formed part of the

(y) *Wise v. Metcalfe*, 10 B. & C. 313. See *ante*, p. 279.

(z) *Huntley v. Russell*, 13 Q. B. 572.

(a) *Duke of St. Albans v. Skipwith*, 8 Beav. 354.

(b) *Strachy v. Francis*, 2 Atk. 217. *Duke of Marlborough v. St. John*, 5 De Gex & Sm. 179. *Sowerby v. Prior*, L. R. 8 Eq. Ca. 417; 38 L. J. Ch. 617.

(c) *Holden v. Weekes*, 1 Johns. & Hem. 278; 30 Law J., Ch. 35.

annual profits thereof. No action at law is maintainable against his representatives for getting gravel, though it seems he might be prohibited from such getting by a court of equity or common law, or punished by the ecclesiastical court^(d).

The law, however, of ecclesiastical dilapidations has been placed on an entirely new footing, so far as buildings are concerned, by the "Ecclesiastical Dilapidations Act, 1871" (34 & 35 Vict. c. 43), which provides (s. 53), that no sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of the Act, and to which the Act shall be applicable (*i.e.*, *semble*, in no case but that of wilful waste), unless the claim for such sum be founded on an order made under the provisions of the Act.

The Act accordingly provides for the appointment of diocesan surveyors (s. 8), on whose recommendation all repairs to buildings, which the incumbent would be bound to repair, are to be made, and on the completion of such repairs, the liability of the incumbent or his personal representatives to any claim for dilapidations will cease for a period of five years from the date of the certificate by the surveyor of the due execution of the prescribed works, except in cases of wilful waste, or damage by fire, against which the incumbent shall not have insured (ss. 46, 47). Similar provisions are made in respect of the residences, etc., of archbishops, bishops, deans, canons, etc., on their employment, for the purpose of inspection and repair, of a surveyor approved by the Ecclesiastical Commissioners (ss. 25-8). The duty of executing the prescribed repairs, however, still rests on the incumbent (s. 19), who may borrow from the Governors of Queen Anne's Bounty the whole or any part of the sum required, and charge the same upon the benefice (s. 17). The incumbent may, if he prefers it, execute all necessary repairs himself, without the intervention of the surveyor (s. 22). But he would not, it seems, in such a case be entitled to the exemption from liability mentioned above; and provision is made by ss. 23 and 45, for the execution of the repairs, if the incumbent refuses or neglects to execute them.

It will be seen from the above provisions that the Act contemplates, in effect, a quinquennial inspection and repair of all ecclesiastical buildings, which the incumbent would be bound to repair. But should this not be done, it further provides that on the vacancy of any benefice, the bishop shall direct the surveyor to report upon the dilapidations, and, after hearing the objections to such report, if any, shall

(d) *Ross v. Adcock*, L. R., 3 C. P. 655. See *Martin v. Roe*, *post*, 292.

make a final order stating the repairs and their cost, for which the late incumbent or his personal representatives are liable, which sum shall be a debt due from the late incumbent or his personal representatives to the new incumbent, and recoverable as such at law or in equity (ss. 29-36).

338 Waste by copyholders.—By the general custom of copyholds, if a copyholder commits waste, it is a forfeiture of his estate(e), and, as such penal consequences are attached to this description of tort, the law requires clear proof of some invasion on the part of the tenant of the lord's property, or some act or neglect which tends materially to deteriorate the tenement, or to destroy the evidence of its identity(f). The pulling down of an old ruinous barn by a copyholder, without the license of the lord, is, in strictness of law, waste, and works a forfeiture of the copyhold estate; but if no real injury has thereby been done to the inheritance, the penal consequences of waste do not attach, and there is no authority for saying that any act can be waste, so as to work a forfeiture, which is not injurious to the inheritance, either by diminishing the value of the estate, or by increasing the burthen upon it, or by impairing the evidence of title(g).

339 Tenants in common.—If one tenant in common misuses property which he holds in common with another, he is answerable to the other in an action for misfeasance; but he is not responsible in an action for waste for felling timber trees fit to be cut, or for opening mines, or taking any of the fair profits of the common property; nor is he liable in trespass for cutting grass(h); but the other tenant in common will be entitled to recover a moiety of the value of whatever is severed from the freehold and converted into a chattel(i).

340 Waste by the removal of fixtures.—"Questions respecting the right to what are ordinarily called fixtures," observes Lord Ellenborough, "principally arise between three classes of persons. First, between different descriptions of representatives of the same owner of the inheritance, viz., between his heir and executor. In this first case, i.e., between heir and executor, the rule as to severance obtains with the most rigor in favor of the inheritance, and against the right to dis-

(e) See *ante*, p. 124, *Salisbury v. Gladstone*.

(f) *Burton's Real Property*, 411; 7th ed. p. 1335.

(g) *Grubb v. Earl of Burlington*, 5 B. & Ad. 517.

(h) *Jacobs v. Seward*, 38 L. J., C. P. 252; L. R., 4 C. P., 328. See *Bailey v. Hobson*, *post*, p. 318. Under the statutes of New York, a tenant in common of unimproved timber lands may maintain an action of waste against his co-tenant who has cut and removed timber and converted it to his own use. *Elwell v. Burnside*, 44 Barb. (N. Y.) 447. See also *Hawley v. Clowes*, 2 Johns. Ch. 122.

(i) *Martin v. Knowles*, 8 T. R. 145.

annex therefrom, and to consider as a personal chattel, anything which has been affixed thereto(*j*). Secondly, between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favorably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence have always been allowed in favor of the claim of severance, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant"(*k*).

As between heir and executor, the rule is, that where a lessee having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule, at a very early period, had several exceptions engrafted upon it in favor of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade. And it was laid down that if a lessee for years erect a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor. And so of a baker. And it is not waste to remove such things within the term(*l*). And as between the executor and the heir-at-law, it has since been held that where a fixed instrument, engine or utensil, or a building covering machinery, is accessory to matter of a personal nature, then it shall itself be considered personalty, and belong to the executor, such as a fire engine accessory to the carrying on the trade of getting and vending coals; or a brew-house furnace and coppers, or a cider-mill, or varnish-house; but salt-pans connected with salt-springs, and erected for the benefit of the inheritance, and barns and agricultural buildings, erected for farming purposes, are

(*j*) *Walmsley v. Milne*, 7 C. B., N. S. 115; 29 Law J., C. P. 97. See 2 Kent's Comm. 343 *et seq.*; *Richardson v. Borden*, 42 Miss. 71. In New York, however, it is provided by statute that things annexed to the freehold or to any building shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of the sixth section; and that subdivision declares that "things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the walls of a house so as to be essential to its support," shall be deemed assets and shall go to the executors or administrators. 2 R. S. 83, §§ 6, 7. By this statute it was probably intended to put the executor upon the same footing with the tenant, and to give him in preference to the heir, such articles as a tenant might hold against his landlord. *Voorhees v. McGinnis*, 48 N. Y. 278. How far the legislature were successful in this attempt may be seen by consulting *House v. House*, 10 Paige, 158; *Ford v. Cobb*, 20 N. Y. 344; *Murdock v. Gifford*, 18 N. Y. 28.

(*k*) *Elwes v. Maw*, 3 East, 53. *Richardson v. Borden*, 42 Miss. 71; 1 Washb. on Real Prop. 18.

(*l*) *Ib.* 20 Hen. 7, 13a. b. See *Treadway v. Shawn*, 7 Nev. 37; *Hill v. Sewald*, 53 Penn. St. 271.

not by the common law removable by executors, but belong to the heir(m).

The cases regarding the right of removal of fixtures, as between the executor of a tenant for life and the remainderman, will be found to turn each on its own peculiar circumstances; the character of the fixture, the use made of it, the mode of its attachment to the freehold, the facility of severance, the injury to the freehold by severance, and, in regard to an ecclesiastical benefice, the character and object of the building to which the chattel is attached, and the purpose for which it was attached. A building erected by an incumbent, which is in itself mere matter of luxury and ornament, which it would be a burthen to the benefice to keep up, and which the incumbent might have pulled down if he thought fit, and which may be detached without injury to the freehold, passes in general as part of the personal estate to the executors of the deceased incumbent, and may be taken away by them(n).

The right to remove fixtures, without incurring liability for waste, is considered at length in many learned treatises(o), and the remainder of the present chapter will be confined to the consideration of fixtures that have been held removable, or irremovable, as between landlord and tenant(oo).

(m) *Ib.* 2 Smith's L. C. 153, 6th ed. The case of the salt pans, decided by Lord Mansfield, has been very generally followed in England and in this country. *Ford v. Cobb*, 20 N. Y. 344. *Murdock v. Gifford*, 18 id. 28. *Powell v. Monsen Co.*, 3 Mason, 459. *Gale v. Ward*, 14 Mass. 352. *Cresson v. Stout*, 17 Johns. 117. *Swift v. Thompson*, 9 Conn. 63. *Teaff v. Hewitt*, 1 Ohio St. 511. *Vanderpoel v. Van Allen*, 10 Barb. 157.

(n) *Martin v. Roe*, 7 Ell. & Bl. 243.

(o) *Amos on Fixtures*. Grady on *Fixtures*. And see *D'Eyncourt v. Gregory*, L. R., 8 Eq. Ca. 332.

(oo) It is a general rule that as between vendor and vendee, mortgagor and mortgagee, executor and heir, the strict rule of law applies in favor of the vendee, mortgagee, and heir, holding many articles to be fixtures, and as belonging to the freehold, which would not be so held as between landlord and tenant. *Richardson v. Berden*, 42 Miss. 71. *Preston v. Briggs*, 16 Vt. 124. *McGreary v. Osborne*, 9 Cal. 119. 2 Kent's Comm. 343 *et seq.* 1 Wash. on Real Prop. 7. *Dispatch Line of Packets v. Bellamy Man. Co.*, 12 N. H. 205.

And although the executor is placed upon the same footing as the heir by the statutes of New York, in other respects the law in that state preserves its former rigor in favor of the inheritance. *Voorhees v. McGinnis*, 48 N. Y. 278.

As the illustrations given in the text are confined to questions arising between landlord and tenant, a few of the many decisions will be noticed, showing what have been deemed fixtures as between vendor and vendee and mortgagor and mortgagee.

As between vendor and vendee it has been held that double windows which were not in use at the time of the sale of the house, and had never been nailed or fastened in, did not pass with the house. *Peck v. Batchelder*, 40 Vt. 233.

A deed of a hotel has been held to carry with it as an appurtenance the hotel sign and post, although set at a considerable distance in front of the hotel lot. *Redlon v. Barker*, 4 Kansas, 445. But it does not carry with it an ice-chest, although it is so constructed as to prevent removal without being taken apart. *Park v. Baker*, 7 Allen (Mass.), 78.

Chandeliers attached to the house are fixtures as between vendor and vendee. *Johnson v. Wiseman*, 4 Met. (Ky.) 357. But see *Vaughen v. Haldeman*, 33 Penn. St. 522.

341 *Landlord's fixtures*.—The term “landlord’s fixtures” means such things as the landlord chooses to annex to the freehold and demise with it, and which, of course, the tenant has no right to remove, and

Permanent fences pass with the realty. *Gidden v. Bennett*, 43 N. H. 306. *Smith v. Carroll*, 4 Green (Iowa), 146. *Boon v. Orr*, id. 304.

A cider press once annexed to the realty passes by a conveyance of the freehold, although temporarily severed from the freehold for the purpose of repairs. *Wadley v. Jauvrin*, 41 N. H. 503.

So a cotton gin put up after the usual manner for use on lands devoted to the growing of cotton, has been held to be a fixture and to pass with the land to the vendee. *Richardson v. Borden*, 42 Miss. 71. So of a bath-tub nailed to a dwelling-house and the pipes used to convey water thereto. *Cohen v. Kyler*, 27 Mo. (6 Jones) 122.

In respect to machinery, no general rule can be given, and each case depends upon its own peculiar circumstances. It has been held that machinery does not pass with the freehold as between vendor and vendee. *Lacey v. Giboney*, 36 Mo. 320. And see *Bartlett v. Wood*, 32 Vt. 372. And on the other hand, machinery in a steam flouring mill has been held to pass with the realty. *McGreary v. Osborne*, 9 Cal. 119. So of stills for distilling, and copper kettles for cooking feed for hogs, when encased in brick and mortar. *Ryan v. Lawrence*, 5 Jones’ Law (N. C.), 337. As between one who has taken a mortgage of steam boilers, engine, shafting, etc., while in process of construction and before annexation to the freehold, and a purchaser under a foreclosure of a mortgage of the lands to which they had been annexed in a permanent and substantial manner, it has been held that in the absence of proof of the intent of the owner either to make the machinery a part of the realty or to remove it at a future time, it would pass to the purchaser under the foreclosure sale. *Voorhees v. McGinnis*, 48 N. Y. 278. But in the same case the rule was held to be otherwise as to other machines, such as planing machines, saw benches, saws, etc., affixed to the building only for convenience in using and capable of removal without injury to the building or the machinery itself. But in *Symonds v. Harris* (51 Me. 14), it was held that the machinery attached to a mill by spikes, bolts and screws, and operated by belts running from permanent shafting driven by a waterwheel, were a part of the realty. And in *Brennan v. Whitaker* (15 Ohio St. 446), it was held that boilers, engines, saws and gearing and other machinery for applying the power in a steam saw mill were fixtures as between the mortgagor and the mortgagee of the land to which such machinery is attached. The cases cited show that no rule of universal application can be given by which to determine whether a given article or thing is or is not a fixture, and that the question depends on the peculiar facts and circumstances surrounding each particular case. A thing or article may be a fixture under one state of facts and not under another. Thus on the sale of agricultural lands, manure, whether in heaps or scattered in a barnyard, has been held to be a fixture and to pass as a part of the realty to the vendee; but, on the sale of lands not used for agricultural purposes, has been held to be personal property and not to pass to the vendee. *Richardson v. Borden*, 42 Miss. 71. *Stone v. Proctor*, 2 Chip. 115. *Daniels v. Pond*, 21 Pick. 367. But see *Ruckman v. Outwater*, 4 Dutch. (N. J.) 581.

It is a general rule that to give to articles personal in their nature the character of real estate, the annexation must be of a permanent character. To this rule there are exceptions, under which fall such articles as are not themselves annexed, but are deemed to be of the freehold from their use and character, such as millstones, fences, statuary and the like. *Voorhees v. McGinnis*, 48 N. Y. 278. *Potter v. Cromwell*, 40 id. 287. *Capen v. Peckham*, 35 Conn. 88. *Snediker v. Warring*, 12 N. Y. 170.

It is not the manner of fastening, but the permanent and habitual annexation that determines when the article annexed becomes a part of the realty. *Ladlin v. Griffiths*, 35 Barb. (N. Y.) 58. And the permanency of the attachment does not depend so much upon the degree of force with which the thing is attached, as upon the motive and intention of the party attaching it. If an article is attached for temporary use with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor. If it is placed there for the permanent improvement of the freehold, he may. *Crane v. Bingham*, 3 Stoct. (N. J.) 29. See *Noble v. Bosworth*, 19 Pick. 314; *Butler v. Page*, 7 Met. 40; *Christian v. Dripps*, 28 Penn. 271; *Hill v. Sewall*, 53 Penn. St. 271; *Brennan v. Whitaker*, 15 Ohio St. 446. And it has been held in Pennsylvania that the old notion of physical attachment, or that the question of whether an article is a fixture or not depends upon the mode of its attachment to the freehold, has long been exploded in that State; and that on the contrary the question depends on the

must restore at the end of the term; such as grates, marble chimney-pieces, locks, keys, bars and bolts, steam-engines and boilers, hay-cutters, malt-mills, corn-crushers, grinding-stones, etc. (p).

342 *Tenant's fixtures.*—The rule formerly was, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards took it away, it was waste. In the progress of time this rule was relaxed, and many exceptions have been grafted upon it. One has been in favor of ornament, as ornamental chimney-pieces,

nature and character of the act by which the article is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act. *Meigs' appeal*, 62 Penn. St. 28. And the rule adopted by the courts of Vermont requires the intention to render an article a fixture by the act of annexation to be affirmatively made to appear. *Hill v. Wentworth*, 28 Vt. 428. From the current of the later authorities it would seem that the mode in which an article is annexed to the freehold is important rather as an evidence of the intention of the person in making the annexation than as an independent test whether a chattel has become a fixture.

The adaptability of the chattel to the use of the freehold is another test whether it has lost its character of personal property or not, although not so certain in its character as the one above mentioned. *Voorhees v. McGinnis*, 48 N. Y. 278. *Voorhees v. Freeman*, 2 Watts & S. 116. *Pyle v. Pennock*, id. 390. *Murdock v. Gifford*, 18 N. Y. 28.

But the most important and conclusive test is the intention of the party in making the annexation. *Potter v. Cromwell*, 40 N. Y. 287. *Hill v. Sewall*, 53 Penn. St. 271. *Hill v. Wentworth*, 28 Vt. 428. *Murdock v. Gifford*, 18 N. Y. 28. *Winslow v. Merchants' Ins. Co.*, 4 Met. 306. *Swift v. Thompson*, 9 Conn. 63. *Capen v. Peckham*, 35 id. 88.

The fact that the article annexed to the freehold cannot be severed therefrom without great injury to the article itself or to the freehold has in a number of cases been held to fix the character of the article as a part of the realty. *McKim v. Mason*, 3 Md. Ch. Decis. 186. *Providence Gas Co. v. Thurber*, 2 R. I. 15. *Ford v. Cobb*, 20 N. Y. 344. *Main v. Schwarzwælder*, 4 E. D. Smith (N. Y. C. P.), 273. *Tuttle v. Robinson*, 33 N. H. 104. *Baker v. Davis*, 19 id. 325. But it has also been held that this fact is not now to be deemed controlling. *Voorhees v. McGinnis*, 48 N. Y. 278.

It has also been held in New York that a chattel may lose its personal character and become a part of the realty without further annexation thereto than its own weight, as in the case of a statue and sun dial, carved in stone, and placed as an ornament on the lawn surrounding a private residence. *Snedeker v. Warring*, 12 N. Y. 170. And see *Voorhees v. McGinnis*, 43 N. Y. 278.

And it has been held in Mississippi, that in determining whether a given article is a chattel or a fixture, reference must be had to the nature of the thing itself; the position of the party placing it where found; the probable intention in putting it there; the injury which would result from its removal, and also the object of the party placing the article on the premises with reference to trade, agriculture or ornament. *Richardson v. Borden*, 42 Miss. 71.

It has been held in Ohio and New York that the true criterion of a fixture is the united application of three requisites: First. Actual annexation to the realty or something appurtenant thereto. Second. Application to the use or purpose to which that part of the realty with which it is connected is appropriated. Third. The intention of the party making the annexation to make a permanent accession to the freehold. *Teaf v. Hewitt*, 1 Ohio St. 511. *Potter v. Cromwell*, 40 N. Y. 287.

But it does not follow that a chattel may not become a fixture without the existence at the same time of each of these characteristics, nor that if once a fixture it will cease to be a part of the realty when any one of the conditions fails. Thus a fence enclosing a field, and in no way attached to the soil other than by its own weight, is not the less a fixture because it is not supported by posts or stakes set in the ground. *Smith v. Carroll*, 4 Green (Iowa), 146. *Boon v. Orr*, id. 304. Nor will a dwelling-house cease to be a part of the realty when reduced to its original elements of boards and timber by a tempest. *Rogers v. Gelingier*, 30 Penn. St. 185. Or by the owner for the purpose of reconstruction or repair. *Wadley v. Jauvrin*, 41 N. H. 503. *Beard v. Durald*, 22 La. An. 284.

(p) *Walmsley v. Milne*, 7 C. B., N. S. 115; 29 Law J., C. P. 97.

pier-glasses, hangings, wainscot fixed only by screws, and the like. Of all these, it is to be observed that they are exceptions only(*q*). Other exceptions have been grafted upon the rule in favor of the enjoyment of the occupation, and in favor of trade, and vessels, machinery, and utensils, which are immediately subservient to the purposes of trade(*qq*). If a landlord lets a house unfurnished, without the conveniences of grates or gas-fittings, and the tenant, for the enjoyment of his occupation, fixes them in the house, he may, unless he has contracted to leave them behind, remove them during his term(*r*). Whether a particular fixed chattel belongs to the landlord or the tenant, must in some instances depend upon what the contracting parties propose to be the subject of the demise(*rr*). Pillars of brick and mortar built on the floor of a dairy by a tenant to sustain milk-pans have, however, been held to be part of the freehold(*s*); also barns and beast-houses, wagon-houses, fuel-houses, pigeon-houses, carpenters' shops for mending wagons and carts, and agricultural buildings employed and used upon the farm, and let into the ground, and not merely placed on the surface thereof, or on a brick or stone floor(*t*); also conservatories, hot-houses, or green-houses, erected on a brick or stone foundation, and attached thereto by permanent fastenings; so that if the tenant

(*q*) *Buckland v. Butterfield*, 4 Moore, 447. See *Treadway v. Shawn*, 7 Nev. 37.

(*qq*) If a tenant attaches to the freehold any articles for the purposes of his business, the law, in favor of trades, presumes an intention to remove them before the expiration of his term; and it is only on the failure of the tenant to so remove them that the law will presume an intention to make a gift to the landlord. *Hill v. Sewald*, 53 Penn. St. 271.

And trade fixtures generally, although attached to the realty, if erected by the tenant, remain his property, and may be removed by him during or at the expiration of his lease. *Crane v. Brigham*, 3 Stoct. (N. J.) 29.

(*r*) Gas fixtures, such as a gasometer, and an apparatus for generating gas, may be removed by the tenant. *Hays v. Doane*, 3 Stoct. (N. J.) 84.

(*rr*) *Elliott v. Bishop*, 10 Exch. 496; 11 ib. 113. *Sumner v. Bromilow*, 34 L. J., Q. B. 130.

(*s*) *Leach v. Thomas*, 7 C. & P. 327.

(*t*) *Elwes v. Maw*, 3 East, 38; 2 Smith's L. C. 153, 6th edit. *Wood v. Hewett*, 8 Q. B. 913. In Iowa it was held that buildings erected by a tenant on land demised for the purpose of carrying on his business, and under an implied license from the owner, would not in equity be deemed a part of the realty in the hands of a purchaser having full knowledge of the license before purchasing. *Wilgus v. Gettings*, 21 Iowa, 177.

In a late case in Pennsylvania it was held that buildings erected by the United States upon a public common, and used as barracks and hospitals during the rebellion, did not become a part of the freehold, and that the question of fixture did not depend upon whether or not the foundation was let into the soil. *Meigs' Appeal*, 62 Penn. St. 28.

In Tennessee it was held that a wooden house built by a settler upon land upon which his regiment was encamped became a part of the freehold. *Childress v. Wright*, 2 Cold. (Tenn.) 350.

In Massachusetts it was held that a meeting-house, built upon stone foundations on land not owned by the society building the house, became a part of the realty. *Poor v. Oakman*, 104 Mass. 309.

A building is, in its very nature, an annexation to the land, and becomes a chattel only by the application of some exceptional rule. *Ombony v. Jones*, 19 N. Y. 234. *Schemmer v. North*, 32 Mo. 208.

removes them after he has put them up he is guilty of waste(*u*). But if the tenant raises and constructs foundations of a permanent character for the reception of a superstructure of wood, such as a windmill, a pump, a Dutch barn or granary, a pigeon or fowl-house, or a conservatory, and the superstructure merely rests on this foundation, or is attached thereto by screws or movable pins or bolts, so as to be removable at pleasure without material or permanent injury to the freehold, the foundation belongs to the landlord, as part and parcel of the land, and the movable structure placed on such foundation by the tenant continues the property of the latter, and may be carried away by him at the expiration of his lease(*x*). A door which may be lifted from its hinges, and a sliding fender used to prevent the escape of water from a mill-stream, does not necessarily become part of the freehold(*y*); nor a mooring-pile, driven into land for the accommodation of the navigation of a canal or river(*z*). But locks, keys, and bars belong to the landlord; and so does a shutter and sliding bolt, put up for the security of the premises(*zz*).

343 *Agricultural tenant's fixtures made removable by statute.*—By 14 & 15 Vict. c. 25, s. 3, it is enacted that if any tenant shall with the consent in writing of the landlord, at his own cost and expense, erect any building, engine, or machinery, for the purposes of trade or agriculture, such buildings shall be the property of the tenant, and shall be removable by him, one month's previous notice in writing being given of his intention, and the landlord or his agent being afforded an opportunity of purchasing the thing proposed to be removed, as therein mentioned(*a*).

If a tenant receives from his landlord timber for the purpose of erecting a shed, and uses the timber in the construction of it, he has no right to pull down the building and remove the timber, although he has added materials of his own, and confounded them, in the erection, with those furnished by the landlord(*aa*).

(*u*) *Buckland v. Butterfield*, 4 Moore, 440; 2 B. & B. 54. *Jenkins v. Gething*, 2 Johns. & H. 520. *Syme v. Harvey*, 24 Sc. Sess. Cas. 502. *Sleddon v. Cruikshank*, 16 M. & W. 71; 16 Law J., Exch. 61.

(*x*) *Grymes v. Boweren*, 4 M. & P. 143; 6 Bing. 437. *Rex v. Otley*, 1 B. & Ad. 161. *Wansbrough v. Maton*, 4 Ad. & E. 884. *Davis v. Jones*, 2 B. & Ald. 165. *Rex v. Londonthorpe*, 6 T. R. 377. *Wiltshier v. Cottrell*, 22 Law J., Q. B. 181. *Taylor v. Townsend*, 8 Mass. 411. *Washburn v. Sproat*, 16 Mass. 449.

(*y*) *Wood v. Hewitt*, 15 Law J., Q. B. 247.

(*z*) *Lancaster v. Eve*, 5 C. B., N. S. 726.

(*zz*) A tenant may lawfully remove a padlock placed by him on a corn-house. *Whiting v. Brastow*, 4 Pick. 310.

(*a*) See *Pelleuz v. Bullerdeick*, 13 La. An. 274.

(*aa*) *Smith v. Render*, 27 Law J., Exch. 83. So if a tenant has erected additional sheds and buildings upon the demised premises with his own materials, and has so connected them

344 Ornamental fixtures.—The ornamental fixtures now held severable and removable by the tenant are, chimney-glasses, pier-glasses, ornamental chimney-pieces, and stoves, tapestry and hangings nailed to the wall, in lieu of ornamental paper or panels(*b*), and ornamental cornices capable of being detached without injury to the building(*c*).

345 Domestic and trade fixtures.—Amongst the various domestic and trade-fixtures held to be removable by the tenant are gas-pipes and gas-fittings(*d*), and water-pipes attached to buildings by metal bands and nails(*e*), grates, ranges, ovens, coppers, bells, blinds, fixed tables, water-butts, cupboards, etc.(*f*), soap-boilers' furnaces, fat-vats, coppers, dyeing and brewing vessels(*g*), cider-mills(*h*), baking-ovens, steam-engines, and salt-pans(*i*); also machinery, engines, vats, plant and utensils used in trade, however bulky or complex they may be in their construction. The tenant may take them to pieces, and remove them, and put them together again in the same form in some other place(*k*). And where a shed or building is a mere accessory to a trade fixture, such as a shed, or any temporary building, erected merely for the purpose of covering and protecting a steam engine, or machinery or trade utensils, from the effect of the weather, it may be removable, together with the trade-fixture to which it belonged, on the ground that "omne accessorium sequitur suum principale"(*l*). But a building is not removable merely because it has been erected for manufacturing or trading purposes, or for the purpose of covering and protecting machinery. If the building is of a substantial character, standing on

with buildings already thereon that they cannot be removed without material injury to the landlord's property, such erections will be treated as a part of the realty. *Powell v. McAshan*, 28 Mo. 70.

(*b*) *Beck v. Rebow*, 1 P. Wms. 94.

(*c*) *Avery v. Cheslyn*, 3 Ad. & E. 75. Any chattel becomes a part of the realty, when so affixed to the freehold as to be incapable of severance without injury thereto; and it is immaterial whether the annexation be for use, ornament or caprice. *Providence Gas Co. v. Thurber*, 2 R. I. 15.

(*d*) *Lawrence v. Kemp*, 1 Duer (N. Y.), 363. *Wall v. Hinds*, 4 Gray (Mass.), 256.

(*e*) *Wall v. Hinds*, 4 Gray (Mass.), 256.

(*f*) *Elliott v. Bishop*, *ante*, p. 295. So of fire-frames fixed in common fire places with bricks between the frame and jambs of the fireplace. *Gaffield v. Hapgood*, 17 Pick. 192. So of a pump placed in the well by the tenant. *McCracken v. Hall*, 7 Ind. 30. Or a cistern and sink fastened by nails or set into the floor by cutting away the boards. *Wall v. Hinds*, 4 Gray (Mass.), 256.

(*g*) *Moore v. Smith*, 24 Ill. 512. *Pillou v. Love*, 5 Hayw. 109. And see *Burk v. Baxter*, 3 Mo. 207; *Terry v. Robbins*, 5 Smedes & Marsh. 291.

(*h*) *Holmes v. Tremper*, 20 Johns. 29.

(*i*) 42 Ed. 3, fol. 6, pl. 19; 20 Hen. 7, fol. 13, pl. 24. *Poole's case*, 1 Salk. 368. *Lawton v. Lawton*, 3 Atk. 13. *Penton v. Robart*, 2 East, 90. *Ford v. Cobb*, 20 N. Y. 344, 349.

(*k*) *Vanness v. Pacard*, 2 Pet. 137. *Kelsey v. Durkee*, 33 Barb. (N. Y.) 410. *Finney v. Watkins*, 13 Mo. 291.

(*l*) A tenant may remove sheds erected by him for the purpose of brick making. *Beckwith v. Boyce*, 9 Mo. 560.

brick or stone foundations let into the soil, and is constructed so as not to be removable without the entire destruction of the fabric, it cannot be disannexed from the freehold and taken away, although it may be built over a steam-engine, and may contain nothing but steam-machinery, spinning-jennies, drums and wheels, all of which may be removable, and to all of which it may in a certain sense be accessory(*f*).

346 *Fixtures removable by local custom and usage*.—Things annexed to the freehold are sometimes held removable in accordance with local custom and usage in particular districts, such as barns and granaries erected on stone pillars, or on pattens, or blocks of timber(*g*). And if the pillars or pattens merely rest on the ground, and are not attached to foundations sinking into the soil, they are removable without any custom(*h*).

347 *Abandonment of the right to disannex and remove ornamental and trade-fixtures*.—If the tenant has entered into an express covenant to yield up, at the expiration of his term, “all erections and buildings that may be erected,” or “all improvements that may be made,” upon the demised premises, he cannot afterwards remove trade erections or buildings, or trade or ornamental or domestic fixtures(*i*). A covenant in a lease to yield up the demised premises to the lessor at the expiration of the lease, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease, and does not extend to fixtures which were not then in existence; but a covenant to yield up fixtures belonging, or that may belong, to the demised premises, extends to fixtures that are afterwards put up by the tenant(*k*).

348 *Inability of the tenant to remove fixtures after the expiration of his term*.—Whenever an outgoing tenant is possessed of fixtures which he has

(*f*) *Whitehead v. Bennett*, 27 Law J., Ch. 474. In the case of *Omberry v. Jones* (19 N. Y. 234), that a ball room, resting upon stone posts slightly embedded in the soil, and removable without injury to the inheritance, was, within the principle of erections made for the purposes of trade, removable by the tenant who erected it.

In the case of *Cowden v. St. John* (16 Iowa, 590), the court was equally divided upon the question whether a building erected by a tenant for the purposes of trade, and consisting of a balloon frame set upon posts extending into the ground, and attached to a fence at the corners, was a trade fixture.

(*g*) 11 Vin. Abr. 154. EXECUTORS, U. pl. 74. *Culling v. Tuffnell*, Bull. N. P. 34. *Keough v. Daniell*, 12 Wis. 163.

(*h*) 2 Smith's L. C. 8th ed. Notes to *Elwes v. Maw*.

(*i*) *Naylor v. Collinge*, 1 Taunt. 19. *Thresher v. E. L. Water Co.*, 2 B. & C. 608; 4 D. & R. 62. *Martyr v. Bradley*, 2 M. & Sc. 25; 9 Bing. 24. *West v. Blakeway*, 3 S. C. N. R. 218. *Elliott v. Bishop*, ante, p. 295. See also *Dumergue v. Rumsev*, 33 Law J., Exch. 83; *Sumner v. Bromilow*, 34 ib. Q. B. 130.

(*k*) *Hitchman v. Walton*, 4 M. & W. 414. *Metrop. Co. Ins. Soc. v. Brown*, 28 Law J., Ch. 581.

a right to remove, he must exercise such right prior to the determination of his tenancy; he cannot, after a formal disclaimer of the title of his landlord, or after he has once quitted the demised premises and given up the key to the landlord, re-enter for the purpose of severing and removing fixtures(*kk*). "After the term, they become a gift in law to him in reversion, and are not removable," unless the tenant, after the expiration of the term, has remained in possession, with the sufferance and permission of the landlord, and actually severs them and removes them during the continuance of his lawful possession, after the expiration of the term(*l*). If he holds over wrongfully, he loses his right to sever and remove his fixtures; and if he quits possession, and the tenancy is determined, his right to his fixtures is extinguished, and they become the property of the reversioner(*ll*). If the lease becomes forfeited, and the tenant, whilst he continues in possession after the forfeiture, and before judgment in ejectment has been obtained against him, removes his fixtures, he will be entitled to retain those removed within a reasonable time, as they are not forfeited to the landlord by the forfeiture of the lease(*m*). But if the landlord re-enters for the forfeiture the tenant's right to remove the fixtures is gone(*n*).

349 Right of purchasers, or mortgagees, to enter and remove fixtures.—The right of the assignee of the lessee can of course, in general, extend no

(*kk*) *Davis v. Buffum*, 51 Me. 160. *Haflick v. Stober*, 11 Ohio (N. S.), 482. *Davis v. Moss*, 38 Penn. St. 346. *Beers v. St. John*, 16 Conn. 322. *Loughran v. Ross*, 45 N. Y. 792. *McCracken v. Hall*, 7 Ind. 30. *State v. Elliott*, 11 N. H. 540.

(*l*) *Merritt v. Judd*, 14 Cal. 59. *Loughran v. Ross*, 45 N. Y. 792. *Ombony v. Jones*, 19 N. Y. 234. But this possession must be under an implied continuance of the original lease to give the tenant the right to remove fixtures after the expiration of his term. If the tenant has taken a new lease of the premises, in which no mention is made of the fixtures, and has entered upon a new term thereunder, the right to remove the fixtures is thereby terminated, although the tenant's possession has been in fact continuous. *Id.* And see *Shepard v. Spaulding*, 4 Met. 416.

(*ll*) *Leader v. Homewood*, 5 C. B., N. S. 546; 27 Law. J., C. P. 316. *Ruffey v. Henderson*, 21 ib. Q. B. 49; 17 Q. B. 574. *Heap v. Barton*, 12 C. B. 274. *Talbot v. Whipple*, 14 Allen (Mass.), 177, and see note 1, *ante*, p.—The rule given in the text applies only to tenancies having a fixed duration. When the time at which the term will end is uncertain, depending upon a contingency, and may be determined unexpectedly to the tenant, as in case of a tenancy for life, or at will, this rule is relaxed, and the tenant or his representatives will be allowed a reasonable time to remove the fixtures after the expiration of the term. *Davis v. Moss*, 38 Penn. St. 346. *Loughran v. Ross*, 45 N. Y. 792. *Ellis v. Paige*, 1 Pick. 43. *Reynolds v. Shuler*, 5 Cow. 323. *Amboney v. Jones*, 19 N. Y. 234. *Ferard on Fixtures*, 106, 107. As to what will be deemed a reasonable time, see *Burk v. Hollis*, 98 Mass. 55.

The rule also presupposes that the act of the tenant in allowing the fixtures to remain attached to the freehold was voluntary on his part. If the landlord has enjoined the removal of the fixtures, and the tenancy has terminated while the injunction was pending, the tenant will be allowed a reasonable time for the removal of the fixtures after the dissolution of the injunction. *Bircher v. Parke*, 40 Mo. 118. *Mason v. Fenn*, 13 Ill. 525.

(*m*) *Stansfield v. Mayor of Portsmouth*, 4 C. B., N. S. 131. *Sumner v. Bromilow*, 34 L. J., Q. B. 130. *Keogh v. Daniell*, 12 Wis. 163. But see *Storer v. Hunter*, 3 B. & C. 368.

(*n*) *Pugh v. Acton*, 38 L. J., Ch. 619. *L. R.*, 8 Eq. Ca. 628. *Whipley v. Dewey*, 8 Cal. 86.

further than the right of the lessee himself; but the tenant's right to remove fixtures is held to be so far connected with the land, that it may be considered as a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender, "for, as regards strangers who were not parties or privies to the surrender, the estate surrendered hath in law a continuance"(o); and, therefore, if a lessee who has mortgaged his fixtures surrenders his term and quits possession, the mortgagee may nevertheless enter and remove the fixtures(p). Trade fixtures affixed to mortgaged premises by the mortgagor in a quasi-permanent manner, before or even after the mortgage, pass to the mortgagee(q). An equitable mortgagee has the same rights in this respect as a legal mortgagee(r).

350 *Waste committed by strangers upon land demised to a tenant or lessee.*—

Every lessee of land, whether for life or years, is liable, under the statute of Gloucester, to an action for commissive or wilful waste done on the land in lease, by whomsoever it may be committed. The statute of Gloucester (*ante*, p. 235) "prohibiteth farmers from doing waste: and yet, if they suffer a stranger to do waste, they shall be charged with it, for it is presumed in law that the farmer may withstand it, 'Et qui non obstat quod obstare potest, facere videtur.' In this case the lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste, and so the loss, as reason requireth, in the end shall lie upon the wrong-doer"(s).

351 *License to commit waste.*—If a general or partial permission be given to the lessee by the lease to commit waste, he is so far tenant without

(o) Co. Litt. 338b.

(p) Lond. & Westminster Loan, etc., Co., 6 C. B., N. S. 798; 28 Law J., C. P. 297.

(q) Cullwick v. Swindell, L. R., 3 Eq. Ca. 249. Climie v. Wood, L. R., 3 Exch. 257; 4 Exch. 328 (Exch. Ch.); 38 L. J., Exch. 223. See Boyd v. Shorrock, L. R., 5 Eq. Ca. 72. *Ex parte* Ashbury, L. R., 4 Ch. App. 630. Longbottom v. Berry, L. R., 5 Q. B. 123. Holland v. Hodgson, L. R., 7 C. P. 328. Voorhees v. McGinnis, 48 N. Y. 278. Brennan v. Whittaker, 15 Ohio St. 446. Hoskin v. Woodward, 45 Penn. St. 42. Burnside v. Twitchell, 43 N. H. 390. Harris v. Haynes, 34 Vt. 220. Crane v. Brigham, 3 Stoct. (N. J.) 29. Millikin v. Armstrong, 17 Ind. 456. Laffin v. Griffiths, 35 Barb. (N. Y.) 68. Smith v. Moore, 26 Ill. 392. Sands v. Pfeiffer, 10 Cal. 258. Gardner v. Finley, 19 Barb. (N. Y.) 317. Roberts v. Dauphin Deposit Bank, 19 Penn. (7 Harris) 71. McKim v. Mason, 3 Md. Ch. Decis. 186. Corliss v. McLagin, 29 Me. 115. Sparks v. State Bank, 7 Blackf. 469. Winslow v. Merchant's Ins. Co., 4 Met. 306. Butler v. Page, 7 Met. 40. Union Bank v. Emerson, 15 Mass. 159. But see Fullman v. Stearns, 30 Vt. 443; Clark v. Reyburn, 1 Kansas, 281; Tibbets v. Moore, 23 Cal. 203. But the parties may, by an agreement made contemporaneously with the execution of the mortgage, limit its application so far as to exempt specified classes of chattels from the operation of the general rule. Frederick v. Devol, 15 Ind. 357. See Bartholomew v. Hamilton, 105 Mass. 239.

(r) Tebb v. Hodge, L. R., 5 C. P. 73.

(s) 2 Inst. 146. Wood v. Griffin, 46 N. H. 230. Austin v. Hudson River R. R. Co., 25 N. Y. 334. Cook v. Champlain Transportation Co., 1 Denio, 91.

impeachment of waste. Such permission vests the property of what is the subject of waste in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals. Where land was demised for a term of years, with liberty to the lessee to dig half an acre of brick-earth to a certain depth annually, and the lessee covenanted that if he dug more he would pay an increased rent of 375*l.* per annum per acre, and a stranger dug and took away brick-earth, it was held that the lessee was entitled to recover from the stranger the full value of such brick-earth(*t*).

352 *Right of reversioners to enter upon lands in the possession of their lessees to inspect waste.*—The law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee to see if there be waste, to the intent that he may have his action, if there be cause for it; and if the lessee prevents the inspection, he is liable to an action for damages(*u*).

353 *Injuries to lands and tenements from fire.*—The involuntary and unintentional burning of a house, through the negligence of the tenant or his servants, amounts, in contemplation of law, to no more than permissive waste; and for this a tenant-at-will or from year to year is not, as we have seen, responsible to the reversioner (*ante*, p. 282). Where the Countess of Shrewsbury brought an action against a lawyer of the Temple, and declared that she leased to him a house at will, “*et quod ille tam negligenter et improvide custodivit ignem suum quod domus illa combusta fuit*,” it was held that the action was not maintainable, as it was in effect an action for permissive waste, for which a tenant-at-will was not answerable(*v*). Every landlord who demises buildings to a tenant must be taken to contemplate all the ordinary risks to which house property is exposed from fire and the negligence of servants intrusted with fire and candles(*w*); and if he wishes to be protected from these risks, he must either insure or take from his lessee a covenant to repair and maintain the premises. If he fails to do so, and the premises are destroyed by fire, without any gross or culpable negligence on the part of the tenant, the landlord will have no remedy for the loss. If the fire has been caused by such an amount of gross negligence as to give it the appearance of a wilful act, the party guilty

(*t*) *Attersoll v. Stevens*, 1 Taunt. 183.

(*u*) *Hunt v. Downman*, Cro. Jac. 478. *Conwell v. State*, 3 Ired. 387.

(*v*) *Countess of Shrewsbury v. Crompton*, 5 Co. 13b; Cro. Eliz. 777; *Tindal, C. J.*, 4 M. & Sc. 253. *Horsefall v. Mather*, Holt, N. P. C. 9.

(*w*) *Fortuna autem ignis, vel hujusmodi, eventus inopinati, omnes, tenentes excusat.* *Fleta lib. i. cap. 12, s. 20.*

of the misconduct, whether it be the tenant or a stranger to the demise, will be answerable for commissive waste. And, although a lessee coming into possession of houses and buildings under a contract with a lessor who might, if he thought fit, have taken security against damage from fire, is not responsible to such lessor for fire caused by involuntary and unintentional neglect, yet, if a fire, originating in negligence, spreads from the demised premises to other buildings of the lessor, or to the buildings of strangers, the lessee will be responsible for the damage done to them(x).

Every person who puts a dangerous thing in motion which causes injury to another, is, as we have seen (*ante*, p. 2), in general responsible for the mischief it occasions(y). Where a man shooting with a gun at a fowl, hit his own house and set it on fire, and the fire spread to the house of his neighbor and destroyed it, it was held that the firer of the gun was responsible for the damage, although the fire was occasioned rather by an accident or misadventure than by negligence(z).

Every person who lights a fire is clothed by the common law with a heavy responsibility to his neighbors as regards the safe keeping of such fire. By the ancient custom of the realm, "*quilibet homo et fœmina, ignem suum, die et nocte, salve et secure custodire teneatur, ne pro defectu debitæ custodiæ ignis hujusmodi damnum aliquod vicinis suis eveniat*"(a). It was formerly held, that if a fire broke out accidentally in a man's house, and raged to such a degree as to burn his neighbor's house, he in whose house the fire first happened was liable to an action on the case on this general custom of the realm(b). In Rolle's Abridgment it is said: "If my fire by misfortune burns the goods of another man, he shall have an action on the case against me. If the fire lights suddenly on my house, I knowing nothing of it, and burn my goods, and also the house of my neighbor, my neighbor shall have an action on the case against me. If my servant puts a candle or other fire in a place in my house, and it falls and burns all my house and the house of my neighbor, action on the case lies against me by him; and the law is the same if my guest should do it, or a person who enters my house with my leave or knowledge"(c). "But if a man out of my house, against my will, puts fire into the straw of my house

(x) *Panton v. Isham*, 3 Lev. 359.

(y) *Grose, J.*, in *Leame v. Bray*, 3 East, 600.

(z) *Anon. Cro. Eliz.* 10.

(a) *Rastr. Entr.* p. 18. *Panton v. Isham*, 3 Lev. 356. See *Althorff v. Wolfe*, 22 N. Y. 366, note.

(b) *Bac. Abr.*, Actions on the Case, F., p. 104, 7th ed.

(c) 1 *Roll. Abr.*, ACTION SUR CASE R. *Danvers Abr.* 10.

or elsewhere, whereby my house is burnt, and the houses of my neighbors are burnt, of that I shall not be bound to answer to them, etc., for that cannot be said to be by malfeasance on my part, but against my will"(d).

But although the master of a house, or the raiser of a fire, was clothed with this extensive responsibility as regarded the lighting, safe-keeping, and spreading of such fire, yet if the fire spread by reason of the act of God, or from some superior cause which could not have been prevented, controlled, or resisted by human agency, the master of the house, or the lighter of the fire was held excused. Thus, where the defendant's servant kindled a fire in the defendant's field in the way of husbandry, and in the ordinary course of his employment as a farm servant, and the wind drove the fire into an adjoining heath and coppice of the plaintiff, and set it on fire, it was held that if the defendant could have shown that the spreading of the fire had been occasioned by a sudden storm, which could not have been foreseen, guarded against, or controlled by human agency, that would be good evidence to excuse the defendant(e).

354 *Accidental fires*.—To put the law on a proper footing, by rendering a person responsible only on proof that the fire was occasioned by the actual negligence of himself or his servant(f), it was enacted by the 6 Anne, c. 31, ss. 6, 7, that no action or suit shall be maintained against any person in whose house or chamber any fire shall *accidentally* begin, or any recompense be made by such person for any damage occasioned thereby. This statute was repealed by 12 Geo. 3, c. 73, s. 46, but the above protection was re-enacted by s. 37; and by 14 Geo. 3, c. 78, s. 36, it is extended to all persons in whose stable, barn, or other building, or on whose *estate* any fire shall *accidentally* begin; but no contract between landlord and tenant is to be defeated or made void.

It was thought for a long time that the word "accidental" in these statutes was employed in contradistinction to wilful, and that the same fire might be said to begin accidentally, and yet be the result of a certain amount of negligence; but it has been since held that these statutes refer only to fires produced by mere chance, or which are incapable of being traced to any cause, and so stand opposed to the negligence of either servants or masters, and that they do not, consequently, protect persons from the ordinary common-law responsibility in respect

(d) Markham J., *Beaulieu v. Finglam*, 2 H. 4, fol. 13, pl. 6.

(e) *Tubervil v. Stamp*, 1 Salk. 13; 1 Ld. Raym. 264.

(f) *Ld. Canterbury v. The Queen*, 1 Phill., 12 Law J., Ch. 284.

of fires occasioned by negligence(*g*). Thus, where the occupier of a meadow adjoining some cottages belonging to the plaintiff stacked a hay-rick on the extremity of the meadow in too green a condition, close to the plaintiff's cottages, and the hay smoked, and steamed, and exhibited unequivocal symptoms of approaching combustion, and the defendant was frequently warned of the danger of the stack's taking fire, and said that he would "chance it," but he ultimately caused a hole to be cut through the centre of the rick, which, unfortunately, hastened the catastrophe it was intended to avert, and the hay-stack caught fire, and the fire spread to the barn and stables of the defendant, and thence to the plaintiff's cottages, and totally consumed them, it was held that the defendant was responsible for the destruction of the cottages, and that, in cases of this sort, "it is for the jury to say whether or not, under the circumstances, the party has conducted himself with such a degree of care and caution as might be looked for in a prudent man"(*h*).

It has been held, also, that these statutes respecting accidental fires do not apply where the fire originates in the use of a dangerous engine or instrument, knowingly used by the owner of the land or estate on which the fire breaks out; so that if the owners of manufactories and steam-engines are guilty of any negligence or carelessness in the management of their furnaces and chimneys, and by reason thereof sparks escape and are blown on to the adjoining buildings, the owners of the furnace will be responsible for the damage done(*hh*). It

(*g*) *Filliter v. Phippard*, 11 Q. B. 357. *Canterbury (Visct.) v. Att.-Gen.*, 1 Phill. 328. *Webb v. Rome, Watertown & Ogdensburgh R. R. Co.*, 49 N. Y. 420, 427. The common law rule is still in force, at least to this extent, that he who negligently sets or negligently manages a fire in his own property, is liable to his immediate neighbor for the damage caused to him by the spread of the fire on his neighbor's next adjacent property. *Higgins v. Dewey*, 107 Mass. 494. *Barnard v. Poor*, 21 Pick. 378. *Perley v. Eastern R. R. Co.*, 98 Mass. 414. *Jacobs v. Andrews*, 4 Iowa, 506. *Webb v. Rome, Watertown & Ogdensburgh R. R. Co.*, 49 N. Y. 420, 427. But it has been held in New York and Pennsylvania that where a spark from a locomotive set fire to a house, and the fire communicated from thence to another house, the owner of the latter building had no cause of action against the company, as the damages were too remote. *Ryan v. New York Central R. R. Co.*, 35 N. Y. 210. *Pennsylvania R. R. Co. v. Kerr*, 62 Penn. St. 353.

But the doctrine of these cases is in direct opposition to decisions in Massachusetts and New Hampshire. See *Hart v. Western R. R. Co.*, 13 Met. 99; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; *Ingersoll v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438; *Hooksett v. Concord R. R.*, 38 N. H. 242. And was expressly dissented from in an unreported case decided in the Supreme Court of Illinois, decided June, 1872. See 4 Chicago Legal News, 326. In a similar case decided in the same State, it was held that it was properly a question for the jury to decide whether the damages were too remote. *Toledo, Peoria & Warsaw R. R. Co. v. Pindar*, 53 Ill. 447. And in a recent case in Wisconsin, the cases in New York and Pennsylvania, above referred to, were cited with doubt if not disapproval. *Kellogg v. Chicago & North-Western R. R. Co.*, 26 Wis. 223. And it is doubtful if they will be followed in New York. *Webb v. Rome, Watertown & Ogdensburgh R. R. Co.*, 49 N. Y. 420, 428.

(*h*) *Vaughan v. Menlove*, 4 Sc. 251; 8 B. N. C. 468.

(*hh*) See *Teall v. Barton*, 40 Barb. (N. Y.) 546.

has been held, moreover, that a fire designedly lighted by the defendant or by his orders, on his own estate, and which afterwards spreads, and causes damage to the plaintiff, is not a fire which "accidentally begins" within the meaning of the statute; so that if a person lights, or causes his servants to light, fires on his land, for the purpose of burning weeds and rubbish, and the fire spreads to and destroys the hedges and woods or cornfields of the adjoining landed proprietor, the lighter of the fire will be responsible for the damage(i). But a fire may be knowingly and designedly lighted in the first instance, and yet may fairly be said to "accidentally begin" the moment that, through some sudden and unexpected wind, the fire spreads, or sparks and fragments of fire are blown into the air, and get beyond the control of the party who has lighted and watched the fire (*ante*, p. 303).

355 *Fire spreading from blast-furnaces and steam-engines.*—Wherever it is practicable to adopt precautions that will render damage by fire from a furnace "next to impossible," a failure to adopt those precautions will be negligence. Where a spark of fire from the chimney of a locomotive engine on a railroad fell on the thatch of a cart-lodge, and set it on fire, and the fire communicated to several other farm-buildings, and totally destroyed them, it was held that the very occurrence of the disaster was, *primâ facie*, proof of negligence on the part of the company and their servants having the management of the engine, rendering it incumbent on them to show that every possible precaution had been taken to prevent the escape of sparks(j).

356 *Fires spreading from railways to the adjoining property.*—If railway companies allow quantities of long dead grass, or any other combustible material, dangerously to accumulate along their railway, and the combustible matter is ignited from lighted coals or sparks escaping from their locomotive engines, and the fire spreads from the railway to the adjoining coppices and fires them, the railway company will be responsible for the damage done, for such a fire is not a fire which ac-

(i) *Filliter v. Phippard*; *Tubervil v. Stamp*, *supra*. In this country, in the absence of any statutory rule to the contrary, the liability of the owner of land in the case mentioned in the text depends wholly upon the question of negligence. If the fire was negligently set or negligently kept the owner will be liable, but otherwise if he was guilty of no negligence. *Higgins v. Dewey*, 107 Mass. 494. *Stuart v. Hawley*, 22 Barb. (N. Y.) 619. *Hanlon v. Ingram*, 3 Clarke (Iowa), 81; *id.*, 1 Clarke (Iowa), 108. *Clarke v. Foot*, 8 Johns. 421. *Bush v. Brainerd*, 1 Cow. 78. *Bailey v. Mayor, etc.*, of New York, 3 Hill, 531. *Gardner v. Heartt*, 1 Denio, 466. In Connecticut it is provided by statute that "every person who shall set fire on any land, that shall run upon the land of any other person, shall pay to the owner all the damages done by such fire." R. S. tit. 1, § 277.

(j) *Piggott v. Eastern Co. Rail. Co.*, 3 C. B. 229. *Aldridge v. Gt. West. Rail. Co.*, 3 M. & Gr. 515. *Freemantle v. Lond. & North-West. Rail. Co.*, 10 C. B., N. S. 89; 31 Law J., C. P. 12; 3 F. & F. 337. *Huids v. Barton*, 25 N. Y. 544. *Fero v. Buffalo & State Line R. R. Co.*, 22 N. Y. 209.

cidentally begins on their estate, but is a fire caused by their negligence in not keeping the railway free from combustible materials likely to be ignited by their furnaces, and to cause damage to their neighbors. And they will be liable, although they could not reasonably anticipate that such consequences would ensue from their negligence(k). They may be expressly authorized by statute to use locomotive furnaces of a dangerous character, but no statute can exempt them from the consequences of negligence in the management of their railways, or the construction of their fire-boxes, chimneys or furnaces,

(k) *Smith v. Lond. & South-West. Rail., L. R., 5 C. P. 98; 6 ib. 14.* *Flynn v. San Francisco & San Jose R. R. Co., 40 Cal. 14.*

In the following cases it has been held, in an action to recover damages for property destroyed by a fire caused by sparks from the engine used by a railway company, and communicated to the lands of an adjoining owner by means of dry grass, weeds, and bushes allowed to accumulate along the track, that the question whether the company were guilty of negligence in allowing combustible matter to accumulate upon their land, was properly left to the jury. *Kellogg v. Chicago & Northwestern R. R. Co., 26 Wis. 223.* *Ohio & Mississippi R. R. Co. v. Shaufelt, 47 Ill. 497.* *Illinois Central R. R. Co. v. Nunn, 51 id. 78.* *Illinois Central R. R. Co. v. Frazier, 47 Ill. 505.* *Bass v. Chicago, Burlington & Quincy R. R. Co., 28 Ill. 9.* *Illinois Central R. R. Co. v. Mills, 42 Ill. 407.* *Webb v. Rome, Watertown & Ogdensburg R. R. Co., 49 N. Y. 420.* *Kesee v. Chicago and Northwestern R. R. Co., 30 Iowa, 78.*

In Illinois and Iowa it has been held, in a number of cases, that an owner of land adjoining a railroad track is as much bound in law to keep his land free from an accumulation of dry grass and weeds as railroad companies are; and that, if a fire is ignited on the track, and is communicated to the fields adjoining, the negligence of the owner will be held to have so far contributed to the loss as to prevent a recovery for the injuries sustained, unless it be shown that the negligence of the company was greater than that of the owner. *Chicago & Northwestern R. R. Co. v. Simonson, 54 Ill. 504.* *Ohio & Mississippi R. R. Co. v. Shaufelt, 47 Ill. 497.* *Illinois Central R. R. Co. v. Mills, 42 Ill. 407.* *Kesee v. Chicago & Northwestern R. R. Co., 30 Iowa, 78.*

But it has been held in California and Wisconsin that a failure to remove dry grass and stubble from land adjoining a railroad track is not an omission of any duty which the law imposes; and that it is not such contributory negligence on the part of the owner of the adjoining land as to impair or defeat a recovery for damages arising from a fire communicated to such land by weeds negligently allowed to accumulate along the line of the railroad. *Flynn v. San Francisco and San Jose R. R. Co., 40 Cal. 14.* *Kellogg v. Chicago & Northwestern R. R. Co., 26 Wis. 223.* And see *Martin v. Western Union R. R. Co., 23 Wis. 437; Hewey v. Nourse, 54 Me. 256; Field v. N. Y. Central R. R. Co., 32 N. Y. 339; Bachelier v. Heagan, 18 Me. 32; Barnard v. Poor, 21 Pick. 378; Fero v. Buffalo and State Line R. R. Co., 22 N. Y. 209; Hart v. Western R. R. Co., 13 Metc. 99; Ingersoll v. Stockbridge and Pittsfield R. R. Co., 8 Allen, 438; Perley v. Eastern R. R. Co., 98 Mass. 414; Hooksett v. Concord R. R. Co., 38 N. H. 242; McCready v. R. R. Co., 2 Strobb. (Law,) 356; Cleveland v. Grand Trunk R. R. Co., 42 Vt. 449.*

It has also been held that the fact that natural agencies, such as high winds or drought, contributed to cause the injury, or that the property destroyed was at a distance from the place where the fire originated, does not affect the liability of the company. *Kellogg v. Chicago and Northwestern R. R. Co., 26 Wis. 223.* See *Perley v. Eastern R. R. Co., 98 Mass. 414; Hart v. Western R. R. Co., 13 Metc. 99; Ingersoll v. Stockbridge and Pittsfield R. R. Co., 8 Allen, 438; Webb v. Rome, Watertown and Ogdensburg R. R. Co., 49 N. Y. 420.* But see *Ryan v. N. Y. Central R. R. Co., 35 N. Y. 210; Pennsylvania R. R. Co. v. Kerr, 62 Penn. St. 353; Toledo, Peoria and Warsaw R. R. Co. v. Pindar, 53 Ill. 447.*

It is provided by the general statutes of Massachusetts (ch. 63, § 101), that every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and that the railroad corporation shall have an insurable interest in the property along the route, for which it may be held so responsible, and may procure insurance thereon in its behalf.

whereby coals of fire are thrown on the adjoining property. If they neglect to avail themselves of all such contrivances as are in known practical use to prevent the emission of sparks from their engines, they will be responsible for such neglect(l). And if they run locomotive engines without statutable authority, in that case they are responsible for any damage caused by such engines in setting fire to adjoining property or otherwise, although they have not been guilty of negligence(m).

357 *Fires occasioned by the negligence of servants.*—The 12 Geo. 3, c. 73, s. 35, imposes penalties upon servants who, through negligence or carelessness, fire any houses or buildings; but this enactment does not exempt the master from the responsibility for the negligent acts of the servant whilst carrying into execution the master's orders, and doing something which the master employed him to do(n). If the work the servant is employed to execute does not require the use of fire, but the servant, nevertheless, kindles a fire for his own purposes, to cook his dinner or light his pipe, and carelessly throws burning material amongst combustibles, and destroys valuable property, the master is

(l) *Freemantle v. Lond. & North-West. Rail. Co., ut sup.* *Vaughan v. Taff Vale Rail. Co.*, 3 H. & N. 743; 28 Law J., Exch. 41; 29 Law J., Exch. 247; 5 H. & N. 679. *Jackson v. Chicago & Northwestern R. R. Co.*, 31 Iowa, 176.

It has been held in a long line of cases in this country, that the mere fact that a fire was occasioned by sparks from a railway locomotive does not make a *prima facie* case against the company, as the emission of sparks from a locomotive is not in itself illegal, and negligence cannot be inferred from the mere fact of causing fire, as sparks and coals may escape notwithstanding the adoption of all the safeguards which modern improvement has suggested. *Gandy v. Chicago and Northwestern R. R. Co.*, 30 Iowa, 420. *Frankfort, etc., Turnpike Co. v. Philadelphia, etc., R. R. Co.*, 54 Penn. St. 345. *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. 218, 224. *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124. *Fero v. Buffalo and State Line R. R. Co.*, 22 N. Y. 209. *Rood v. N. Y. and Erie R. R. Co.*, 18 Barb. (N. Y.) 80. *Macon and Western R. R. Co. v. McConnell*, 27 Ga. 481. *Smith v. Hannibal and St. Joseph R. R. Co.*, 37 Mo. 287. *McCready v. South Carolina R. R. Co.*, 2 Strobb. 356. But see *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 337; *Illinois Central R. R. Co. v. Mills*, 42 Ill. 407.

It seems to be conceded by the authorities that the loss of property adjacent to a railroad from the sparks, is, in the absence of negligence on the part of the company, or statutory rule to the contrary, *damnum absque injuria*.

But it has also been held that the absence of a spark-arrester, the failure to use the best, the employment of a drunken engineer, the use, at the time, of an excessive amount of steam, an extraordinary heavy train, an unlawful rate of speed, the defect or want of repair in the engine, the stopping of the engine, or stirring the fire in a place of peculiar peril, the repeated and unusual dropping of coals, or excessive and continual emission of sparks, etc., are facts tending to establish negligence. *Gandy v. Chicago and Northwestern R. R. Co.*, 30 Iowa, 420. *Jackson v. Chicago and Northwestern R. R. Co.*, 31 Iowa, 176. *Webb v. Rome, Watertown and Ogdensburgh R. R. Co.*, 49 N. Y. 420, 424. *Bedell v. Long Island R. R. Co.*, 44 N. Y. 367.

And when it is in evidence that engines properly constructed and in good order will not drop coals upon the track, the dropping of coals from the engine upon the track is, of itself, evidence of negligence sufficient to charge the company. *Field v. N. Y. Central R. R. Co.*, 32 N. Y. 339.

(m) *Jones v. Festiniog Rail. Co.*, L. R., 3 Q. B. 733.

(n) *Vaughan v. Menlove*, 3 B. N. C. 468.

not responsible for the unauthorized act of his servant(o). Where a maid-servant, in order to clear a chimney of soot, set fire to the soot, with a quantity of furze, and burnt the house down, it was held that the master was not responsible for the damage, as it was no part of the servant's business to clean the chimney, or to use fire for the purpose(p).

Amongst the Romans, where fire was little used, and candles were unknown, it was considered that damage from fire seldom occurred without imprudence or negligence, and those through whose neglect, however slight, a fire occurred, were held answerable for the damage done by it(q).

358 *Injuries from gunpowder and explosive substances—Explosions of gas.*

—Whoever introduces gunpowder or explosive materials into a building is responsible for damage occasioned by the introduction of such dangerous substances. If a person mixes things together, which alone are perfectly innocent, but which are liable to explode on coming into contact, he is responsible for the consequences; and if an explosion ensues he must make good the damage(r). Every tenant of a house

(o) *Williams v. Jones*, 33 Law J., Exch. 297.

(p) *McKenzie v. McLeod*, 10 Bing. 385; 3 Law J., N. S. C. P. 75. It was held in North Carolina that where slaves, in a dry time, in working new ground, set fire to a log-heap within a few feet of the fence and a dead pine tree, and there was an abundance of dry stuff between the log-pile and the fence, the master was responsible for the injury occasioned by the spreading of the fire, although it was calm in the morning when the fire was set. *Garrett v. Freeman*, 5 Jones' Law, 78.

The law of waste has been modified in the United States both as to the remedy and the law itself; and the action of waste or estoppel has in a great degree been superseded by an action on the case in the nature of waste. See 4 Kent's Comm. 81. In New York, prior to the Code, the remedy for wrongs in the nature of waste was by a special statutory action, technically known as the action of waste. See 2 R. S. 334, ss. 1-10; 1 R. S. 750, s. 8. But by the adoption of the Code of Procedure the action of waste was abolished, and it was provided that "wrongs heretofore remediable by action of waste are subjects of action as other wrongs, in which action there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises." N. Y. Code, s. 450. It was also provided that "the provisions of the Revised Statutes relating to the action of waste shall apply to an action for waste brought under this act, without regard to the form of the action, so far as the same can be so applied. Id. s. 451.

For the history of the statutes of California in regard to actions of waste and their construction and effect, see *Parrott v. Barney*, Deady, 404.

In Massachusetts the statute of Gloucester (6 Edw. 1, ch. 5) was adopted, but modified in respect to tenants in dower. *Sackett v. Sackett*, 8 Pick. 309. Under the Massachusetts statute of 1783, ch. 40, s. 3, the tenant in dower, committing waste, forfeits the place wasted and single damages only. *Padelford v. Padelford*, 7 Pick. 152. So in Georgia, the statute of Gloucester has not been adopted in respect to tenants in dower, and the remedy is by action on the case in the nature of waste, for actual damages, or by injunction. *Parker v. Chambliss*, 12 Ga. 235.

Under the statutes of Maine, for waste committed or suffered by a tenant for dower or for life, the reversioner may elect between an action of waste to recover the place wasted, with damages, and an action on the case in the nature of waste, to recover damages only; but he cannot have both remedies. *Stetson v. Day*, 51 Maine, 434.

(q) *Domat*, liv. 2, tit. 8, s. 4.

(r) *Tindal, C.J.*, in *Vaughan v. Menlove*, 4 Sc. 252.

is responsible for not taking care that the stop-cocks for regulating the supply of gas to a house are properly turned; and if these stop-cocks are negligently left open by the tenant or servants when the gas-lights are not burning, and an explosion ensues, and injures the house, the tenant will be responsible for the injury. But if a thief enters the house in the absence of the tenant, and cuts and carries away a gas-pipe without the knowledge of the tenant, or against his will, the latter is not then responsible for the resulting damage. When the entry of gas into a house is under the control of the occupants of the house, the gas company supplying the gas is not bound, on receiving notice that no more gas will be required, to stop the supply from the outside by putting on an outer stop-cock, or cutting off the communication between the gas-pipes in the interior of the house and the main in the street(s). In supplying gas to a house, a gas company is bound to use every reasonable precaution to prevent injury during the operation of "tapping the main"(t).

SECTION II.

REMEDIES AT COMMON LAW FOR INJURIES TO LANDS FROM WASTE, NEGLIGENCE, AND FIRE.

359 *The writ of prohibition for waste* was anciently a common law remedy, grantable only at the instance of the person injured, but by the statute of Westminster the second (13 Ed. 1, c. 14), this writ is taken away, and a writ of summons substituted in its place; "and although it is said by Lord Coke, when treating of prohibition at the common law, that it may be used at this day, those words, if true at all, can only apply to that very ineffectual writ directed to the sheriff, empowering him to take the *posse comitatus* to prevent the commission of intended waste"(u).

360 *Actions for waste*.—The real action for waste, in which the land or tenement itself was recovered, with thrice as much as the waste was taxed at, has been abolished by 3 & 4 Wm. 4, c. 27, s. 36, and the remedy at common law is now by the ordinary action on the case, in

(s) *Holden v. Liv. Gas Co.*, 3 C. B. 14; 15 Law J., C. P. 304.

(t) *Blenkiron v. Gt. Central Gas Consumers' Co.*, 2 F. & F. 438.

(u) *Jefferson v. Bishop of Durham*, 1 B. & P. 121.

which the actual damage sustained may be recovered, and an injunction obtained to prevent the continuance or repetition of the mischief(x).

361 *Actions by owners of insured premises.*—The right of the owner of real property which has been damaged or destroyed by fire, caused by rioters or by negligence, to sue the wrong-doer for damages, is not affected by the fact of his having insured the property, and received from an insurance company full indemnity for his loss(y), but he sues in the character of a trustee for the insurer, and is bound to hand over the damages he recovers to the latter. And an insurer, who has paid the loss, is entitled to sue in the name of the insured for the purpose of recovering full compensation from the wrong-doer(z).

362 *Parties to actions for waste.*—An action for waste in houses and buildings must in general be brought by the person entitled to the immediate estate in remainder; but if the tenant for life commits waste, and the first remainderman dies, the person next entitled may sue for the damage(a), if he had a vested interest in remainder at the time the waste was done(b). When the person next in remainder has only a life interest, his right to recover damages is of course confined to the

(x) *Post*, ch. 23, s. 1.

(y) *Yates v. Whyte*, 5 Sc. 640; 4 Bing. N. C. 272.

(z) *Randall v. Cockran*, 1 Ves. sen. 97; *post*, ch. 22, s. 1.

(a) *Bray v. Tracy*, Cro. Jac. 688; *Paget's case*, 5 Co. 76b. At common law none but an immediate reversioner or remainderman in fee or in tail, could have waste, and the estate of inheritance must have been in him when the waste was committed. But he could have maintained waste after the tenancy had expired, and he had got possession of the estate. If an estate intervened for life between the reversioner in fee and the tenant, he could not bring an action of waste so long as the intervening estate continued. *Robinson v. Wheeler*, 25 N. Y. 252.

In New York, under the Revised Statutes, any person seized of an estate in remainder or reversion, may maintain waste, notwithstanding an intervening estate for life or years. 1 R. S. 750, s. 8. So the statute gives the action against the tenant for life or years, and the assigns of the tenant by the curtesy or in dower, or for life or years, thus extending the common law remedy which gave the action only against the tenant by the curtesy, tenant in dower or guardian. *Robinson v. Wheeler*, 25 N. Y. 252; 2 R. S. 334, s. 1. The statute also gives the action to the assignee of such tenant; to one joint tenant or tenant in common against another joint tenant or tenant in common who shall commit waste of the estate held in joint tenancy or in common; and to an heir, whether he be within or of full age, for waste done in the time of his ancestor, as well as in his own time. 2 R. S. 334, ss. 2, 3, 4. And under the statutes of New York the reversioner may recover waste by a tenant, although after its commission he has alienated the estate, and has no interest therein at the time of suit brought. *Robinson v. Wheeler*, 25 N. Y. 252.

One having a contingent remainder, or entitled, upon a contingency, to an executory devise, cannot maintain an action of waste as having the next immediate estate of inheritance. *Hunt v. Hall*, 37 Me. 333.

In Wisconsin only the person having the legal title can support an action of waste. *Gillett v. Treganza*, 13 Wis. 472.

Under the Revised Statutes of North Carolina (ch. 119, s. 4), one tenant in common may maintain an action on the case in the nature of waste against his co-tenant, but only where there is a permanent injury to the property held in common. *Smith v. Sharpe*, *Busbee's Law* (N. C.) 91.

(b) *Bacon v. Smith*, 1 Q. B. 348.

injury done to his limited interest(c). Where timber has been lawfully felled on an estate by a tenant for life, or a person having a limited interest, the first owner of the inheritance is entitled to maintain an action for the conversion of the timber as a chattel severed from the inheritance, passing over all the intermediate limited estates(d), for the property in the timber must be in some one as soon as the wrongful act is done, and the law therefore vests it in the first owner of the inheritance(e).

In cases of injuries from fire caused by the negligence of a neighbor, who has carelessly lighted a fire on his own land, which has spread to a demised tenement and injured it, the landlord is entitled to sue for the damage done to his inheritance, and the tenant for the injury to his possession and occupation(f). We have already seen that, when several persons have a joint interest in the property, as occupiers or reversioners, they ought all to be made plaintiffs in an action for an injury to the property(g); and that when several persons have been jointly engaged in the doing of the wrongful act, the plaintiff may sue one or more of them at his election(h).

363 *Declarations for waste* should set forth the defendant's possession and occupation of a messuage, tenement or land, of which the reversion is in the plaintiff, and the wrongful commission by the defendant of the particular description of waste complained of, averring that, by means of the wrongful act, the plaintiff is greatly injured in his revisionary estate, and claiming damages(i). If the tenant has severed and removed things attached to the freehold; if he has dug up and carried away virgin soil, stone, or gravel, without the license of the landlord or reversioner, or has severed and removed landlord's fixtures, the things so severed forthwith vest in the landlord as chattels, and the latter may also declare either for a trespass or for a conversion of the property(k).

(c) *Evelin v. Raddish*, *ante*, p. 91. And where an action on the case is brought against the tenant for life by the remainderman, the measure of damages is the injury to the inheritance. *McCullough v. Irvine*, 13 Penn. St. 438.

(d) *Bowle's case*, 11 Rep. 79b.

(e) *Wood, V. C.*, *Gent v. Harrison*, Johns. 524; 29 Law J., Ch. 68.

(f) *Panton v. Isham*, 3 Lev. 399; 1 Salk. 19. *Ante*, p. 242.

(g) *Ante*, pp. 85, 242.

(h) *Ante*, pp. 207, 243; and *post*, ch. 20.

(i) *Martyr v. Bradley*, 9 Bing. 24. *Young v. Spencer*, 10 B. & C. 145. *Martin v. Gilham* 7 Ad. & E. 540; 2 Wm. Saund. 252. It is not necessary that the plaintiff in an action of waste should set out his title particularly; it is sufficient if he shows himself entitled to an immediate estate of inheritance. *Greenly v. Hall*, 3 Harring. 9.

(k) *Higgon v. Mortimer*, 6 C. & P. 616; *post*, ch. 7, s. 2.

364 *Declarations upon the custom of the realm for the negligent keeping of a fire* show a good cause of action, by setting forth that the defendant, by his servant, lighted a fire on the defendant's land, and so negligently kept such fire that it extended from the defendant's land to the adjoining buildings, etc., of the plaintiff, and wholly destroyed them(*l*); or that the plaintiff was possessed of a close of land, closely adjoining a certain other close in the occupation of the defendant, and that the defendant wrongfully lighted a fire on his said close, at a time when, by reason of the state of the wind and weather, it was highly dangerous to light a fire, and that through the negligence of the defendant and his servants, the fire extended itself from the close of the defendant to the close of the plaintiff, and burnt and destroyed the trees, hedges, and fences of the plaintiff, etc.,(*m*).

A good cause of action also is disclosed by a declaration alleging that the plaintiff was possessed of farm-buildings and stacks of corn standing in a close in the occupation of the plaintiff, closely adjoining a certain other close in the occupation of the defendant, and that the defendant placed a stack of hay on his said close, which heated and smoked, and gave out a strong smell, indicating that the hay-stack was in danger of taking fire, of which the defendant then had notice, and that the defendant, knowing the dangerous condition of the hay-stack, nevertheless kept it on his said close, and knowingly caused it to be a source of danger to the adjoining property of the plaintiff, although he could have removed it, or prevented it from being dangerous; and that by reason of the defendant's default and negligence in the premises, the hay-stack ignited and burst into flame, and set fire to the adjoining farm-buildings of the plaintiff(*n*).

365 *Pleas*.—The plea of not guilty, and the evidence admissible thereunder, and special pleas in actions for waste, etc., are governed by the same rules as those previously set forth in actions for infringements upon territorial and incorporeal rights(*o*).

366 *Evidence at the trial*.—*Proof on the part of the plaintiff* in actions for waste, must be directed to the establishment of the material facts alleged in the declaration, *i.e.*, the defendant's tenancy of the land on which the waste was committed, the plaintiff's reversionary interest

(*l*) *Panton v. Isham*, 3 Lev. 359.

(*m*) *Filliter v. Phippard*, 11 Q. B. 348.

(*n*) *Vaughan v. Menlove*, 3 B. N. C. 468. *Aldridge v. Gt. West. Rwy.*, 3 M. & Gr. 516. *Piggot v. East Co. Rail. Co.*, 3 C. B. 229. *Vaughan v. Taft Vale Rail. Co.* *Fremantle v. Lond. & North-West. Rail. Co.*, *ante*, p. 307.

(*o*) *Ante*, pp. 88, 180; and *post*, ch. 21.

therein, the nature of the grievance, and the permanent injury thereby done to the inheritance, or to the plaintiff's proprietary rights as reversioner (*ante*, pp. 85, 310). If the action is brought for permissive waste, the plaintiff must prove that the defendant is tenant for life, or that he has a permanent interest in the property permitted by him to go to waste and ruin (*ante*, pp. 242, 278); but if it is for commissive waste, the nature and duration of the defendant's interest in the property is wholly immaterial. If it be proved that the tenant left windows and doors open which ought to have been kept closed against storm and rain, or that panes of glass were broken, and that he allowed the windows to remain without glass, so that the rain, frost, and damp penetrated the building, and rotted the internal timbers and woodwork thereof, to the lasting damage of the inheritance, there will be evidence of commissive waste. If the plaintiff complains of the removal of doors and partitions in the house, he must show that the alterations made were of a permanent character, making a real change in the form and arrangement of the building, or that they deteriorated the property (*ante*, pp. 279, 280). If the cause of action is founded on the removal by the tenant of things attached to the freehold, it must be shown that the removal was wrongful, either on the ground that the things removed never did belong, or ceased to belong to the defendant, or that they had become forfeited to the plaintiff (*ante*, pp. 290–299). If the plaintiff sues for damage from fire, he must show that the fire was lighted by the defendant or his servants, or that a fire was burning on the defendant's estate, and that it was so negligently managed, or was lighted so carelessly, that it extended to the plaintiff's buildings and destroyed them. It is not necessary to prove the legal duty to take care of a fire^(oo). If the action is brought by a lessor, it may, as we have seen, be defeated by proof of the tenancy between the plaintiff and the defendant (*ante*, p. 301).

367 *Damages recoverable in respect of the severance and sale of fixtures.*—

Where fixtures have been unlawfully detached from the freehold and sold by auction, the measure of damages in an action against a wrongdoer for the seizure and removal of the fixtures is the value of the

^(oo) In actions against a railroad company to recover damages caused by fire created by sparks from a locomotive, the burden of proof is on the plaintiff to show negligence on the part of the company. *Smith v. Hanibal & St. Joseph's R. R. Co.*, 37 Mo. 287. And see note *i*, page 307.

But if the plaintiff shows such circumstances as to raise the presumption of negligence, it will not be necessary for him to show affirmatively that there was something unsuitable or improper in the construction, or condition, or management of the engine, unless the presumption of negligence is rebutted by the defendant. *Field v. New York Central R. R. Co.*, 32 N. Y. 339.

fixtures, as between an outgoing and incoming tenant(*p*), in addition to compensation for any intentional wrong, injury, or insult involved in the act of removal, or for any trespass that may have been committed in removing them.

368 *Effect of the recovery of nominal damages.*—In the old action of waste, where the thing wasted was sought to be recovered as well as damages, it was held that if the damages did not amount to 3s. 4d., the defendant was entitled to judgment(*q*). “I do not,” observes Lord Eldon, C.J., “see precisely on what grounds these decisions proceeded; though I can easily conceive many cases in which it may be extremely unconscientious for a plaintiff to take advantage of his judgment, where such small damages have been recovered.” Therefore, where the owner of land suffered his tenant to expend a large sum of money in building upon the land and laying out a garden without making any objection to the alteration and improvement, and then brought an action of waste on the statute, and the jury assessed the damages at one farthing, the court gave judgment for the defendant. But in an action on the case for waste, it is no objection to the landlord’s claim to substantial damages, or to the judgment of the court, that the property has been improved in value by alterations made upon it, if those alterations have been made without the knowledge of the landlord, or in spite of his protest or objections. Thus, if a tenant convert a furze brake in which game have bred into arable or pasture land, by which its real value is much improved, but the landlord has objected to the improvement, preferring a furze brake with game to a cornfield without game, the landlord is entitled to substantial damages(*r*), and to judgment, whatever may be the damages recovered(*s*).

369 *Assessment of damages.*—We have already seen that the damages in actions for injuries to real property must be assessed with reference to the several interests of the owners and occupiers, and be apportioned to each in respect of the injury sustained by each, and that the satisfaction made to one is no bar to an action brought by the other (*ante*, pp. 90, 255).

Where, therefore, a house has been burned down, or destroyed by culpable negligence, and there are several persons interested in the property, viz., tenant for life, tenant in tail, and reversioner in fee, the tenant for life can recover only such damages as are commensurate

(*p*) *Thompson v. Pettit*, 10 Q. B. 106.

(*q*) *Rigg v. Parsons*, cited 2 East, 155; Bull. N. P. 120.

(*r*) *Heath, J., Harrow School v. Alderton*, 2 B. & P. 86.

(*s*) *Pindar v. Wadsworth*, 2 East, 161.

with his life estate(*t*). If a house demised to a tenant has been set on fire, or thrown down through the negligence of a neighbor, the damages are apportionable between the landlord and tenant. The tenant is entitled to recover in respect of the value of his possessory interest and unexpired term in the premises, and the landlord in respect of the injury to his reversion(*u*). But if the tenant is bound by covenant to keep the house in repair, the substantial injury would then accrue to the tenant, and the tenant would be entitled to recover the cost of rebuilding the house, deducting the difference in value between old materials and new(*x*). The tenant, moreover, would be entitled to damages in respect of the loss he has sustained in being obliged to seek out and pay for another residence; but he could not recover the full value of the house(*y*).

When the action is brought for a breach of duty by the defendant, in omitting or neglecting to restore or rebuild a house which the defendant has undertaken to maintain and keep up, and which has been accidentally burnt or destroyed, the measure of damages is not the cost of rebuilding the house. In such a case, the plaintiff can only recover the loss he has sustained by the actual deterioration of his property. And if the new house, when rebuilt, will be much more valuable to the plaintiff than the old house that was burnt or destroyed, the defendant is entitled to the benefit of the deduction of the increased value from the cost of the rebuilding(*z*).

The plaintiff's right to recover damages from the wrong-doer, in respect of the injury he has sustained, is not affected, as we have seen, by the fact of his having insured the property and being indemnified for the loss(*a*); but he cannot, as we shall presently see, recover a double satisfaction, but is bound to pay over to the underwriter of the policy the damages he recovers from the wrong-doer(*b*).

370 *Damages recoverable from a tenant who obstructs the reversioner in the exercise of his right to enter upon the demised premises to inspect waste.*—

We have already seen that the law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action, if there be cause for it; and, therefore, if the lessee prevents the inspection,

(*t*) *Evelyn v. Raddish*, Holt, 543.

(*u*) *Panton v. Isham*, 3 Lev. 359; 1 Salk. 19.

(*x*) *Lukin v. Godsall*, 2 Peake, 15; *post*, ch. 14, s. 1.

(*y*) *Hosking v. Phillips*, 3 Exch. 182.

(*z*) *Yates v. Dunster*, 11 Exch. 17; 24 Law J., Exch. 226. *Lukin v. Godsall*, 2 Peake, 15.

(*a*) *Clark v. Blything*, 2 B. & C. 253; *ante*, p. 310.

(*b*) *Post*, ch. 22, s. 1.

substantial damages may be recovered from him by reason of the infringement of the lessor's right, although no waste has actually been committed or damage done(c).

SECTION III.

OF INJUNCTION TO PREVENT WASTE.

371 *Prevention of commissive or wilful waste by injunction.*—The courts of chancery and of common law (d) will interfere by injunction to restrain lessees, tenants for life, mortgagors in possession, and persons having a limited interest in land, from committing waste thereon to the injury of the landlord, mortgagee, or reversioner(e). The court will restrain them from digging, or ploughing up, or destroying the surface of ancient pasture land, and from sowing the land with pernicious crops(f), from digging and carrying away brick-earth(g) and stones(h), cutting ditches, opening mines and quarries(i), and abusing a limited right to dig for and carry away stone(k), cutting turf(l), or timber(m), or underwood of insufficient growth(n), pulling down fences and buildings, and carrying away the materials(o); unless the wrongful act works a forfeiture of the estate, and the landlord or reversioner has an immediate right of entry, and fails to exercise the

(c) Hunt v. Dowman, Cro. Jac. 478.

(d) As to injunction at common law, see *post*, ch. 23.

(e) Bac. Abr. (WASTE), N.

(f) Worsley v. Stuart, 4 Bro. P. C. 377. Drury v. Molins, 6 Ves. 328. Pratt v. Brett, 2 Madd. 62.

(g) London (Bishop of) v. Webb, 1 P. Wms. 528. Vincir v. Vaughan, 2 Beav. 466. Livingstone v. Reynolds, 2 Hill, 157.

(h) Cowper v. Baker, 17 Ves. 128. West Point Iron Co. v. Reymert, 45 N. Y. 703.

(i) Gibson v. Smith, 2 Atk. 182. West Point Iron Co. v. Reymert, 45 N. Y. 703. Moore v. Masseni, 32 Cal. 590.

(k) Thomas v. Oakley, 18 Ves. 184.

(l) Coppinger v. Gubbins, 9 Ir. Eq. Rep. 310.

(m) Perrot v. Perrot, 3 Atk. 94. Packington's case, ib. 215. Morris v. Morris, 15 Sim. 509. Porch v. Frees, 3 Green (N. J.), 204. Dickinson v. Jones, 36 Ga. 97. But an injunction restraining the cutting of timber will be more rarely granted in this country than in England, as it is only where the cutting of timber will work a permanent injury to the freehold or inheritance that this act will be deemed waste, and its commission restrained. McCay v. Wait, 51 Barb. (N. Y.) 225. Keeler v. Eastman, 11 Vt. 293. Shine v. Wilcox, 1 Dev. & Bat. Ch. 631. Alexander v. Fisher, 7 Ala. 514. And see *ante*, p. — note.

(n) Brydges v. Stephens, 6 Madd. 279.

(o) London (Mayor of) v. Hedger, 18 Ves. 355.

right by bringing an ejectment(*p*), or unless the parties have, by their contract, assessed the compensation in the shape of an increased rent or liquidated damages, to be paid for the doing of the act(*q*), and not as a cumulative remedy(*r*). Where a tenant from year to year received notice to quit, and then began to cut and damage the hedgerows, and to take manure off the land and remove straw, etc., contrary to the course of good husbandry, the court granted an injunction to stop the mischief(*s*). And where the tenant of a farm, having discovered valuable mineral deposits in a stream which ran from the Welsh mountains through his land, set to work to gather the minerals, and sell them, the court granted a perpetual injunction to restrain him from so doing(*t*).

Where there is tenant for life, remainder for life, remainder in fee, or where there is tenant for life subject to waste, remainder for life dispunishable for waste, remainder in fee, the Court of Chancery will not suffer an agreement between the two tenants for life to commit waste, to take place against the remainderman before the time comes when the second tenant for life's power commences(*u*). And where there is tenant for life, remainder for life, remainder in fee, the court, on a bill brought by remainderman in fee to stay waste in the first tenant for life, will, notwithstanding the intermediate estate for life, upon a certificate of the waste, grant an injunction. And so it will on a bill brought by a mortgagor, where the mortgagee in possession commits waste by cutting down timber, and the money arising from the sale of the timber is not applied in sinking the interest and principal of the mortgage. And where mortgagor in possession commits waste, the court will, on a bill by the mortgagee, grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance(*v*).

The court will also restrain, by injunction, a lessee for lives renewable for ever from committing waste on the demised premises(*x*),

(*p*) *Lathropp v. Marsh*, 5 Ves. 259.

(*q*) *Woodward v. Gyles*, 2 Vern. 119. *Carnes v. Nesbitt*, 7 H. & N. 778; 30 Law J., Exch. 348. *Rolfe v. Peterson*, 2 Bro. P. C. 436. *Linden v. Hepburn*, 3 Sandf. (N. Y.) 668. *Young v. Edwards*, 11 How. (N. Y.) 201.

(*r*) *London (City of) v. Pugh*, 4 Bro. P. C. 395.

(*s*) *Onslow v. —*, 16 Ves. 173. See *Harvey v. Harvey*, 41 Vt. 373.

(*t*) *Thomas v. Jones*, 1 Y. & C. 510.

(*u*) *Robinson v. Litton*, 3 Atk. 210. See *Birch-Wolfe v. Birch*, L. R., 9 Eq. Ca. 683.

(*v*) *Farrant v. Lovel* 3 Atk. 722. *Gray v. Baldwin*, 8 Blackf. 164. *Brown v. Stewart*, 1 Md. Ch. Decis. 483. *Phoenix v. Clark*, 2 Halst. Ch. 447. *Cooper v. Davis*, 15 Conn. 556. *Brady v. Waldron*, 2 Johns. Ch. 148. *Salomon v. Claggett*, 3 Bland. 125. *Capner v. Flemington Mining Co.*, 2 Green Ch. 463. *Robinson v. Renwick*, 3 Edw. Ch. (N. Y.) 245.

(*x*) *Parcell v. Nash*, 1 Jones, 625.

and prevent one tenant in common from wilfully destroying the common property(*y*); but where a railway company obtained a lease from five out of six tenants in common, and laid down a railway on the land in spite of the opposition of the sixth, the court refused to grant an injunction to prevent the latter from tearing up the rails(*z*).

If one tenant in common thinks proper, by agreement with the other, to hold the common property as occupying tenant, and thereby excludes his co-tenant in common from all right of entry upon the land holden in common, an injunction will be granted to restrain him from dealing with the land otherwise than as an ordinary occupying tenant(*a*). But if there be no tenancy, the tenant in common in occupation of the land cannot be restrained from acts contrary to good husbandry and the custom of the country only, but not amounting to the destruction or waste of the common property(*b*).

The patron of a living may also have an injunction against the incumbent to stay waste; and a bishop may be restrained from felling timber for sale at the instance of the Attorney-General, on behalf of the crown, the patron of bishoprics(*c*). The patron is the proper person to institute a suit to restrain the opening and working of new mines, and he is the only person who can interfere, unless it be the ordinary, in the event of collusion between the patron and the incumbent(*d*).

An injunction to restrain waste will be granted to protect the interest of a child in *ventre sa mère*, or a contingent remainderman or executory devisee(*e*).

If a tenant, finding his house ruinous and in danger of falling, proceeds to pull it down, with the intention of building a better, the landlord may, by injunction, restrain him from so doing, as the tenant has no right, as we have seen (*ante*, p. 279), to make changes and alterations in the property demised to him without the landlord's consent(*f*).

The Court of Chancery does not now treat questions of destructive damage to property exactly as it did forty or fifty years back; its

(*y*) *Hole v. Thomas*, 7 Ves. 289.

(*z*) *Durham and Sund. Rail. Co. v. Wawn*, 3 Beav. 119.

(*a*) *Twort v. Twort*, 16 Ves. 128. See *Hawley v. Clowes*, 2 Johns. Ch. 122.

(*b*) *Bailey v. Hobson, L. R.*, 5 Ch. App. 180.

(*c*) *Knight v. Mosely*, Amb. 176. *Wither v. Dean*, etc., of *Winchr.*, 3 Mer. 427. *Duke of Marlborough v. St. John*, *ante*, p. 288.

(*d*) *Holden v. Weekes*, *ante*, p. 288.

(*e*) *Robinson v. Litton*, 3 Atk. 211; 2 *Daniel's Ch. Pr.* 1225.

(*f*) *Smyth v. Carter*, 18 Beav. 78. *Douglass v. Wiggins*, 1 Johns. Ch. 435.

protection in such respect being more largely afforded than it then generally was(*g*). "The arm of the court," it has been said, "is long enough to reach clear cases of destructive waste, even where the party committing such waste is in possession, and the party seeking to restrain the acts of waste is out of possession, and his title is denied by the defendant"(*h*). Where, therefore, an action for ejectment has been brought, the court will, at the instance of the plaintiff in the action, restrain the person in possession of the property from recklessly cutting down vast quantities of timber, or denuding the estate of trees, or committing acts of waste and destruction inconsistent with any fair or reasonable exercise of acts of ownership(*i*). And where waste is committed by a stranger in collusion with the tenant, the court will, at the instance of the landlord, grant an injunction against such stranger, as well as against the tenant(*k*). But "the court never interposes in case of permissive waste, either to prohibit or to give satisfaction, as it does in case of wilful waste"(*l*).

An injunction will be granted against waste when it is done only in a slight degree, or when threatened(*m*); but not on the principle that it will do no harm to the defendant, if he does not intend to commit the prohibited act(*n*). Nor has the court jurisdiction to interfere after all the mischief that can be done has been done(*o*). But if there is yet room for its intervention, it has jurisdiction, under the 20 & 21 Vict. c. 27, to assess the damages already done(*p*).

The court also will prevent one of several partners from doing acts tending to depreciate the value of the partnership property, and injuring the credit of the firm(*q*); and from disposing of the joint stock to his own private purposes, in fraud of his co-partner(*r*).

372 *Effect of acquiescence in the commission of waste.*—It is a principle of equity, that when a person has stood by seeing an act done, and has

(*g*) *Haigh v. Jaggard*, 2 Coll. Ch. C. 231.

(*h*) *V.-C. Wood in Talbot (Earl of) v. Scott*, 4 Kay & J. 108.

(*i*) *Neale v. Cripps*, 4 Kay & J. 472. But in an early case in New York the court refused to grant an injunction to stay waste in favor of the plaintiff in ejectment against the defendant, the title being in dispute and the defendant having for a long time been in possession. *Storm v. Mann*, 4 Johns. Ch. 21.

(*k*) *Norway v. Rowe*, cited 1 Myl. & Cr. 522.

(*l*) *Powys v. Blagrave*, 4 De Gex, Mac. & G. 448.

(*m*) *White Water Valley Canal Co. v. Comegys*, 2 Carter (Ind.), 469. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601. *London v. Warfield*, 5 J. J. Marsh. 196.

(*n*) *Coffin v. Coffin*, Jacob, 70.

(*o*) *Reubens v. Joel*, 13 N. Y. 488. *Society for Establishing Useful Manufactures v. Morris Canal*, Saxton, 157.

(*p*) *Hindley v. Emery*, L. R., 1 Eq. Ca. 52.

(*q*) *Marshall v. Watson*, 25 Beav. 504.

(*r*) *Hartz v. Schrader*, 8 Ves. 317.

consented to it, he cannot complain of that which he has himself expressly or impliedly authorized or permitted(s). Thus, where the plaintiff had demised a logwood-mill to the defendant, and the latter altered it to a cotton-mill of great value, and the plaintiff stood by and saw the cotton-mill erected at great expense, and made no objection, and afterwards approved of the defendant's planting about the mill, and the plaintiff then filed a bill for an injunction to restrain the defendant from using the mill as a cotton-mill, the court dismissed the bill, on the ground that the plaintiff had by his conduct encouraged the defendant to make the alteration(t).

373 *Effect of laches or delay in seeking a remedy.*—Where an expectant tenant for life in remainder sees a tenant for life in possession improperly cut timber, and not only takes no step to prevent it during his life, but allows a long period of time to elapse after his death without seeking any redress, a court of equity will not, after this long lapse of time, charge the estate of the prior tenant for life with the burthen of making good the value of the timber so cut by him, for a court of equity is averse to the assertion of stale demands(u).

374 *Parties entitled to sue in equity.*—By 15 & 16 Vict. c. 86, s. 42, rule 5, it is enacted that in all suits for the protection of property, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

(s) Binney's case, 2 Bland, 99; Water Lot Co. v. Buchs, 5 Ga. 315.

(t) Brydges v. Kilburne, cited Jackson v. Cator, 5 Ves. 688. Harrow School v. Alderton, ante, p. 314. Rex v. Butterton, 6 T. R. 555. E. I. Co. v. Vincent, 2 Atk. 82. Parrott v. Palmer, 3 Myl. & K. 640.

(u) Harcourt v. White, 28 Beav. 311; 30 Law J., Ch. 681. See Sheldon v. Rockwell, 9 Wis. 166; Tash v. Adams, 10 Cush. 252; Whitney v. Union R. R. Co., 11 Gray, 359; Burden v. Stein, 27 Ala. 104; Long v. Cross, 5 Jones Eq. 323; Schemerhorn v. L'Espinasse, 2 Dall. 360.

CHAPTER VI.

OF TRESPASS UPON REAL PROPERTY—TITLE TO LANDS AND TENEMENTS.

SECTION I.—*Of trespasses upon lands and tenements.*—What constitutes a trespass—Abuse of a license or authority rendering parties trespassers ab initio—Trespasses by cattle and domestic animals—Trespasses from want of fences and from defective fences—Who is bound to fence and repair fences—Destruction of crops by rabbits and pigeons—Damage done by trespassing dogs—Trespasses where the surface and subsoil constitute separate freeholds—Forcible entry and detainer—Trespasses upon the soil of highways—Continuing trespasses.

SECTION II.—*Of the title to lands, fences, and boundary-walls.*—Trial of title in an action of trespass—Title to realty from twenty years' possession—Limitation of actions for the recovery of realty—Accrual of the right on dispossession, or discontinuance of possession—What is a dispossession or discontinuance of possession, causing the time of limitation to begin to run—Occupation of poor relations and servants—The possession of the servant the possession of the master—Accrual of the right on death, alienation, forfeiture—Conversion of tenancy-at-will into an indefeasible estate—Possession by cestui que trust—Title of bona fide purchasers of trust estates—Acquisition of title by parties who gained possession as tenants from year to year—Continued wrongful receipt of rent—Possession of coparceners, joint-tenants, tenants-in-common, relations, etc.—Acknowledgments of title—Disabilities—Preservation of title by re-entry and resumption of possession—Rights of mortgagees, lay rectors, etc.—Title to the sea-shore, the soil of fresh-water lakes, highways, private ways, etc., and waste land adjoining—Title to the soil of towing-paths and artificial river-banks and canal-banks—Right of property in trees and bushes, boundary-walls and fences, hedges and ditches—Title to pews.

SECTION III.—*Of actions for trespasses upon realty.*—Damage by rioters—Parties to be made plaintiffs and defendants in actions of trespass—Pleadings—Liberum tenementum—Leave and license—Pleas of justification—Defences and evidence—Assessment of damages—Surrounding circumstances of aggravation—Apportionment of damages as between tenant and reversioner—Damages recoverable from one of several co-trespassers—Tenants holding over—Trespass for mesne profits—Prevention of trespasses by injunction.

SECTION I.

OF TRESPASSES UPON LANDS AND TENEMENTS.

375 *What constitutes a trespass.*—Every entry upon land in the occupation or possession of another constitutes a trespass, in respect of which an action for damages is maintainable, unless the act can be justified in the exercise of some legal or personal authority or incorporeal right (*ante*, c. 3). If a man's land is not surrounded by any actual fence, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property, although no actual damage may be done (*ante*, pp. 9-13). If the entry is made after notice or warning not to trespass, or is a wilful and impertinent intrusion upon a man's domestic privacy, or an insulting invasion of his proprietary rights, a very serious cause of action will arise, and exemplary damages will be recoverable(*a*); but if there has been no insulting or wilful and persevering trespass, and no actual damage done, and no question of title is involved, the damages recoverable may be merely nominal, and the trespass may be excused altogether, if it can be shown that it was committed in self-defence, in order to escape from some pressing danger or apprehended peril(*b*), or in defence of the possession of a man's goods and chattels, or cattle, sheep, or domestic animals; for "if I drive my beasts along the highway, and you have open uninclosed land adjoining the highway, and my beasts enter your land and eat the herbage thereof, and I come freshly and chase them out of your land, you shall not have any action against me, because the chasing them was lawful"(*c*). So, if my goods have been taken by you, and placed on your land, I may justify my entry on your land for the purpose of re-taking them(*d*).

376 *Abuse of a license or authority rendering a person a trespasser ab initio.*—When a person has a special privilege or authority to enter upon

(*a*) *Merest v. Harvey*, 5 Taunt. 443. *Greenville, etc., R. R. Co. v. Partlow*, 14 Rich. Law (S. C.), 237. *Hawk v. Ridgway*, 33 Ill. 473. *Devaugh v. Heath*, 37 Ala. 595. *Perkins v. Towle*, 43 N. H. 220. *Dorsey v. Manlove*, 14 Cal. 553. *Nagle v. Mullison*, 34 Penn. St. 48. *Koib v. Bankhead*, 18 Texas, 228. *Mitchell v. Billingsley*, 17 Ala. 391.

(*b*) 37 Hen. 6, 37, pl. 26. See *Allison v. Chandler*, 11 Mich. 542; *Hawk v. Ridgway*, 33 Ill. 473; *Jefcoat v. Knotts*, 13 Rich. Law (S. C.), 50.

(*c*) *Catesby*, arg. 6 Ed. 4, 7, pl. 18. *Goodwin v. Cheveley*, 4 H. & N. 631.

(*d*) 2 Roll. Abr. 565, pl. 9.

lands to make a seizure of goods, and he exceeds his authority, by breaking open the outer doors of a dwelling-house(e), he becomes a trespasser *ab initio*. All his subsequent acts are trespasses, and he is in the same position as if he was a perfect stranger, acting without any color of excuse or justification(f). The same result follows whenever a person has a lawful authority to enter lands for any purpose whatever, and he exceeds his authority by doing on the land what he had no right to do; or by staying longer than he had a right to stay(g).

Every trespass upon land is, in legal parlance, an injury to the land, although it consists merely in the act of walking over it, and no damage is done to the soil or grass. Every injury to the possession of the occupier is, in principle, an injury to the property; and, therefore, if a man is unlawfully turned out of his dwelling-house, that amounts, in point of law, to an injury to the dwelling-house(h).

Where an action was brought for trespassing on a close and treading down the grass, and the defendant pleaded that he had land lying next the said close, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, and the plaintiff demurred, it was adjudged for the plaintiff: for though a man doth a lawful thing, yet if any damage do hereby befall another, he shall answer for it, if he could have avoided it(i).

(e) *Post*, ch. II, s. 1.

(f) *Attack v. Bramwell*, 32 Law J., Q. B. 146.

(g) *Conn. Digest, TRESPASS (C)*, 2. *Six Carpenters' case*, 8 Cro. 146a. *Reed v. Harrison*, 2 W. Bl. 1218. *Aitkenhead v. Blades*, 5 Taunt. 197; *post*, ch. 14, s. 2. It has been held in New York that where the law gives to any person a license or authority and he abuses it, he becomes a trespasser *ab initio*; but he does not become a trespasser *ab initio* by reason of an abuse of the license or authority given by another, although he may be liable for the abuse. *Adams v. Rivers*, 11 Barb. (N. Y.) 390. *Van Brunt v. Schenck*, 13 Johns. 414. *Allen v. Crofoot*, 5 Wend. 506. *Dumont v. Smith*, 4 Denio, 319. And see *Cole v. Drew*, 44 Vt. 49. It has been held in Pennsylvania that one who has a license to enter upon the land of another for a lawful purpose, and exceeds his license or abuses his authority, is liable in an action *quare clausum fregit* for the consequential damages arising therefrom. *Kissecker v. Monn*, 36 Penn. St. 313. But it has also been held in the same State, that where a right to enter on land exists, its abuse will not sustain an action of trespass. *Edelman v. Yeakel*, 27 Penn. St. 26.

It was decided in New Hampshire that one who has a right to enter upon land for a particular purpose, and entering for that purpose exceeds his authority and commits acts for which he was not authorized to enter, is not liable in an action of trespass *quare clausum fregit*. *Jewell v. Mahood*, 44 N. H. 474.

So it was held in Maine that one who has permission to enter upon the land of another is not liable in an action *quare clausum fregit*, although he became a trespasser by acts committed after entry under the license. *Hunnewell v. Hobart*, 42 Me. 565.

There have been similar decisions in Vermont. *Stone v. Knapp*, 29 Vt. 501. And New York. *Allen v. Crofoot*, 5 Wend. 506.

A stranger is not a trespasser who enters upon land under an invitation from one lawfully on land by license from the owner. *Kelly v. Tilton*, 3 Keyes, 263.

(h) *Meriton v. Coombes*, 9 C. B. 972; 19 Law J., C. P. 336.

(i) *Mich.* 6, E. 4, p. 7, pl. 18.

If one man throws stones, rubbish, or materials of any kind, on the land of another, or allows his cattle, poultry, or domestic animals, to go upon another man's land, this is a trespass for which he is responsible in damages, unless he can show that his neighbor was bound by contract or prescription to fence for his benefit(*k*). To pour water out of a pail into another man's yard, or to fix a spout so as to discharge water upon another's land, or to suffer filth to ooze through a boundary-wall and to run over another's close or yard without his leave or permission, is a trespass, unless a right of way over the adjoining close, or a right to discharge water upon it, or a right for the passage of waste-water and refuse through it, has been gained(*l*).

377 Trespasses by cattle and domestic animals.—If a man's cattle, sheep, or poultry, or any animals in which the law gives him a valuable property, trespass upon another's close, the owner of the animals is, as we have seen (*ante*, p. 149), responsible for the trespass and consequential damage, unless he can show that his neighbor was bound to fence, and had failed so to do(*m*). And it matters not whether the animals be at

(*k*) Williams, J., *Cox v. Burbridge*, 13 C. B., N. S. 438. Holt, C.J., *Mason v. Keeling*, 1 Ld. Raym. 608; 12 Mod. 336. *Dawtry v. Huggins*, Clayton, 32. Vin. Abr. TRESPASS (B). Trespass *quare clausum fregit* lies against one who, in blasting, throws large quantities of rocks and stones upon the land and buildings of another. *Scott v. Bay*, 3 Md. 431.

(*l*) *Reynolds v. Clarke*, 2 Ld. Raym. 1399.

(*m*) *Sayrill v. Milward*, 21 Hen. 6, p. 33, pl. 20. *Lee v. Riley*, 34 Law J., C. P. 212. *Thayer v. Arnold*, 4 Metc. 589. In this country the question whether one becomes a trespasser by permitting his cattle to stray upon the land of another depends upon the laws of the various states, and the obligation of the several owners to fence in their cattle or to fence the cattle of others out.

In the absence of any statutory provisions making it obligatory on the tenants of adjoining land to make and maintain partition fences, the common law rule that the tenant of a close is not bound to fence against an adjoining close unless by force of ageement or prescription, still prevails. *Moore v. Levert*, 24 Ala. 310.

In Maine, the requisites of a legal fence are prescribed by statute; and it is made the duty of adjoining proprietors to maintain partition fences in equal shares, so long as such proprietors continue to improve the adjoining lands. See R. S. tit. 2, ch. 22. The mode of fixing the liability of each to maintain a distinct portion of the division fence is also prescribed by the same statute. And see R. S. of 1871, tit. 1, ch. 3, s. 10; R. S. ch. 3, s. 18. But these statutes are merely in affirmance of the common law, and no tenant of a close is bound to maintain a fence against an adjoining close in the absence of any agreement, prescription or assignment under the statute; and in such cases each owner is bound to keep his cattle on his own close at his peril, and it is trespass if the cattle of one cross upon the land of the other. *Little v. Lathrop*, 5 Greenl. 357. *Sturtevant v. Merrill*, 33 Me. 62. *Bradbury v. Gilford*, 53 id. 99.

In New Hampshire similar statutes have been enacted. See Gen. Stat. of 1867, ch. 128. And the party neglecting to build or keep in repair any partition fence which he is bound to maintain, is liable for all damages arising from such neglect, and has no remedy for any damages happening to himself therefrom. R. S. ch. 136, s. 12. *Lawrence v. Combs*, 37 N. H. 331. But in New Hampshire as in Maine, the owner of a close is not obliged to fence against any cattle but such as are rightfully on the adjoining land. *Id.* *Little v. Lathrop*, 5 Greenl. 357. See *Noyes v. Colby*, 10 Foster (N. H.), 143.

In Vermont the owners of adjoining land are required to maintain division fences, except when either owner elects to let his land lie vacant; and when the owner of unoccupied and unimproved land chooses to let his land lie common he can do so, unless

the time in his own immediate care or charge, or under the care of his

the adjoining owner occupies his land, in which case the other owner may be compelled to fence. Owners of land adjoining highways are not compelled to fence the highway. Where division fences are not required, each owner is liable for any damages arising from the straying of his cattle on the occupied land of others; and where no division fence is maintained, neither can legally pasture his lands until both have agreed to occupy in common. See Gen. Stat. of 1863, ch. 102. If the owner of cattle allows them to stray upon the land of one who is not an adjoining proprietor, he will be liable in trespass, as it is the duty of the owner of cattle to restrain them, and it is not the duty of the owner of the close to fence against any animals not belonging to an adjoining proprietor. *Wilder v. Wilder*, 38 Vt. 678.

The statutes of Massachusetts declare what shall be deemed a legal fence, and provide that occupants of inclosed lands shall keep up and maintain partition fences between their own and the next adjoining inclosures in equal shares, so long as both parties improve the same. Gen. Stat. ch. 25, ss. 1, 2. Under these statutes, as at common law, where the owner of land is not bound by prescription, agreement, or assignment of fence-viewers, to maintain a division fence, he may maintain an action of trespass *quare clausum fregit* against an adjoining owner whose cattle escape upon his land. *Thayer v. Arnold*, 4 Met. 589.

In Rhode Island, the requisites of a sufficient fence is prescribed by statute, and the rights and liabilities of the adjoining proprietors declared and determined. Gen. Stat. of 1872, ch. 94.

The statutes of Connecticut require the proprietors of lands to make and maintain sufficient fences to secure their fields, and declare what shall be deemed such a fence. R. S. of 1866, ch. 21. Under this statute the owner or occupier of land is obliged to fence against cattle at his own risk, and if he fails to do so, he cannot recover damages for trespass by cattle. *Wright v. Wright*, 21 Conn. 329.

The statutes of New Jersey require the owners of adjoining lands to maintain an equal proportion of their division fences, except where they chose to let their lands lie open or vacant, and declare what shall be deemed a sufficient fence, and further provide that the owner of cattle trespassing over or through a lawful fence shall be liable for the damages. No land owner can recover damages for trespasses through a defective division fence which he is bound to maintain; but he is liable for damages done by his own cattle to the land of the adjoining owner by reason of his own defective fences. See *Nixon's Dig.* (4th ed.) § 31, *et seq.* See also Laws of 1870, ch. 398. In cases where the adjoining owners have not entered into any agreement in respect to a division fence, and the cattle of the one have entered upon the lands of the other, the owner of the cattle will be liable to the other in trespass. *Coxe v. Robbins*, 4 Halst. 384.

In Pennsylvania the statute requires the owner of improved lands to fence them, not only to restrain his own cattle, but also to shut out the roving cattle of his neighbors, and trespass cannot be maintained for the entry of cattle upon improved lands. *Gregg v. Gregg*, 55 Penn. St. 227. But except where the statute requires the owner of lands to fence, the common law rule requiring the owner of cattle to restrain them at his peril is still in force. *Id.*

In Delaware the owner of cattle is liable in damages for trespasses on lands inclosed with a lawful fence; and if such cattle are unruly and break through such fence after notice that they are unruly, he is liable in double damages. See Revised Code, ch. 57.

In Maryland the subject of fences is regulated by the local laws for the several counties. Where there is no statutory rule, the common law rule prevails, and each owner of cattle is bound to restrain them on his own close at his peril, unless the adjoining owner is bound by prescription to fence against him. *Richardson v. Milburn*, 11 Md. 340.

For the fence laws of Virginia, see Code of 1860, ch. 99, s. 1, as amended by ch. 239 of Laws of 1872; Code, ch. 99, ss. 3-5.

For the fence laws of West Virginia, see Code of 1868, ch. 60.

For the fence laws of Ohio, see 1 R. S. ch. 45, as amended by the Laws of 1873, p. 246.

In this state, the doctrine of the common law making the owner of domestic animals a trespasser for permitting them to stray upon the uninclosed lands of another is not in force. *Cleveland, Columbus & Cincinnati R. R. Co. v. Elliott*, 4 Ohio (N. S.), 474; *Kerwhacker v. Cleveland, Columbus & Cincinnati R. R. Co.*, 3 Ohio (N. S.), 172.

In Michigan it was provided by the act of 1847 that "no person shall recover for damages done upon lands by beasts, unless in cases where, by the by-laws of the township, such beasts are prohibited from running at large, except when such lands are inclosed by a fence," etc.

servants, or in the custody of a stranger. In this last case, the stranger

As to what is a legal fence in this state, and the person liable to repair, see 1 Comp. Laws of 1871, ch. 14. See also as to the liability of the owner of cattle trespassing on land of another, *Aylesworth v. Harrington*, 17 Mich. 417; *Williams v. Michigan Central R. R. Co.* 2 id. 259.

In Indiana it is provided by statute that the owner of land protected by a lawful inclosure may recover the amount of damage done, but otherwise where the fence was not lawful. See 1 R. S. 1882, ch. 62. This act applies only to outside fences, and in respect to cattle trespassing through other fences, the parties are left to their common law rights and liabilities. *Coot v. Morea*, 33 Ind. 497. *Brady v. Ball*, 14 id. 317. *Page v. Hollingsworth*, 7 id. 317. As to what is a lawful fence, see Laws of 1865, ch. 173.

In Illinois the owner of cattle is not required to keep them upon his own land; and if they stray upon the land of another, the latter cannot maintain trespass unless he can show that his land was protected by a good and sufficient fence. *Misner v. Lighthall*, 13 Ill. 609. *Seely v. Peters*, 5 Gilm. 130. *Headam v. Rust*, 39 Ill. 186. *Stoner v. Shugart*, 45 id. 76.

For the laws of Wisconsin in respect to fences, see 1 Taylor's Stat. ch. 17.

For the laws of Minnesota, see Revised Stat. of 1866, ch. 18; R. S. ch. 10, s. 15; id. ch. 19 s. 29. The law allowing cattle to run at large has been repealed. R. S. ch. 122.

In Iowa the common law requiring every owner of cattle to restrain them within his own close is not in force; and in order to maintain trespass for damages by cattle, the plaintiff must show that the land trespassed upon was inclosed by a fence sufficient to turn ordinary stock. *Wagner v. Bissell*, 3 Iowa, 397. *Heath v. Cottenback*, 5 id. 490. But where two persons have fields fenced in common, either will be liable for the damage to the other if he willfully turns his stock into the inclosure. *Broadwell v. Wilcox*, 22 Iowa, 568. For the law of Iowa in respect to division fences, see Code of 1873, tit. 11, ch. 4; *Phillips v. Oyster*, 32 Iowa, 257.

In Missouri the common law rule is not in force, and damages cannot be recovered against the owner of cattle for their trespass unless the lands entered upon were legally inclosed. *German v. Pacific R. R. Co.*, 26 Mo. 441. As to what is a legal inclosure, see 1 Wagner's Stat. ch. 71. In case the field trespassed upon was legally inclosed, the owner of the land may recover damages for the first trespass, double damages for the second, and may kill the beast trespassing for a third offense. Id.

In Kansas, an owner cannot recover for injuries done to his crops by cattle trespassing, unless he can show that his field was inclosed by a lawful fence. *Larkin v. Taylor*, 5 Kansas, 433. For the fence laws of Kansas, see Gen. Stat. of 1868, ch. 40.

In Nebraska, the owner of animals trespassing on lawfully inclosed land is liable in damages. And as to what is a lawful inclosure, see Gen. Stat. of 1873, ch. 2, ss. 18-38.

In Nevada, the owner of cattle breaking into any grounds inclosed by a lawful fence is liable for the actual damage for the first offense, and in double damages for all subsequent offenses; and neither of two or more persons having fields inclosed in common can lawfully turn cattle on his land to the injury of the others, without becoming liable in damages. 2 Comp. Laws of 1873, pp. 459-460.

In California, the owner of cattle breaking into grounds inclosed by a lawful fence is liable in damages to the same extent as in Nevada; and the requisites of a lawful fence are particularly described by statute. See 1 Gen. Laws of 1864, ss. 3029-3062. But where the lands entered upon are not so inclosed, the owner of cattle is not liable for the trespass. *Cornford v. Dupuy*, 17 Cal. 308. And see *Logan v. Gedney*, 38 id. 579.

For the fence laws of North Carolina, see Rev. Code, ch. 48; Laws of 1873, ch. 98; id. 193; Laws of 1871, ch. 187.

In South Carolina, the owner of animals trespassing on the lands of another is liable in damages if the field entered upon was inclosed by a lawful fence, but otherwise not. 6 Stat. at Large, No. 2430. And see 2 Stat. at Large, No. 108.

In Georgia, no domestic animal can lawfully run at large, and the owner of an animal trespassing is made liable for all damages. Code of 1873, ch. 9, ss. 1443-1451.

In Florida, owners of cattle are not liable for trespass on lands not protected by a lawful fence. The requisites of a lawful fence are defined by statute. See Thompson's Digest, ch. 5.

In Alabama, a partition fence between adjoining proprietors is the joint property of both; and each is bound to keep the entire fence in good repair. Neither can maintain trespass against the other for injuries arising from an insufficient fence. Revised Code of 1867, tit. 13, ch. 8. *Walker v. Watrous*, 8 Ala. 493. See Clay's Digest, 241, s. 4; *Moore v. Lye*, 24 Ala. 310.

may be sued as well as the owner for the trespass(n). But if my servant, without my knowledge, takes my beasts and puts them in another's land, my servant is the trespasser, and not I; for, by his wilful dealing with the beasts without any authority from me, he gains a special property in them for the time, and for this purpose they become his beasts(o). But if a wife so deals with her husband's cattle, the husband himself is the trespasser, for his wife can gain no special property in them as against the husband(p). A commoner who puts his beasts upon a common which is not enclosed, is bound at his peril to see that his beasts do not stray from the common and trespass upon another man's land(q).

378 *Trespass from want of fences and from defective fences.*—Where the plaintiff himself has contributed to the injury of which he complains, he has no ground, as we have seen, for seeking compensation in damages (*ante*, p. 24). If, therefore, a man is bound by contract or prescription (*ante*, p. 149), to repair a fence between my land and his, and he neglects to repair, and by reason thereof my beasts get on to his land, this is a good justification to an action of trespass brought by him(r). In such a case it is lawful for me to go into my neighbor's land after my beasts, and chase them back into my own land; and I may plead this as a justification for the trespass, because it was rendered necessary by the default of my neighbor(s).

In Kentucky, the statute defines a lawful fence, and makes the owner of cattle trespassing on fields inclosed by a lawful fence liable for actual damages for the first offense, double damages for the second, and treble damages for the third, etc., and gives the owner of the land trespassed upon the right to kill the cattle trespassing, on giving a prescribed notice. See Gen. Stat. of 1873, ch. 55, art. 1.

For the laws of Tennessee in respect to animals trespassing, see Code of 1858, ch. 3.

For the fence laws of Mississippi, see R. S. of 1870, ch. 33, ss. 1905-1915.

For the fence laws of Louisiana, see Revised Civil Code of 1870, ch. 3, s. 1, arts. 675-690.

For the liability of owners of cattle trespassing upon lawfully inclosed grounds in the state of Arkansas, see Rev. Stat. ch. 76; Digest of 1858, ch. 87. And see Laws of 1873, ch. 96.

For the laws of Texas, see Paschal's Annotated Digest, 639, 647.

For the laws of New York in regard to fences, see Laws of 1873, ch. 377; Laws of 1871, ch. 635; Laws of 1866, ch. 540; Laws of 1850, ch. 319; Laws of 1838, ch. 261; 1 R. S. part 1, ch. 11, tit. 4, art. 4; *id.* tit. 2, art. 1.

(n) 2 Roll. Abr. 546, pl. 20. *Dawtry v. Huggins*, Clayt. 32, pl. 56. *Noyes v. Colby*, 10 Foster (N. H.), 143.

(o) 2 Roll. Abr. TRESPASS, 553, pl. 25.

(p) 2 Roll. Abr. TRESPASS, 553, pl. 2. In New York, under the statutes relating to the rights and duties of married women, a married woman having a separate estate may be held liable for damages done by the straying of her cattle from her own premises upon adjoining lands, notwithstanding the husband and children reside with her upon the lands, and both the land and cattle are used for the support of the family. *Rowe v. Smith*, 45 N. Y. 230.

(q) 20 Ed. 4, fo. 10b, cited in *Read v. Edwards*, 34 Law J., C. P. 32.

(r) 2 Roll. Abr. TRESPASS, 565, pl. 3, citing 19 Hen. 6, 34; 39 E. 3, 3b. See *Cowles v. Balzer*, 47 Barb. (N. Y.) 562; *Walker v. Watrous*, 8 Ala. 493; *Lawrence v. Coombs*, 37 N. H. 331; *Shepherd v. Hees*, 12 J. hns. 433.

(s) 2 Roll. Abr. TRESPASS, 565, pl. 4.

379 *Who is bound to repair fences.*—Whenever two persons have adjoining fields, and no hedge or fence between them, each must take care that his own beasts do not trespass on his neighbor(*t*), unless one proprietor has acquired a right or title, by grant or prescription, to have the boundary-fence between his close and that of the adjoining proprietor maintained and repaired at the expense of such adjoining proprietor(*u*), (*ante*, p. 149). “Every man must use his own land so as thereby not to hurt another; and as, of common right, one is bound to keep his cattle from trespassing on his neighbor, so he is bound to use anything that is his so as not to hurt another by such user. If, therefore, a vendor sells a piece of pasture lying open to another piece of pasture of which he is possessed, the vendee is bound to keep his cattle from running into the vendor’s piece”(*x*). If a landowner, who has land abutting upon a highway, neglects to fence the land from the highway, so that cattle stray from the high-road and injure his crops, he cannot immediately distrain the beasts’ damage feasant, or treat the owner of the beasts as a trespasser, but must either drive them out himself, or allow a reasonable time to the drovers in charge of them to get them out of the land(*y*). But if the beasts are not lawfully using the highway, if they have strayed away from the owner or his servants, and are trespassing upon the public thoroughfare, and pass from thence on to the adjoining uninclosed land, this is a trespass for which the owner of the beasts is responsible(*z*). And whenever one landowner is bound to maintain and repair a fence for the benefit of the adjoining landowner, and cattle escape out of the land of the latter, and trespass upon the land of the person who ought to have kept up the fence, it is no excuse that the fences were out of repair, if the beasts were trespassers in the place from whence they came. If it be

(*t*) Bayley, J., *Boyle v. Tamlin*, 6 B. & C. 337; *Dyer*, 372b.

(*u*) See *Barber v. Whiteley*, 34 Law J., Q. B. 212; *Bradbury v. Gilford*, 53 Me. 99; Gen. Stat. of Vermont, 1863, ch. 102; *Aylesworth v. Harrington*, 17 Mich. 417; 2 Comp. Laws of Nevada, 1873, p. 460; *Walker v. Watrous*, 8 Ala. 493.

(*x*) *Tenant v. Goldwin*, 6 Mod. 814.

(*y*) *Goodwin v. Chevely*, 4 H. & N. 631; 28 Law J., Exch. 298.

(*z*) 2 Roll. Abr. 565, pl. 7. *Dovaston v. Payne*, 2 H. Bl. 528. In those localities where cattle may lawfully run at large, and in those states where it has been declared by statute that an entry upon uninclosed land shall not create a liability for damages, this doctrine is clearly inapplicable. The doctrine stated in the text is inapplicable in Ohio (*Kerwhacker v. Cleveland*, Columbus and Cincinnati R. R. Co., 3 Ohio, N. S. 172; *Cleveland, Columbus and Cincinnati R. R. Co. v. Elliott*, 4 Ohio, N. S. 474), in Illinois (*Headam v. Rust*, 39 Ill. 186; *Stoner v. Shugart*, 45 Ill. 76), in Iowa (*Wagner v. Bissell*, 3 Iowa, 396), in Missouri (*Gorman v. Pacific R. R. Co.*, 26 Mo. 441), in California (*Comerford v. Dupuy*, 17 Cal. 308; *Logan v. Gedney*, 38 Cal. 579), in North Carolina (*Johns v. Witherspoon*, 7 Jones’ Law, 555), in South Carolina (*Murray v. South Carolina R. R. Co.*, 10 Rich. Law, 227), in Florida (*Thomp. Dig.* ch. 5), in Tennessee (Code of 1858, ch. 3), and probably in many other states. See *ante*, p. 324, note *m*.

a close, the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way(a).

380 *Destruction of crops by rabbits and pigeons*.—If a man encourages the growth of wild rabbits upon his land, and forms “coney burrows” there, and the rabbits stray from his land to the land of his neighbor, this is no trespass for which the breeder of the rabbits is responsible, for when they have left his land they are not then *his* rabbits doing damage. Being animals *feræ naturæ*, he has no more property in them after they have left his soil, than in the birds of the air, which may breed in one man’s land, and devour the crops of another(b). The only remedy, therefore, for a person whose crops are eaten by wild rabbits is the capture and destruction of the rabbits. Commoners may destroy rabbits which come upon the common from the adjoining land, not being the lord’s land(c); but they have no remedy against those who breed them(d). The same law prevails with regard to pigeons; “if they come upon my land I may kill them,” but I have no remedy against any one for breeding them(e).

381 *Damage done by intruding dogs*.—A man is not, by the common law, considered to have the same valuable property in a dog as in cattle and sheep; and it has been held that if a man’s dog goes into his neighbor’s garden, and spoils and injures his crops, no action will lie(f), unless the dog is of a peculiarly mischievous disposition, so as to be unfit to be at large, and this is known to the master(g). If the master accompanies the dog, and is himself a trespasser, the damage done by the dog is consequential upon the trespass by the master(h). Owners of dogs in Scotland and Ireland have recently been made liable for injuries done to sheep and cattle by their dogs: and all persons

(a) *Dovaston v. Payne*, *ut sup.*; *Anon.* 3 Wils. 126. That the owner of real estate is not bound to maintain partition fences against one who is not an adjoining owner or occupant, see *Aylesworth v. Herrington*, 17 Mich. 417; *Wilder v. Wilder*, 38 Vt. 678. See, also, *Page v. Olcott*, 13 N. H. 399.

(b) *Boulton’s case*, 5 Co. 104a; *Cro. Eliz.* 547. It has been held, in Missouri, that a land owner is under no obligation to fence against animals *feræ naturæ*, but on the other hand, the owner of such animals must keep them at his peril, and that he is liable for damage done by them on the lands of others, whether such lands were fenced or not. *Canefox v. Crenshaw*, 24 Mo. 199.

(c) *Cooper v. Marshall*, *post*, ch. 3, s. 1.

(d) *Hinsley v. Wilkinson*, *Cro. Car.* 387.

(e) *Dewell v. Saunders*, *Cro. Jac.* 490. *Bayley J.*, *Hannan v. Mockett*, 2 B. & C. 939.

(f) *Holt, C. J.*, *Mason v. Keeling*, 12 Mod. 336. *Brown v. Giles*, 1 C. & P. 118. *Woolf v. Chakler*, 31 Conn. 121.

(g) *Read v. Edwards*, *ante*, p. 327. See *Fairchild v. Bentley*, 30 Barb. (N. Y.) 147.

(h) *Beckwith v. Shordike*, 4 Burr. 2093. *Woolf v. Chakler*, 31 Conn. 121. As to damage done by ferocious dogs, see *ante*, pp. 254, 255. As to damage done by several dogs jointly, see *Carroll v. Weiler*, 4 Sup. Ct. (N. Y.) 131.

who harbor dogs on their premises are deemed to be the owners of the dogs, unless they can prove the contrary, and show that the dog remained on their premises without their knowledge(i).

382 *Trespasses where the surface and subsoil of land constitute separate freeholds.*—If it appears that the plaintiff has parted with the vesture and herbage, and right to the surface of the land, and retains only an interest in the subsoil, he cannot maintain an action for trespasses upon the surface(k); but if any person digs holes through the surface, and trespasses upon the subsoil, he is then entitled to an action for damages(l). If land is demised generally to a lessee, who enters under the lease, he is in possession of both the surface and the minerals; but he has no right to work the minerals without the license of the lessor, neither can the lessor work them without the permission of the lessee. If the adjoining occupier sinks a mine in his own land, and makes lateral excavations, trespassing upon the minerals of the lessee without disturbing the surface of the land in his occupation, the lessee may, nevertheless, maintain an action for the trespass and injury to his possessory interest, and the lessor may maintain an action for the injury to his reversionary estate. If the surface and minerals have been dissevered in title, and have become separate tenements, then the grantee or owner of the minerals is the only person entitled to sue in respect of trespasses upon them(m).

383 *Forcible entry and detainer.*—At common law, if a man had a right to the possession of land, and a right to enter thereon, he might enter and obtain possession with force and arms, and retain possession by force, which gave an opportunity, we are told, to powerful men to enter upon land under pretence of feigned titles, and forcibly eject their weaker brethren(n), and therefore it was enacted (5 Rich. 2, c. 7), “that none thenceforth make entry into any lands and tenements but in cases where entry is given by the law, and in that case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner”(o). A mere trespasser cannot, by the very act of trespass, immediately, and without acquiescence on the part of the

(i) 25 & 26 Vict. c. 59; 26 & 27 Vict. c. 103, *ante*, p. 30.

(k) *Cox v. Mousley*, 5 C. B. 549.

(l) *Cox v. Glue*, ib. 549, 553; 17 Law J., C. P. 162.

(m) *Keyse v. Powell*, 2 Ell. & Bl. 144; 22 Law J., Q. B. 305. *Lewis v. Branthwaite*, 2 B. & Ad. 437. See *Hamilton (Duke of) v. Graham*, L. R., 2 Sc. App. 166.

(n) *BAC. ABR. FORCIBLE ENTRY.*

(o) As to recovery of possession by persons forcibly expelled, see 8 H. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15.

landowner, become possessed of the land upon which he has trespassed, and which he tortiously holds, and he may consequently be expelled by main force(*p*); but if he is allowed to continue on the land, and the landowner sleeps upon his rights, and makes no effort to remove him, he will gain a possession, wrongful though it be, and cannot be forcibly ejected. A mere intruder upon land, who has been allowed to run up a hut and occupy it, has no right to the hut or to the possession thereof, and the landlord may enter and pull down the hut about the ears of the occupants and remove the materials(*q*). But the dwelling-houses of strangers cannot be pulled down whilst people are living in them, for the mere purpose of abating a nuisance or preventing the enjoyment of some incorporeal right, such as a right of common(*r*). The rightful owner cannot, in any case, when he has a right of entry, whether legal or equitable, be made responsible in damages for a trespass upon his own land, for he is no trespasser if he has a right to go upon it(*s*); but if he assaults and expels persons who, having originally come into possession lawfully, continue to hold unlawfully, after their title to occupy has been determined, he may be made responsible for the assault, and be indicted for a forcible entry(*t*), but he cannot be made responsible in damages for the expulsion(*u*). Having a right to enter upon his own land, he may do so peaceably; and if his entry is resisted by force, he may, it seems, repel force by force(*v*).

“Where a breach of the peace,” observes Parke, B., “is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public, in the shape of an indictment for a forcible entry, he is not liable to the other party. It is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that the defendant entered upon it accordingly”(*x*).

384 *Of trespasses upon the soil of highways set out and dedicated to the public by private proprietors.*—By setting out a highway, and dedicating it to the use of the public, the owner of the land over which the

(*p*) *Browne v. Dawson*, 12 Ad. & E. 629.

(*q*) *Davison v. Wilson*, 11 Q. B. 890; 17 Law J., Q. B. 196.

(*r*) *Jones v. Jones*, 31 Law J., Exch. 506.

(*s*) *Davison v. Wilson*, *supra*. *Allen v. Walker*, L. R., 5 Exch. 187.

(*t*) *Newton v. Harland*, 1 Sc. N. R. 492.

(*u*) *Pollen v. Brewer*, 7 C. B. N. S., 373.

(*v*) *Newton v. Harland*, 1 Sc. N. R. 492.

(*x*) *Harvey v. Bridges*, 14 M. & W. 442; 1 Exch. 261. *Davison v. Wilson*, 11 Q. B. 890. *Meriton v. Coombes*, 9 C. B. 787; 19 Law J., C. P. 336.

right of way is granted does not thereby part with the property in the soil. The landlord, in such a case, has full dominion and control over the land subject to the easement, and may recover it in ejectment(y), or bring an action for a trespass against any person who deposits stones or rubbish upon the soil, or constructs a bridge over or upon any part of the highway, or infringes in anywise upon the ordinary proprietary rights of the owner of the soil(z). Nor do the Highway Acts or the Metropolis Local Management Acts interfere with this right, or the fact that the public have appropriated part of the highway to one kind of passage, viz., for carriages, and another part to another, e.g. to foot-passengers. For the reasonable use and enjoyment therefore of his own premises the owner may make a carriage-way across the foot-way(a). And the same rule prevails with regard to land over which any other privilege or easement has been granted to particular individuals, or to the public at large, such as a stall in a market(b).

385 *Of continuing trespasses.*—If a man throws a heap of stones, or builds a wall, or plants posts or rails on his neighbor's land, and there leaves them, an action will lie against him for the trespass, and the right to sue will continue from day to day, until the incumbrance is removed. An action may be brought for the original trespass in placing the incumbrance on the land, and another action for continuing the thing so erected; for the recovery of damages in the first action, by way of satisfaction for the wrong, does not operate as a purchase of the right to continue the injury(c).

(y) *Goodtitle v. Alker*, 1 Burr. 183. *Cole v. Drew*, 44 Vt. 49. *Holden v. Shattuck*, 34 Vt. 336. *Perley v. Chandler*, 6 Mass. 454. *Stackpole v. Healy*, 16 id. 33. *Jackson v. Hathaway*, 15 Johns. 447. *Etz v. Daily*, 20 Barb. (N. Y.) 32. But it will not lie for a street unless the occupation of it by the defendant is wholly inconsistent with the public easement. *Adams v. Saratoga & Washington R. R.*, 11 Barb. (N. Y.) 414.

(z) 3 Com. Dig. CHIMIN. (A. 2), 27. *Lade v. Shepherd*, 2 Str. 1004. *Every v. Smith*, 26 Law J., Exch. 345. See 27 & 28 Vict. c. 101, s. 51, *ante*, p. 272; *Cole v. Drew*, 44 Vt. 49; *Hollenbeck v. Rowley*, 8 Allen (Mass.), 473; and see *Pound v. Plumstead Board of Works*, L. R., 6 Q. B. 183; and cases cited in the preceding note.

A private individual, under the direction of the proper officer, may lawfully cut the grass growing beside the highway if it impedes the exercise of the right of the public to the enjoyment of the public easement. But the grass belongs to the owner of the fee, and if the person cutting it carries it away, this renders the whole act wrongful, and the person committing it a trespasser *ab initio*. *Cole v. Drew*, 44 Vt. 49.

(a) *St. Mary Newington v. Jacobs*, L. R., 7 Q. B. 47.

(b) *Mayor of Northampton v. Ward*, 1 Wils. 114.

(c) *Holmes v. Wilson*, 10 Ad. & E. 503. *Bowyer v. Cook*, 4 C. B. 236.

SECTION II.

OF THE TITLE TO LAND, FENCES, AND BOUNDARY-WALLS.

386 *Proof of possession of land and pertainancy of the rents is primâ facie evidence of a seisin in fee of the person possessed*, the presumption being in favor of the fee and not of any less estate(*d*), until it is rebutted by a contrary presumption arising from the surrounding circumstances. If, therefore, a person is shown to be in receipt of rent, he is presumed to be entitled to the reversion in fee of the land in respect of which the rent is received, unless the rent is so disproportioned to the annual value of the property, as to lead to the presumption of its being a mere quit rent(*e*). Thus, in an action on the case for an injury to the plaintiff's reversion in cutting down trees on land in the possession of his tenant, proof of payment of rent by the latter to the plaintiff is *primâ facie* evidence of the plaintiff being the reversioner, and of the trees being his property(*f*).

387 *Trial of title in an action of trespass*.—If the defendant, in an action for a trespass committed by him upon the land or messuage of the plaintiff, pleads that the close or land in which the trespass was committed was the soil and freehold of the defendant, the plaintiff's title to the property is in issue, and also his right of possession (*post*, s. 3), and the defendant may, under this plea, bring forward evidence to show that he had a right to enter upon the close because it was his freehold, or because it has been demised to him, or because he has obtained an indefeasible title under the statute for the limitation of actions and suits relating to real property(*g*).

388 *Title to realty from twenty years' possession*.—*Limitation of actions for the recovery of realty*.—By 3 & 4 Wm. 4, c. 27, s. 2, entitled "An Act for the Limitation of Actions and Suits relating to Real Property," it is enacted; that no person shall make an entry or distress, or bring an action to recover any land or rent, but within *twenty years* next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to some person

(*d*) *Jayne v. Price*, 5 Taunt. 326. *Doe v. Penfold*, 8 C. & P. 537.

(*e*) *Doe v. Johnson*, Gw, 183. *Reynolds v. Reynolds*, 12 Ir. Eq. Rep. 181.

(*f*) *Daintry v. Brocklehurst*, 3 Exch. 209.

(*g*) As to the registration of title to real estate, see 25 & 26 Vict. c. 53.

through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same^(h). Where the person really entitled to an estate is in possession but as agent for another, to whom he, under a mistake, accounts for the rents, he has no right of entry without giving up his agency; the person in receipt of the rents, therefore, may acquire a title by long possession as against him⁽ⁱ⁾. An encroachment made by a tenant is made for the benefit of his landlord, and the statute, therefore, does not apply to the land enclosed till the termination of the tenant's interest^(j).

389 *Accrual of the right on dispossession or discontinuance of possession.*—

When the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or receipt of the profits of the land, or in receipt of the rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then the right is to be deemed (s. 3)

(h) *Brassington v. Llewellyn*, 27 Law J., Exch. 297.

The period within which real actions must be brought has been made the subject of various statutory provisions, and in many, but not all of the States, the English period of limitation has been adopted.

The States which require all actions for the recovery of lands to be brought within twenty years, are: New York (Code, §§ 78, 79, 80), New Jersey (Laws of 1799, §§ 9, 10, 12, 13; *Nixon's Dig.*, 1855, p. 436), Maine (Rev. Stat. of 1857, tit. 9, ch. 105), New Hampshire (Gen. Stat. of 1867, ch. 202, §§ 1, 2), Massachusetts (Gen. Stat. of 1860, ch. 154), Rhode Island (Rev. Stat. of 1857, ch. 148, §§ 2, 3), Delaware (Code of 1852, ch. 122, p. 439), Maryland (Code of 1860, art. 57, § 9, p. 397), Indiana (2 Rev. Stat., 76, 77), Illinois (2 Comp. Stat. of 1858, pp. 749, 750), Wisconsin (Rev. Stat. of 1858, ch. 138, §§ 1-14, p. 819), Minnesota (Gen. Stat. of 1858, ch. 60, § 4), Oregon (Gen. Stat. of 1864, tit. 2, ch. 1, § 4), Florida (Thomp. Dig. of 1847, p. 441).

The statutes of some of the States have fixed the period of limitation at fifteen years. This is the rule in Vermont (Gen. Stat. of 1863, ch. 63, §§ 1, 2, 3, 18, 21), Connecticut (Gen. Stat. of 1866, p. 551), Kansas (Rev. Stat. of 1868, ch. 80, §§ 16, 19), Virginia (Code of 1860, tit. 45, ch. 149, §§ 1-4, 18), Kentucky (2 Rev. Stat. of 1860, ch. 63, §§ 1, 2, pp. 128, 125).

The limitation of twenty-one years has been adopted in Pennsylvania (*Pardon's Dig.* of 1861, pp. 652-654), Ohio (2 Rev. Stat. of 1860, ch. 87, §§ 9, 10, 23), and Nebraska (Rev. Stat. of 1866, part 2, tit. 2, §§ 6, 7).

In some of the other States the statutes have fixed the period of limitation at ten years. This is the rule in Iowa (Rev. Laws of 1860, §§ 2740-2750), Missouri (2 Gen. Stat. of 1866, ch. 191), Nevada (Laws of 1861, ch. 12, §§ 3-15, 21; Laws of 1867, ch. 49), South Carolina (Stat. at Large, 1712, 1744, 1788, 1824), Alabama (Code of 1867, §§ 2899, 2900, 2909, 2910), Mississippi (Rev. Code of 1857, ch. 57, §§ 1, 2, p. 398), and Texas.

The States which fix the period of limitation at seven years, are North Carolina (Rev. Code of 1854, ch. 65, §§ 1, 2, p. 371), Georgia (Laws of 1856, No. 179, §§ 1-24), and Tennessee (Code of 1858, p. 531, §§ 2755, 2757, 2763-2768).

In California the period of limitation is fixed at five years, and in Arkansas at three years.

In most if not all of these States the statutes have extended the period of limitation in actions in which the people are a party, or in which some of the parties are under disability, and in a few States exceptions exist in favor of absentees. These exceptions will be noticed in a subsequent note. But the references to the statutes given above will be found to cover the exceptions as well as the rule.

(i) *Williams v. Pott*, L. R., 12 Eq. Ca. 149.

(j) *Whitmore v. Humphries*, L. R., 7 C. P. 1.

to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any profit or rent was so received.

390 *What is a dispossession or discontinuance of possession causing the time of limitation to begin to run.*—The word discontinuance of possession means an abandonment of possession by one person, followed by the actual possession of another person; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favor, or for whose protection, the act would operate. To constitute discontinuance, there must be both dereliction by the person who has the right and actual possession, whether adverse or not, to be protected(k). Therefore, where the owner of the fee simple of a close, with a stratum of coal and other minerals under it, has conveyed the surface to one under whom the plaintiff claims, reserving the minerals and a right of entry to get them to another, under whom the defendant claims, the title and right of entry of the grantees of the mines is not barred by simple non-user for more than forty years, no other person having worked or been in possession of the mines(l).

391 *Occupation by poor relations and servants—The possession of the servant the possession of the master.*—A landowner who accommodates a poor relation with a cottage and garden, does not necessarily part with the possession of the property occupied by such poor relation. The latter may have the mere custody of the property; his possession, such as it is, may be the possession of the landowner; and the latter may retain and continue to exercise his proprietary and possessory rights so as to rebut the presumption that he has parted with the possession of the property, and prevent the operation of the Statute of Limitations(m). If a landowner allows his gardener, or servant, or workman employed upon his estate, to live in a cottage thereon rent-free, the possession of the servant is the possession of the master, and the servant has no greater interest in the land than a coachman who occupies part of his master's coach-house, or sleeps over his master's stables; and no title can be gained by such an occupation and enjoyment of the master's property, however long it may be continued. And if a landowner, from motives of kindness or charity, allows a dependent, relative, or friend to occupy a cottage and land upon his estate, and the landowner, during such occupation, continues

(k) Blackburne, C.J., *M'Donnell v. M'Kinty*, 10 Irish Law Rep. 516.

(l) *Smith v. Lloyd*, 23 Law J., Exch. 194; 9 Exch. 571.

(m) *Bertie v. Beaumont*, 16 East, 33. *Hunt v. Colson*, 3 M. & Sc. 791. *Doe v. Stanton*, 2 B. & Ald. 371. *Mayhew v. Suttle*, 4 El. & Bl. 353.

to exercise acts of ownership over the land so occupied; if he repairs the buildings, cuts down or plants trees, or causes drains to be made through the land, or quarries and carries away stone, all these acts of dominion exercised by him over his own property show that he has never parted with the possession of it, although he has allowed another person to occupy it, and share with him in the use and enjoyment thereof⁽ⁿ⁾. A society, also, which allows its agent to live on its premises rent-free does not confer any estate or interest in the land upon the latter, but the occupation is merely the occupation of a servant^(o).

392 *Accrual of the right on death, alienation, forfeiture, etc.*—Provision is also made (s. 3) for the accrual of the right, and the commencement of the period of limitation when the person claiming the land or rent claims the estate or interest of some deceased person, who continued in possession or receipt of the profits of the land or rent in respect of the same estate or interest until the time of his death, and was the last person entitled to the estate or interest in such possession or receipt; also when such person claims in respect of an estate or interest in possession granted, or assured, by any instrument other than a will to him, or some other person through whom he claims, by a person, being in respect of the same estate or interest in the possession or receipt of the profits of the land or in receipt of the rent, and no person entitled under such instrument has been in possession or receipt; also when the estate or interest claimed has been an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained possession or receipt of the profits of the land, or the receipt of rent in respect of such estate or interest; also when the claimant, or the person through whom he claims, has become entitled by reason of any forfeiture, or breach of condition.

Provision is made (ss. 4, 5) for giving new rights of entry, etc., to remaindermen and reversioners in certain contingencies.

393 *Conversion of defeasible tenancies-at-will into an indefeasible title*—*Possession of land by a cestui qui trust.*—When any person is in possession or receipt of the profits of land or rent as tenant-at-will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, is to be deemed (s. 7) to have first accrued either at the determination of such tenancy or at the expiration of one year next

(n) *Turner v. Doe*, 9 M. & W. 645.

(o) *White v. Bailey*, 10 C. B., N. S. 227; 30 Law J., C. P. 253.

after the commencement thereof, at which time such tenancy shall be deemed to have determined^(p). But it is provided that no mortgagor or cestui que trust shall be deemed to be a tenant-at-will to his mortgagee or trustee within the meaning of that clause^(q). This proviso is applicable only to cases of express and declared trusts^(r); so that a person let into possession of and holding lands under an agreement to purchase, is not a cestui que trust within this proviso^(s). A cestui que trust may, in a certain sense, be tenant-at-will to his trustee, if he has been let into possession of the trust estate by the latter, although he is not a tenant-at-will capable of acquiring a title by reason of his possession, within the third section of the statute. The possession of the cestui que trust is, in fact, the possession of the trustee, and the time of limitation will not run against the latter, so long as the relationship of trustee and cestui que trust subsists^(t). But this applies only to the case where the cestui que trust is the actual occupant. If he is merely allowed to receive the rents or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation only of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate; and if the actual occupier is, under such circumstances, permitted to occupy for more than the twenty years prescribed by the statute, without paying rent, the trustees lose their title, and the actual occupier gains the title exactly as in an ordinary case of landlord and tenant^(u). But if the cestui que trust has been let into possession by the trustees, the tenancy between him and his trustees will not be determined by his underletting the premises, unless the trustees have notice of such underletting; for though the general rule is that a tenancy-at-will is not assignable, because the transfer determines the tenancy, yet the rule is subject to the qualification that a tenant-at-will cannot at common law determine his tenancy by transferring his interest to a third party, without notice to his landlord^(x).

394 *Title of bonâ-fide purchasers of trust estates.*—When any land is vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the

(p) *Doe v. Moore*, 9 Q. B. 561. See *Day v. Day*, L. R., 3 P. C. Ca. 751.

(q) See *Thorp v. Facey*, *post*, p. 343.

(r) *Drummond v. Sant*, L. R., 6 Q. B. 763.

(s) *Doe v. Rock*, 4 M. & Gr. 31.

(t) *Garrard v. Tuck*, 8 C. B. 252; 18 L. J., C. P. 338. *Drummond v. Sant*, *supra*.

(u) *Melling v. Leak*, 16 C. B. 669; 24 Law J., C. P. 187. *Doe v. Phillips*, 10 Q. B. 134.

(x) *Carpenter v. Collins*, Yelv. 73. *Pinhorn v. Souster*, 8 Exch. 763. *Melling v. Leak*, 16 C. B. 669.

trustee, or any person claiming through him, to recover such land, is (s. 25) to be deemed to have first accrued at, and not before, the time at which such land shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him(*y*).

395 *Acquisition of title by persons who obtained possession originally as tenants from year to year.*—When any person is in possession or receipt of the profits of any land or rent, as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, is to be deemed (s. 8) to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent, payable in respect of such tenancy, shall have been received (which shall last happen). A tenant holding a house of parish officers upon the condition of sweeping the church, or ringing the church-bell, is a tenant from year to year within this section of the statute(*z*). The words “lease in writing,” are construed to mean not merely a demise in writing, but such an instrument as passes an interest(*a*). Verbal declarations and admissions made by a tenant in possession of his having paid rent, and of the person to whom it was paid, are admissible in evidence to establish the fact of the receipt of rent within this section(*b*).

396 *Effect of continued wrongful receipt of rent.*—It is also enacted (s. 9), that when any person shall be in possession or receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent of 20s. or upwards shall be reserved, and the rent shall have been received by some person wrongfully (*i.e.*, without any title, not wrongfully in the sense of an improper intention to deprive others of their property(*c*)) claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims to make an entry or distress, or bring an action, after the determination of such lease, shall be deemed to have first accrued at the time at

(*y*) See *Walters v. Webb*, L. R., 9 Eq. Ca. 83; 5 Ch. App. 531.

(*z*) *Doe v. Benham*, 7 Q. B. 982. *Doe v. Billett*, *ib.* 983. *Doe v. Hinde*, 2 M. & Rob. 441.

(*a*) *Doe v. Gower*, 17 Q. B. 589; 21 Law J., Q. B. 57.

(*b*) *Doe v. Beckett*, 4 Q. B. 605; 12 Law J., Q. B. 236.

(*c*) *Williams v. Pott*, L. R., 12 Eq. Ca. 149.

which the rent was first so received by the person wrongfully claiming; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

397 *Entry upon land, and continued claim.*—It is further enacted (s. 10), that no person shall be deemed to have been in possession of any land within the meaning of the Act, merely by reason of his having made an entry thereon; and (s. 11) that no continual or other claim upon or near any land shall preserve any right of making an entry, or distress, or of bringing an action.

398 *Possession of coparceners, joint-tenants, and tenants-in-common.*—When any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants-in-common, shall have been in possession or receipt of the entirety, or more than his or their undivided share, for his or their own benefit, or for the benefit of any person other than the persons entitled to the other shares of the land or rent, such possession or receipt is not to be deemed to have been the possession or receipt of or by such last-mentioned persons, or any of them.

399 *Possession of younger brothers or relations.*—When a younger brother or other relation of a person entitled as heir to the possession or receipt of the profits of land, or to the receipt of rent, enters into the possession or receipt thereof, such possession or receipt is not to be deemed to be the possession or receipt of the heir.

400 *Acknowledgments of title.*—By s. 14 it is further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt by the person by whom such acknowledgment shall have been given shall be deemed to be the possession or receipt of the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person, or any person claiming through him, shall be deemed to have first accrued at, and not before, the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given(d).

401 *Ecclesiastical and eleemosynary corporations* are allowed (s. 29) two incumbencies, or sixty years, for the recovery of land.

402 *Disabilities.*—Ten years are allowed (s. 16) in all cases for persons

(d) *Ley v. Peter*, 3 H. & N. 101; 27 Law J., Exch. 239. *Goode v. Job*, 25 ib. Q. B. 1. *Fursdon v. Clogg*, 10 M. & W. 576.

under disability from the time the disability ceases, but no action is to be brought (s. 17) after forty years. The disabilities enumerated as having the effect of extending the period of limitation, are infancy, coverture, idiocy, lunacy, unsoundness of mind, and absence beyond seas, at the time the right to make an entry or distress, or bring action to recover any land or rent, shall have first accrued. The extension of the period of limitation is granted also from the death of the person under disability. If a person before the first disability, *e.g.*, infancy, be removed, becomes subject to another, *e.g.*, by marriage, the ten years run from the date of the removal of the last disability(*e*).

(*e*) *Borrows v. Ellison*, L. R., 6 Exch. 128. The length of time during which the ordinary period for the commencement of actions for the recovery of real property, etc., will be extended where the plaintiff was under disability when the cause of action accrued, varies in the different States.

In New York "if a person entitled to commence an action for the recovery of real property, or to make an entry or defence founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue, either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life, the time during which such disability shall continue, shall not be deemed any portion of the time limited for the commencement of such action, or the making of such entry or defence; but such action may be commenced, or entry or defence made after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defence made after that time," Code, § 88.

It will be seen by reference to the statutes of the various States, that in New York, New Jersey, Vermont, Connecticut, Pennsylvania, Delaware, Ohio, Minnesota, Missouri, Nebraska, Nevada, Oregon, Georgia, North Carolina and Alabama, exceptions are made and the statute of limitations extended in favor of persons under disability arising from infancy, insanity, imprisonment or coverture.

In Maine, Massachusetts, Rhode Island, Michigan, North Carolina and Tennessee the exception covers also persons absent from the United States; and in Illinois the exception extends to persons out of the limits of the United States and in the employment of the United States, or of the State of Illinois.

A similar exception is embodied in the statutes of Mississippi and Kentucky, except that in the latter State imprisoned persons are specified among the persons excepted.

In Florida the exception extends to infants, married women, persons *non compos mentis*, imprisoned or absent from the State.

In Texas, Virginia and Indiana, no exception exists in favor of imprisoned persons; and in Iowa the exception applies only to minors.

In New Jersey, Vermont, New Hampshire, Oregon, Mississippi and Texas the statute of limitations does not run against persons under disabilities.

In Maine, Rhode Island, Pennsylvania, Delaware, Ohio, Nebraska and Florida, the statute is so far modified in favor of persons under disability, as to authorize the commencement of an action to recover real property at any time within ten years from the removal of the disability.

The same rule has been adopted in Virginia, except that the time of limitation can in no case be extended beyond thirty years after the right of action or entry accrued.

In Connecticut, Michigan and Nevada, the statute of limitations is so far extended in favor of persons under disabilities as to allow an action to be brought at any time within five years after the removal of such disabilities.

In Illinois an action to recover lands or tenements may be commenced within three years after the several disabilities have ceased to exist. The same rule has been adopted in Tennessee. In Kentucky the action may be brought at any time within three years after disabilities have been removed, provided the time limited by the statute cannot be extended by rea

By section 26 it is enacted that, in case of concealed fraud, the right of a person to bring a suit in equity for the recovery of land or rent, shall be deemed to have first accrued at the time at which such fraud shall, or with reasonable diligence might, have been first discovered(f).

403 *Preservation of the rights of the landowner by re-entry and resumption of possession of lands before the expiration of the period of limitation.—*

We have seen that, by s. 7 of the 3 & 4 Wm. 4, c. 27, when any person is in possession of land as tenant-at-will, the right of the landowner to enter upon the land, or recover it by action, accrues either at the determination of such tenancy, or at the expiration of one year after the commencement thereof, at which time the tenancy, if not previously determined by the act of the landowner, shall be deemed to have determined (*ante*, p. 336). We have seen, also, that no person is to be deemed to have been in possession of land within the meaning of the Act, merely by reason of his having made an entry thereon, and that no continual claim upon, or near to, land, shall preserve any right of making an entry or bringing an action (*ante*, p. 339). "The making an entry," observes Cresswell, J., "amounts to nothing unless something is done to divest the possession out of the tenant and revest it in fact in the lord." Where, therefore, the defendant has inclosed a piece of land from the waste and built a hut thereon, and the lord of the manor entered upon the premises, and said he took possession in his own right, and ordered a stone to be removed from the hut, and a portion of the fence to be thrown down, but did not turn the defendant and his family out of the cottage, it was held that this was no

son of any death or disability beyond thirty years from the time the cause of action first accrued.

In North Carolina the action may be commenced at any time within three years after the disabilities are removed, and within eight years after the title or claim becomes due.

In Alabama the statute of limitations may be extended three years in favor of persons under disabilities, but the period of limitation can in no case be extended longer than twenty years after the cause of action or right of entry first accrued.

In Missouri the statute of limitations is extended three years in favor of persons under disabilities, except that no action can be commenced or entry made by any person under disability after the expiration of twenty-four years after the cause of action or right of entry accrued.

In Indiana and Arkansas the statute is extended two years in favor of persons under disabilities.

In South Carolina any person or persons beyond the seas, or out of the limits of the State, *feme covert*, or imprisoned, are allowed two years to prosecute their claim; and persons *non compos mentis* have one year after the disability ceases for the same purpose.

In Iowa minors have one year after their majority in which to commence their action.

In Minnesota the statute does not run against persons under disability, except that the period within which the action must be brought cannot be extended more than five years by reason of any disability except infancy, nor can it be extended in any case longer than one year after the disability shall cease.

For a reference to the statutes relating to the limitation of actions, see *ante*, p. , note .

(f) See *Chetham v. Hoare*, L. R., 9 Eq. Ca. 571.

interruption of the possession of the defendant, and no vesting of the possession in himself, and that the lord had not done enough for the assertion of his rights, and for preventing the defendant from gaining a title under the statute(*g*).

Where, on the other hand, the overseers of a parish put the plaintiff into possession of a parish cottage as a parish pauper, and, he having continued in possession for a long time without paying any rent, the overseers in 1839 entered upon the cottage, to prevent him from gaining a title under the statute, and turned out both him and his family, and removed his furniture; but, on the same day, the plaintiff resumed possession of the cottage, and continued in possession till July, 1852, when the overseers again entered, and, he refusing to deliver up the cottage, they destroyed it, and the plaintiff then brought an action of trespass, and the defendants pleaded that the cottage was not the property of the plaintiff, it was held that the right of the defendants was not barred, as they had in 1839 actually dispossessed the plaintiff, and resumed possession of the cottage, and clothed themselves with their original rights.

"Whether the plaintiff," observes Lord Campbell, "during the interval between 1839 and 1852 was tenant-at-will or tenant-at-sufferance, or a mere trespasser, seems to be wholly immaterial, so that the overseers had not in the interval done anything to prejudice the right of entry which vested in them in 1839. It is admitted that the plaintiff would have had no title had the jury found that his subsequent occupation was under a new tenancy-at-will; but how would this at all have affected the new right of entry which had accrued in April, 1839? An attempt was made to do away with the effect of what then happened, by resorting to section 10 of the statute, which enacts, 'that no person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon.' But this evidently applies to a mere entry, as for the purpose of avoiding a fine, which may be made by stopping on any corner of the land in the night-time and pronouncing a few words, without any attempt, or intention, or wish to take possession. In the present case possession was actually taken by the overseers *animo possidendi*; and whether possession was retained by them an hour or a week must, for this purpose, be immaterial"(*h*). So, where a tenant-

(*g*) *Doe v. Coombes*, 9 C. B. 718; 19 Law J., C. P. 906. *Brassington v. Llewellyn*, 27 Law J., Exch. 297.

(*h*) *Randall v. Stevens*, 2 Ell. & Bl. 650; 23 Law J., Q. B. 71.

at-will refused to go out, and was served with a writ of ejectment, and an arrangement was then come to by which he gave up part of the land, and was allowed to remain in a cottage during his life, it was held that a new tenancy-at-will commenced on the making of this arrangement, and that the time of limitation began to run one year after the making thereof(i).

404 *Rights of mortgagees*.—The 7 Wm. 4 & 1 Vict. c. 28, provides that it shall be lawful for any person claiming under any mortgage of land to make an entry, or bring an action or suit to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit, shall have first accrued(k). Where in ejectment for a house by mortgagee against mortgagor it was proved that in 1847 a declaration in ejectment had been served on the mortgagor, who was in possession, and that judgment was signed, and that shortly afterwards the mortgagor ceased to have possession of the land (which had been mortgaged with the house), but retained possession of the house, it was held that there was no evidence of possession by the mortgagee, or of the creation of a new tenancy under him in 1847, so as to prevent the operation of the statute(l).

405 *Title to the church, chancel, and churchyard*.—Although the freehold of the church and chancel, as well as the freehold of the churchyard, is in the rector, whether spiritual or lay, yet the right of possession is in the incumbent, who is responsible to the ordinary for the celebration of divine service(m). Where there is a spiritual rector he has, when inducted, corporeal possession of the church for the use of the parishioners. When there is no spiritual rector, the vicar or the perpetual curate has upon induction the like possession for the like purposes(n). A lay rector, therefore, has no right as against the vicar to the possession of the church or chancel(o). He is, however, *primâ facie*, entitled to the freehold of the churchyard, and to the trees and herbage growing there, although where the vicar has had the enjoyment of the pasturage for a long period, it would be presumed to be

(i) *Locke v. Matthews*, 13 C. B., N. S. 753; 32 Law J., C. P. 98.

(k) *Doe v. Massey*, 17 Q. B. 381; 20 Law J., Q. B. 434.

(l) *Thorp v. Facey*, 35 Law J., C. P. 349.

(m) See *Rugg v. Bishop of Winchester*, L. R., 2 P. C. C. 223.

(n) *Griffin v. Dighton*, 33 Law J., Q. B. 29. *Ibid.* 181 (Exch. Ch.). As to tombstones, see *ante*, p. 9; 31 & 32 Vict. c. 47. As to pews, see *post*, p. 355.

(o) *Griffin v. Dighton*, *ut sup.*

part of his original endowment. It is questionable, however, whether such a presumption would extend to a perpetual curate, although for spiritual purposes he has, like the vicar, uncontrolled possession of the church and churchyard(*p*). And the vicar, it seems, has no right, strictly speaking, to fees for the erection of monumental tablets, or for the construction of vaults in the chancel(*q*).

The freehold of a churchyard, which has been closed under an Order in Council, remains in the rector or vicar, in whom it was vested at the time of the order(*r*). The 20 & 21 Vict. c. 81, which authorizes the Queen in Council to prevent, by order, vaults or places of burial from becoming injurious to the public health, only applies to grounds, at the time of the order, used for the purpose of burial, or which may again be so used as of right. An Order in Council, therefore, directing the churchwardens to enter upon what was formerly a burial ground, is invalid, and the parties acting under it will be trespassers(*s*). A churchwarden has no right without a faculty, to remove portions of the soil, and the bones of deceased persons from the churchyard, and if a monition from the Ecclesiastical Court issues against him to replace them, it is no answer to say he has transferred the land on which they were placed to another(*t*). The immemorial occupation and repair of a private chapel or chancel attached to a church, will entitle the lord of a manor, by prescription, to its exclusive use, although the freehold may be in another, and although the estate or house to which the chapel or chancel is appendant may not be situate in the parish(*u*). And the immemorial repair of such a chapel in a parish church, coupled with other acts of ownership, is evidence of a right of freehold in it, which may be conveyed to a third person, and is not necessarily appendant to any house(*x*).

(*p*) *Greenslade v. Darby*, L. R., 3 Q. B. 421. By 31 & 32 Vict. c. 117, he may now, under certain circumstances, be designated as vicar.

(*q*) *Rugg v. Kingsmill*, L. R., 2 Pr. Co. Ca. 59.

(*r*) *Champneys v. Arrowsmith*, L. R., 2 C. P. 602. *Ibid.* 3 C. P. 107. As to his right to compensation if it be taken compulsorily under an Act of Parliament, see *Stebbing v. Metrop. Board of Works*, *post*, ch. 16, s. 2; see also, *Campbell v. Mayor and Corporation of Liverpool*, L. R., 9 Eq. Ca. 579. *Ex parte* Rector of Liverpool, L. R., 11 Eq. Ca. 15. *Ex parte* Rector of St. Martin's, Birmingham, *ib.* 23.

(*s*) *Foster v. Dodd*, L. R., 1 Q. B. 475; 3 *ib.* 67. An act authorizing the vacation of a graveyard and the removal of bodies therefrom, is constitutional as an exercise of the police power of the State. *Kincaid's Appeal*, 66 Penn. St. 411. That the opening of a highway, by town authorities, through a cemetery may be enjoined, see *Trustees, etc. v. Walsh*, 57 Ill. 363. That trespass will lie against the Superintendent of a cemetery for removing remains therefrom, see *Meagher v. Driscoll*, 99 Mass. 281.

(*t*) *Adam v. Colthurst*, L. R., 2 Adm. & Eccl. 30.

(*u*) *Churton v. Frewen*, L. J., 2 Eq. Ca. 634. As to the right to ring the church bells, see *Durant v. Crocker*, L. R., 2 Adm. & Eccl. 41.

(*x*) *Chapman v. Jones*, L. R., 4 Exch. 273; 38 L. J., Exch. 169.

The rector is entitled to the keys of the church, although the churchwardens have a right of access to it at proper seasons. The latter cannot remove ornaments which have been illegally placed in the parish church, except under the sanction of the ordinary(y). But they are entitled to the communion plate as against the rector, in case of its conversion by him(z).

A sexton of a parish church, for the churchyard of which a burial-ground has been substituted under 15 & 16 Vict. ch. 85, is entitled to perform therein his duties as sexton in respect to the burial of parishioners, just as he would have been entitled to do in the old parish burying-ground, and may justify his entry on the burial-ground, by himself or deputy, to perform such duties, in spite of the refusal of the Burial Board to admit him. He is entitled for the same reasons, to toll the bell in the chapel at such burial(a).

4.06 *Title to the sea-shore(b) and bed of navigable rivers.*—The sea-shore between high-water and low-water mark is *prima facie* the property of the Crown(c), and is extra parochial, unless it be shown by common reputation or otherwise to form part of an adjoining parish(d). And so is the bed of a tidal river between high and low-water mark(e)

(y) *Ritchings v. Cordingley*, L. R., 3 Adm. & Eccl. 113.

(z) *Turner v. Baynes*, 2 H. Bl. 559. *Wilkinson v. Verity*, L. R., 6 C. P. 206.

(a) *Burial Board of St. Margaret's, Rochester, v. Thompson*, L. R., 6 C. P. 445.

(b) The Board of Trade have power, under 54 Geo. 4, ch. 159, s. 14, and 25 & 26 Vict. ch. 69 s. 16, to prohibit persons from taking shingle from the sea-shore within the ports and harbors of the kingdom; and the Commissioners of the Treasury have power, under 16 & 17 Vict. ch. 107, s. 9, to alter the limits of ports, etc. See *Nicholson v. Williams*, L. R., 6 Q. B. 632.

(c) *Hale, de Jure Maris*, Hargrave's Law Tracts, pp. 25-37. In this country, the State in its sovereign character owns the bed of all navigable waters within its borders to high water mark. *People v. Tibbetts*, 19 N. Y. 523. *Gould v. Hudson River R. R. Co.*, 6 id. 522. *Stevens v. Paterson & Newark R. R. Co.*, 34 N. J. 532. *Arnold v. Munday*, 1 Halst. (N. J.) 1. *Martin v. Waddell*, 16 Peters, 367. *Pollard v. Hagan*, 3 How. (U. S.) 212. *Lockwood v. New York, etc., R. R. Co.*, 37 Conn. 387. *Mumford v. Wardwell*, 6 Wall. (U. S.) 423.

(d) *Reg. v. Musson*, 8 E. & B. 900; 27 Law J., M. C. 100.

(e) *Duke of Bridgewater's Trustees v. Bootle-cum-Linacre*, L. R., 2 Q. B. 4. *People v. Tibbetts*, 19 N. Y. 523. *Gould v. Hudson River R. R. Co.*, 6 id. 522. *Stevens v. Paterson & Newark R. R. Co.*, 34 N. J. 532. *Chapman v. Kimball*, 9 Conn. 38. *Smith v. Levinus*, 8 N. Y. 472. *Bailey v. Miltenberger*, 31 Penn. St. 37. *Haight v. Keokuk*, 4 Iowa, 199. *State v. Jersey City*, 1 Dutch. (N. J.) 525. *Tomlin v. Dubuque, etc., R. R. Co.*, 32 Iowa, 106. But see *Martin v. Nance*, 3 Head (Tenn.), 649; *Bainbridge v. Sherlock*, 29 Ind. 364; *Flanagan v. Philadelphia*, 42 Penn. St. 219.

There is an apparent conflict of authorities in this country in regard to the respective rights of individuals and the State to the soil of lands lying under rivers which are in fact navigable, but which are unaffected by the ebb and flow of the tide. In some of the States the question whether a stream is navigable or not is determined by the rules of the common law, and in others by the rules of the civil law. By the common law the criterion of a navigable stream is the flow and reflow of the tide. By the civil law the criterion is the capability and suitability of the stream to the purposes of navigation, in the ordinary state of the water. *Stuart v. Clark*, 2 Swan (Tenn.), 9. *People v. Canal Appraisers*, 33 N. Y. 461. The criterion of the civil law has been adopted in Tennessee. *Stuart v. Clark*, 2 Swan, 9. In North Carolina, Pennsylvania and Tennessee the ebb and flow of tide is no test of the navigability of a river. *Wilson v. Forbes*, 2 Dev. 30. *Ingraham v. Treadgill*, 3 id. 59. *Carson v.*

The soil may, however, be vested in a private individual, or in the lord of the manor, by ancient grant from the Crown, and

Blazer, 2 Binn. 475. *Flanagan v. Philadelphia*, 42 Penn. St. 219. And it has been held in New York that the common law rules, determining what streams are navigable, are not applicable to this country. *People v. Canal Appraisers*, 33 N. Y. 461. So in Iowa it has been held that the ebb and flow of tide is a mere arbitrary test of the navigability of a stream, and one not founded in reason, as many waters where the tide flows are not in fact navigable, and many where no tide flows are navigable. *McManus v. Carmichael*, 3 Iowa, 1.

In the Supreme Court of the United States, Justice McLean, in discussing the question, says: "We apprehend that the common law doctrine as to the navigableness of streams can have no application in this country, and that the fact of navigableness does in no respect depend on the ebb and flow of tide." *Bowman's Devises v. Walthen*, 2 McLean, 376. See also, case of *Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 454; *The Daniell Ball*, 10 Wall. 563.

In some States a stream having a capacity only to float logs at such seasons of the year as will render it of public use, is navigable. See *Browne v. Chadburne*, 31 Me. 9; *Moore v. Sanborne*, 2 Mich. 519; *Wadsworth v. Smith*, 11 Me. 278; *Treat v. Lord*, 42 id. 552; *Veazie v. Dwinel*, 50 id. 484; *Berry v. Carle*, 3 id. 269; *Knox v. Chaloner*, 42 id. 150; *Laney v. Clifford*, 54 id. 489; *Weise v. Smith*, 3 Oregon, 445; *Folger v. Robinson*, id. 458. But this doctrine has been repudiated in California. *American River Water Co. v. Amsden*, 6 Cal. 443. And also in Illinois. *Hubbard v. Bell*, 54 Ill. 110.

This want of a uniform test to determine whether a river is navigable or not, has led to considerable confusion in the determination of the ownership of the soil in the bed of rivers in which no tide ebbs and flows. Thus, in Mississippi, Illinois, Iowa, Minnesota and Missouri the Mississippi river is held to be a public highway. *Morgan v. Reading*, 3 Smedes & Marsh. 366. *People v. St. Louis*, 5 Gilm. 351. *O'Fallon v. Daggett*, 4 Mo. 343. *Godfrey v. City of Alton*, 12 Ill. 29. *McManus v. Carmichael*, 3 Iowa, 1. *Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82.

But it has been held in Iowa that the riparian owner on such river owns only to high water mark, with perhaps some qualified rights to low water line. *McManus v. Carmichael*, 3 Clarke, 1. *Haight v. Keokuk*, 4 Iowa, 199. *Tomline v. Dubuque R. R. Co.*, 32 id. 109. But on the other hand, it has been held in Mississippi that the rules of the common law and not of the civil law govern the right to the soil in the bed of the Mississippi river, notwithstanding its size, and that the river is not navigable at common law; and consequently that the right of the riparian owner goes to the middle of the river, subject only to the right of passage in the public. *Morgan v. Reading*, 3 Smedes & Marsh. 336. To the same effect, see *Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82.

In Michigan, the soil under tideless, but in fact navigable rivers, is in the owner of the adjacent bank. *Lorman v. Benson*, 8 Mich. 18. And see *Moore v. Sanborn*, 2 id. 519. The same rule prevails in Wisconsin. *Walker v. Shepardson*, 4 Wis. 486. See *Mariner v. Shulte*, 13 id. 692.

In Ohio, the owner of land on both banks of a navigable river owns also the bed of the river; and the owner of land lying on one bank of the river owns to the middle of the main channel. *Walker v. Board of Public Works*, 16 Ohio, 540. *Blanchard v. Porter*, 11 id. 138. The land between high and low water mark on navigable rivers in that State consequently belongs to the riparian proprietors. *Id.*

In Tennessee, the owner of land on the bank of a navigable tideless river owns to the ordinary low water mark. *Elder v. Burns*, 6 Humph. 358. *Stuart v. Clark*, 2 Swan, 9. So in Pennsylvania, and the soil in the bed of the river to low water mark is the property of the State. *Flanagan v. Philadelphia*, 42 Penn. St. 219. *Monongahela Bridge Co. v. Kirk*, 46 id. 112. The same rule has been adopted in Alabama. *Bullock v. Wilson*, 2 Porter, 436. And see, as to what rivers are deemed navigable, *Rhodes v. Otis*, 33 Ala. 578; *Ellis v. Carey*, 30 id. 725.

In South Carolina, the English definition of navigable water has never been adopted; and it has been held that the owner of land on the bank of a navigable tideless stream owns the soil of the bed to the middle of the stream. *Cates v. Wadlington*, 1 McCord, 580.

In Indiana, the title of a riparian owner on a tideless navigable river extends only to low water mark. *Bainbridge v. Sherlock*, 29 Ind. 364.

As to the rule in North Carolina, see *Collins v. Benbury*, 3 Ired. 277; *Wilson v. Forbes*, 2 Dev. 30; *Ingraham v. Threadgill*, 3 id. 59.

may form part of the adjoining manor(*f*); but proof that it does so ought to be strictly and rigidly required from all lords of manors who set up exclusive rights in the soil, in derogation of the free use and enjoyment of the sea-shore by the public. Where proof was given by the lord of the manor or territory of Gower of an ancient grant of the terra de Gower in the time of King John, and the limits of the manor both on the land and the sea-side were uncertain, common reputation, modern usage, and the exercise by the lord of acts of dominion over the sea-shore, were admitted in evidence to show the boundary of the manor on the sea-side(*g*). And so of the bed of a navigable river, where the tide flows and reflows, and of all estuaries or arms of the sea; but where a right is claimed to the bed of a navigable river, it must be subject to the common law right of navigation by the public, including that of anchorage. No anchorage dues, therefore, are claimable, although they have been submitted to from time immemorial, unless it can be shown (and slight evidence will be sufficient) that some service to navigation either is, or was originally, rendered in return for the grant, or the locus in quo forms part of a port(*h*).

Where a manor was held under an ancient grant from the Crown, which professed to grant the manor with wreck of the sea, several fishery, and other rights of an extensive description, but did not expressly purport to convey "*littus maris*," it was held that acts of dominion and ownership exclusively exercised by the lord upon the adjoining sea-shore, between high and low water-mark, and which acts would have been unlawful without a license or grant from the Crown, such as the constant and exclusive digging and taking away of sand, stone, gravel, and sea-weed, might be called in aid of the grant to show that the sea-shore was parcel of the manor(*i*). But mere occasional acts of taking sand or gravel, shells or sea-weed, from the sea-shore, ought not of themselves, without proof of adverse and exclusive enjoyment on the part of the lord, to raise any presumption of a grant of the soil from the Crown(*k*). By a grant of the sea-shore, the Crown conveys not that which at the time of the grant is between

(*f*) *Whitstable (Free Fishers of) v. Gann*, 11 C. B., N. S. 387; 31 Law J., C. P. 372. See *Mace v. Philcox*, 33 Law J., C. P. 124; *People v. Tibbetts*, 19 N. Y. 523, 528.

(*g*) *Duke of Beaufort v. Mayor, etc., of Swansea*, 3 Exch. 413. See *Lestrangle v. Rowe*, 4 F. & F. 1048.

(*h*) *Gann v. Whitstable Free Fishers*, 35 Law J., C. P. 29. *Whitstable Free Fishers v. Foreman*, L. R., 2 C. P. 688; 3 *ibid.* 578; 4 Engl. & Ir. App. 266.

(*i*) *Calmady v. Rowe*, 6 C. B. 861. *Att.-Gen. v. Jones*, 2 H. & C. 347.

(*k*) *Livett v. Wilson*, 3 Bing. 115.

high and low water-mark, but that which from time to time shall be between these two termini, so that the freehold shifts as the sea recedes or encroaches. The ordinary limit of the sea-shore is the line of the medium high tide between the springs and the neaps(l).

Different rights in the sea-shore may be vested in a subject, according to the terms of the grant. The king may have granted to a subject the soil itself, or the general privilege of fishing, or of laying, keeping and taking oysters on that spot(m). But the grantee of the Crown must take subject to such prescriptive rights as may have been acquired by subjects by immemorial usage and enjoyment(n), and to the common law right of navigation where the grant is of the soil of a navigable river(o).

The right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the common law. Hence, if the water permanently changes its channel, and flows over land of another, a several fishery in the new channel cannot be claimed by the grantee of a several fishery in the old, although the public right of navigation will continue(p).

407 *Title to the soil of rivers or fresh-water lakes.*—The soil of the bed of a non-navigable river belongs *primâ facie* to the owners of the land or of the manors on either side, *ad medium filum aquæ*(q). Neither, however, is entitled to use it so as to interfere with the natural flow of the stream; hence an encroachment by one landowner on his side of the stream is actionable at the suit of the other, although no special damage be proved(r). So an injunction will be granted to restrain a riparian proprietor on a tidal river from erecting a jetty, and so encroaching on the alveus of a navigable stream(s). It does not appear to be clearly established whether the soil of lakes, like that of fresh-water rivers, belongs in the same way, to the respective owners of the land on either side, or

(l) *Att.-Gen. v. Chambers*, 4 De G. M. & G. 213. The general rule that the proprietors of lands bordering upon waters in which the tide ebbs and flows own only to high-water mark, does not apply to a pond originally fresh, but which has become salt and influenced by the tides, by reason of an artificial channel cut to tidal waters. The rights of the riparian proprietors are not affected by the change. *Wheeler v. Spinola*, 54 N. Y. 377.

(m) *Scrutton v. Brown*, 4 B. & C. 497. See *ante*, p. 209, *in notis*.

(n) *Ld. Denman, C.J., Mayor of Colchester v. Brooke*, 7 Q. B. 374; *ante*, ch. 3.

(o) *Gann v. Whitstable Free Fishers*, *supra*.

(p) *Mayor, etc., of Carlisle v. Graham*, L. R., 4 Exch. 361. See *Duke of Northumberland v. Houghton*, L. R., 5 Exch. 127, as to the merger of a several fishery, originally granted by the Crown previous to *Magna Charta*.

(q) See *Crosley v. Lightowler*, L. R., 3 Eq. Ca. 279; *Hubbard v. Bell*, 54 Ill. 110; *Morgan v. King*, 30 Barb. (N. Y.) 9; *Lorman v. Benson*, 8 Mich. 18; *Martin v. Nance*, 3 Head (Tenn.), 649; *Bowman's Devises v. Wathren*, 2 McLean, 376, and see cases cited in note —, p. —, *ante*.

(r) *Bickett v. Morris*, L. R., 1 Scotch App. Ca. 47.

(s) *Att.-Gen. v. Earl of Lonsdale*, L. R., 7 Eq. Ca. 377.

whether it belongs *primâ facie* to the king in right of his prerogative(*t*).

408 *Of the title to waste uninclosed land adjoining the sea-shore.*—All uninclosed waste land abutting on the sea-shore, and situate above the high-water mark of ordinary spring-tides, belongs *primâ facie* to the owner of the adjoining property, although it is covered with beach and sea-weed, and overflowed by the waves at extraordinary spring-tides(*u*). .

409 *Of the right to the soil of turnpike-roads and highways.*—The soil of a turnpike-road is not vested in the trustees of the road. The trustees have only the control of the highways, the ordinary rule being that the landowners on either side of the road are entitled to the soil of the road, *usque ad medium filum viæ*; and if a landowner owns the soil on both sides of the road, he is entitled to the soil of the whole road(*x*). This is a presumption of law founded on the assumption that in making a road for public convenience, the owners of the land on each side of the road have contributed a portion of their land towards the formation of the road(*y*). Where the owner of two parcels of land on either side of a highway conveys them to a purchaser, the soil of the road passes by presumption of law, although the conveyance is silent as to the existence of the road, and although the particular measurement of each parcel of land is given, which would exclude the road; but this presumption may be rebutted by circumstances showing that the grantor did not intend to transfer to the grantee his right of ownership in the soil of the highway. Words in an instrument of grant,

(*t*) As to grants of a several fishery with livery of seizin, conveying a freehold interest in the soil covered with the water, *Marshall v. Ulleswater*, 32 Law J., Q. B. 139. If a private individual is the owner of the soil forming the bed of a navigable lake, he would be entitled to sue any one who erected a pier running into the lake, or to knock down the pier, but so long as it remains, the owners of land abutting on the lake have a right to use it for the purpose of embarking and disembarking on the lake. *Marshall v. Ulleswater Steam Navigation Co.*, L. R., 7 Q. B. 166. A boundary upon a natural pond or lake carries title to low-water mark, and not to its centre. But a boundary upon an artificial pond or lake, in the absence of other controlling facts, carries title to the centre. *Wheeler v. Spinola*, 54 N. Y. 377. See *Ledyard v. Ten Eyck*, 36 Barb. 102; *Rice v. Ruddiman*, 10 Mich. 102; *Warren v. Chambers*, 25 Ark. 120; *Angell on Watercourses*, s. 41, etc.; *Canal Commissioners v. People*, 5 Wend. 423, 446; *Champlain & St. Lawrence R. R. Co. v. Valentine*, 19 Barb. 484; *Waterman v. Johnson*, 13 Pick. 261; *Bradley v. Rice*, 13 Me. 198.

(*u*) *Lowe v. Govett*, 3 B. & Ad. 869. Hale, *de jure Maris*, c. 4, p. 12. Harg. Law Tracts. As to land gained from the sea, *Att.-Gen. v. Rees*, 4 De G. & J. 55.

(*x*) *Davison v. Gill*, 1 East, 69. *Marquis of Salisbury v. Gt. Northern Railway Co.*, 28 Law J., C. P. 53; 5 C. B., N. S. 208. *Sherman v. McKeon*, 38 N. Y. 266. *Bissell v. New York Central R. R. Co.*, 23 N. Y. 61. *Peek v. Smith*, 1 Conn. 103. *Chatham v. Brainard*, 11 Conn. 60. *Reed v. Leeds*, 19 Conn. 188. *Perley v. Chandler*, 6 Mass. 454. *Rice v. Worcester*, 11 Gray, 283. *Taylor v. Armstrong*, 24 Ark. 102. *Mendez v. Dugart*, 17 La. An. 171. *Buckman v. Buckman*, 3 Fairf. 463. *Holden v. Shattuck*, 34 Vt. 336. *Dubuque v. Maloney*, 9 Iowa, 450.

(*y*) The same presumption applies to two conterminous parishes, where the boundary between them is a highway. *Reg. v. Strand Board of Works*, 33 Law J., M. C. 33.

as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the subject-matter of the grant. And if lands abutting upon a highway are described in the grant as bounded by the highway, the right to the soil, *ad medium filum viæ*, will be impliedly included in the grant, unless the surrounding circumstances rebut the presumption(z). And where the land intended to be conveyed is described by measurement and color, on a plan annexed to, and forming part of, the conveyance, the soil of the highway *usque ad medium filum* passes by the conveyance, unless it is expressly excluded(a).

No legal presumption arises as to the ownership of soil in a road, where the road is defined for the first time under a newly-created authority, such as a board of commissioners for inclosing lands, acting under the powers of an Act of Parliament(b).

410 *The right to the soil of accommodation-ways and private roads* depends upon the history of the premises, and the evidence of acts of ownership over the soil of the road. If nothing else appears than the existence of a private way running between the lands of two adjoining proprietors, the jury may presume that the soil belongs half to the one and half to the other. But that presumption may be rebutted by evidence showing acts of ownership on the part of one only of such adjoining proprietors(c), or by proof of a reservation of the soil of the road by a grantor under whom the landowners on either side of the road claim title(d).

411 *Of the title to waste lands adjoining public highways.*—Waste land extending along a public highway is presumed, in the first instance, to belong to the owner of the adjoining land, and not to the lord of the manor(e); but this presumption prevails only so long as proof to the

(z) *Lord v. Commissioners of Sidney, etc.*, 12 Moore, P. C. C. 498. *Bissell v. New York Central R. R. Co.*, 23 N. Y. 61. *Jackson v. Anderson*, 18 Me. 76. *Newhull v. Ireson*, 8 Cush. 598. *Phillips v. Bowers*, 7 Gray, 24. *Fisher v. Smith*, 9 Gray, 444. *Hollenbeck v. Rowley*, 8 Allen, 473. *Marsh v. Burt*, 34 Vt. 289.

And it has been further held, that where land is sold bordering on a highway, the grantee will take to the middle of the street on which the land is situated, although the land is not described in the deed as bounded by the highway. *Gear v. Barnum*, 37 Conn. 229. *Stark v. Coffin*, 105 Mass. 328. *Hawesville v. Lander*, 8 Bush (Ky.), 679.

(a) *Berridge v. Ward*, 10 C. B., N. S. 415; 30 Law J., C. P. 218. *Simpson v. Dendy*, 8 C. B., N. S. 433. *Dendy v. Simpson*, 7 Jur. N. S. 1058. The same rule applies where lots are sold by reference to a map, and designated as bounded on a street there laid down. *Perrin v. New York Central R. R.*, 36 N. Y. 120.

(b) *Rex v. Hatfield*, 4 Ad. & E. 156. Nor does the same presumption, it seems, apply to houses in a street abutting upon the highway. *Beckett v. Leeds (Corporation of)*, L. R., 7 Ch. App. 421.

(c) *Holmes v. Bellingham*, 7 C. B., N. S. 388.

(d) *Tottenham v. Byrne*, 12 Ir. C. L. R. 388.

(e) *Doe v. Pearsey*, 7 B. & C. 307.

contrary is wanting(*f*). In remote and ancient times, when roads were frequently made through uninclosed lands, and when the same labor and expense were not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law that the public, where the road was out of repair, might pass along the land by the side of the road. This right on the part of the public was attended with this consequence—that although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the onus of repairing the road. If the same person was the owner of the land upon both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an ancient inclosure on one side, and the owner of lands inclosed on the other, he was bound to repair the whole (*ante*, pp. 274, 275). Hence it followed, as a natural consequence, that when a person inclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road, to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of waste left at the sides of roads: the object was to leave a sufficiency of land for passage by the side of the road when it was out of repair(*g*).

But the ordinary presumption, that a narrow strip of land lying between the highway and the adjoining close belongs to the owner of the close, is either done away with or considerably narrowed, if the narrow strip is contiguous to, or communicates with, open commons, or larger portions of land; for the evidence of ownership which applies to the large portions, applies also to the narrow strip which communicates with them(*h*).

412 *Of the right to the soil of towing-paths and the banks of rivers and canals.*

—Navigation companies authorized by statute to set out towing-paths, first give satisfaction to the owners and proprietors of lands made use of for the purpose, do not, by forming a towing-path and giving satisfaction to the owner of the land over which the path is formed, acquire more than a right of way for towing, in the nature of a servitude or easement. Statutory powers of this sort do not enable them to ac-

(*f*) *Doe v. Hampson*, 4 C. B. 273. *Dendy v. Simpson*, 18 C. B. 831.

(*g*) *Steel v. Prickett*, 2 Stark. 469. *Headlam v. Hedley*, Holt, N. P. C. 462. *Doe v. Kemp*, 2 B. N. C. 102.

(*h*) *Grose v. West*, 7 Taunt. 42.

quire the soil itself. Landowners, therefore, whose lands abut upon a navigable river or canal, along which a towing-path extends, have a right to form wharfs on the soil of the towing-path, and to cross the towing-path wherever they please, for the purpose of loading and unloading vessels, provided they do not interfere with the right of way along the towing-path(*i*). Acts of ownership on the part of the proprietors of a navigation company, exercised over the banks of a navigable river, afford no evidence of the ownership of the soil of such banks being vested in the proprietors of the navigation company. If the Act of Parliament under which the company is incorporated gives the company no power to purchase land, that is against their claim to be proprietors of the soil(*k*).

413 *Of the right of property in trees and bushes.*—According to the old authorities, the general property in trees is in the landlord, and the general property in bushes is in the tenant, although if he exceeds his right—as by grubbing up or destroying fences—he may be liable to an action of waste. The tenant has the general property in the cuttings of a hedge, whoever cuts it(*l*).

414 *Of the ownership of trees standing in boundary hedges.*—In an old case, it is said “that if a tree grows in a hedge which divides the land of *A* and *B*, and by the roots takes nourishment in the land of *A* and also of *B*, they are tenants-in-common of the tree, and so it was adjudged”(*m*). But this must be understood of fences of which the adjoining owners are also tenants-in-common; for the general rule is, that the ownership of the tree follows the ownership of the hedge, and the tree will be held to belong to the party on whose land the trunk stands, without reference to the direction of the roots(*mm*). By the French law, “Trees which are found in a common hedge are common like the hedge; each of the two proprietors has the right to require that they should be felled;” and “he whose property is overshadowed by the branches of his neighbor’s trees may compel the latter to cut off such branches. If it be the roots which encroach on his estate, he has a right to cut them therein himself”(*n*).

(*i*) *Badger v. South York R. Co.*, 1 Ell. & Ell. 347; 28 Law J., Q. B. 120. *Monm. Canal & Rail. Co. v. Hill*, 4 H. & N. 427.

(*k*) They will, however, be liable for accidents occurring from non-repair of the towing-path, if they have power under their statutes to take or hire it from the owner, and they do so, although by parol only, and charge a toll for the use of the towing-path. *Winch v. Thames Conservators*, L. R., 7 C. P. 458. *Hollis v. Goldfinch*, 1 B. & C. 205.

(*l*) *Berriman v. Peacock*, 9 Bing. 384.

(*m*) *Anon.*, 2 Rolle’s Rep. 255. *Waterman v. Soper*, 1 Lord Raym. 737. *Holder v. Coates*, M. & M. 112. *Griffin v. Bixby*, 12 N. H. 454. *Hoffman v. Armstrong*, 46 Barb. (N. Y.) 337.

(*mm*) See *Hoffman v. Armstrong*, 48 N. Y. 201; *Dubois v. Beaver*, 25 N. Y. 123.

(*n*) Cod. Civ. art. 672, 673. As to trees overhanging railways, see 31 & 32 Vict. c. 119, s. 24.

415 *Of the right of property in boundary-walls and fences(o).*—Evidence of a common user by two adjoining proprietors of a boundary-wall separating their two estates justifies the presumption, either that the wall was originally built on land belonging in undivided moieties to the owners of the respective premises, and at their joint expense, or that it had been agreed between them that the wall, and the land on which it stood, should be considered the property of both as tenants-in-common, so as to insure to each a continuance of the use of the wall(p). “When a wall is common property, it may happen, either that a moiety of the land on which it is built may be one man’s, and the other moiety another’s, or the land may belong to the two persons in undivided moieties.” But “whenever the land on which a boundary-wall is intended to be built belongs on one side to one party, and on the other to the other party, and they between them agree to build the wall, it would be prudent,” observes Bayley, J., “to make this bargain, that so long as there was to be a wall continuing on the property, the land on which it was built, and the wall which stood upon that land, should be taken to be the common property of the two, and that the owners of the estates on each side should be tenants-in-common of the undivided moiety of that land and of the wall, with the power of adopting such remedies for partition as tenants-in-common may adopt; for if the wall stood partly on one man’s land, and partly on another’s, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two”(q). If one adjoining owner erects a boundary-wall, which also forms the external wall of the house of his neighbor, and places an inscription on it stating that it is his wall, the owner of the house will not obtain a title to such wall by adverse possession, although no rent or acknowledgment has been paid for it for many years(r).

If one tenant-in-common of a wall destroys the wall which is the subject of the tenancy-in-common, that is an actual ouster and expulsion of the one by the other, so that the party expelled and injured may maintain an action against the wrong-doer for the recovery of damages; but if the wall is pulled down for the mere purpose of re-

(o) As to an overhanging cornice, see *Whittaker v. Jackson*, 33 Law J., Exch. 181.

(p) *Wiltshire v. Sidford*, 8 B. & C. 259n. For the statute law of Iowa in relation to party walls, see Rev. Stat. ss. 1914-1925; *Bertram v. Curtiss*, 31 Iowa, 46.

(q) *Cubitt v. Porter*, *infra*.

(r) *Phillipson v. Gibbon*, L. R., 6 Ch. App. 428. It appeared, in this case, that the owner of the house had himself rebuilt the wall more than thirty years before the commencement of the suit, but had replaced the inscription.

building it, and providing a better and stronger wall, no action is, it seems, maintainable. If an improper addition is made to the height of the wall by one tenant-in-common to the injury of the other, the latter may remove the heightened portion of the wall(s). Where a building is placed against the wall by one of two tenants-in-common of the wall, and the wall is heightened and carried up into a chimney, this is evidence of an ouster of the other tenant-in-common, as the altered wall and the old wall are not identical things, and the nature of the property is substantially changed(*t*).

In general, where a boundary-wall is built at the joint expense of adjoining proprietors under the provisions of a Building Act, so that half the thickness of the wall stands on the ground of each proprietor, the two proprietors are not tenants-in-common of the wall, but each is entitled to the ordinary remedy for any injury done to the part of the wall which stands on his own land(*u*). In the metropolis, party walls are regulated by the Building Act, 18 & 19 Vict. c. 122(*x*).

416 *Of the ownership of ditches and hedges.*—"The rule," observes Lawrence, J., "about ditching is this: No man making a ditch can cut into his neighbor's soil, but usually he cuts it to the very extremity of his own land; he is, of course, bound to throw the soil which he digs out upon his own land, and often, if he likes it, he plants a hedge on the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbor's land, and is a trespasser; no rule about four feet and eight feet has anything to do with it"(*y*). A boundary-hedge, separating one estate from another, belongs in general to the occupier who has been in the habit of cutting and repairing the hedge. Proof of the exercise of acts of ownership over the hedge is *primâ facie* evidence of the property in the hedge being in the person who has exercised such acts. In some instances, the adjoining owners are tenants-in-common of the hedge separating their respective properties, so that each has a right to clip the hedge, but not to grub it up(*z*).

By the French law, all ditches between two estates are presumed common, if there be no title or proof to the contrary. But it is proof that a ditch is not common when the bank of earth thrown up is

(s) *Cubitt v. Porter*, 8 B. & C. 257. *Murray v. Hall*, 7 C. B. 441. *Murly v. M'Dermott*, 8 Ad. & E. 138.

(t) *Stedman v. Smith*, 8 Ell. & Bl. 1; 26 Law J., Q. B. 315.

(u) *Matts v. Hawkins*, 5 Taunt. 22.

(x) See *Hunt v. Harris*, 34 Law J., C. P. 249; and *ante*, p. 213.

(y) *Vowles v. Miller*, 3 Taunt. 137.

(z) *Voyce v. Voyce*, Gow, 201.

found only on one side of the ditch. The ditch, in such a case, is deemed to belong exclusively to him on whose side the earth is found to be thrown up. Every hedge which separates two estates is reputed common to both, unless there be only one of the estates in an inclosed condition, or unless there be vouchers or sufficient possession to prove the contrary(*a*).

- 417 *Title to a pew in a church*.—Churchwardens are not justified in dispossessing any one of a sitting in a pew in a church which he has enjoyed for some time, without giving notice of their intention, and offering an opportunity for objection and explanation(*b*). See *ante*, p. 135-6.

SECTION III.

OF ACTIONS FOR TRESPASSES UPON LANDS AND TENEMENTS.

- 418 *Of actions against the hundred for damage done to tenements by rioters*.

—By 7 & 8 Geo. 4, c. 31, s. 2, it is enacted, that if any church or chapel, house, stable, etc., or any building or erection used in any trade or manufacture, or in conducting the business of any mine, or any engine or machinery employed in any manufacture, or in working any mine or any bridge, wagon-way, etc., or trunk for conveying minerals, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously assembled together, the inhabitants of the hundred shall, if the damage done exceeds 30*l*., be liable (s. 8) to yield full compensation to the persons damnified by the offence, and also for any damage which may at the same time be done to any fixture, furniture, or goods, in any such church, chapel, house, or building. Under this statute a borough is liable to contribute, as part of the hundred, to the damage done, notwithstanding the provisions of the Municipal Corporation Act(*c*). But before an action can be maintained, the persons damnified, or such of them as have knowledge of

(*a*) Cod. Nap. liv. 2, No. 666-672.

(*b*) *Horsfall v. Holland*, 6 Jur. N. S. 278.

(*c*) *Birley v. Salford*, 11 M. & W. 399. For the laws of New York providing for compensating parties whose property has been destroyed in consequence of mobs or riots, see Laws of 1855, ch. 428. For cases decided under the statute, see *Ely v. Board of Supervisors of Niagara Co.*, 36 N. Y. 297; *Orr v. City of Brooklyn*, 36 N. Y. 661; *McClure v. Supervisors of Niagara Co.*, 30 Barb. (N. Y.) 594; *Levy v. Mayor, etc. of New York*, 3 Rob. 194; *Schiellina v. Supervisors of Kings Co.*, 43 Barb. (N. Y.) 490; *Ross v. Mayor, etc. of New York*, 4 Rob. 49.

the circumstances of the offence, or the servant or servants who had the care of the property damaged, must, within seven days after the offence, go before some neighboring justice of the peace, having jurisdiction over the locality of the offence, and state upon oath the names of the offenders, if known, and submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance to prosecute, etc.; and every such action must be commenced within three calendar months after the commission of the offence. In an action against the hundred to recover compensation for the felonious demolition of a house, building, or erection, the same strictness of averment and proof is required as on the trial of an indictment for felony(*d*).

No action can be maintained against the hundred in cases where the damage done does not exceed 30*l.*, but the person damnified must hand in a notice of claim to the high constable of the hundred, or, if there is no high constable, to the chief constable or acting chief officer of police of the county in which the hundred is situate(*e*), who is to exhibit such claim to two justices of the peace, who are to appoint a petty session for the purpose of hearing and determining such claim (*s.* 8).

419 *Parties to be made plaintiffs in actions for trespass.—Heirs-at-law.—*

The heir-at-law cannot maintain trespass for an injury to lands descended to him without entry; but, after entry, his right of possession relates back so as to support an action against a wrong-doer for a trespass committed at an antecedent period(*f*).

420 *Tenants-in-common.—*An action is maintainable by one tenant in common against his co-tenant, or the licensee of the latter, for digging up and carrying away the soil of the close of which they are tenants in common. In such an action, a plea that the close is not the close of the plaintiff is not supported by proof that the plaintiff is tenant in common of it, with others who authorized the trespass(*g*). One

(*d*) *Barwell v. Winterstoke*, 14 Q. B. 708.

(*e*) 32 & 33 Vict. c. 47, s. 5, and see s. 7.

(*f*) *Barnett v. Earl of Guildford*, 11 Exch. 19; 24 Law J., Exch. 281. This is not the rule in New Hampshire. *Dexter v. Sullivan*, 34 N. H. 478.

(*g*) *Wilkinson v. Haygarth*, 12 Q. B. 837; 16 L. J., Q. B. 103. It is a general rule that one tenant in common cannot maintain trespass *quare clausum fregit* against his co-tenant. *Booth v. Sherwood*, 12 Minn. 426. *Bennet v. Bullock*, 35 Penn. St. 364.

But under the statutes of Maine a tenant in common of undivided lands may maintain trespass *quare clausum fregit* against a co-tenant for cutting timber on the common estate without notice, or pending a petition for partition. *Mills v. Richardson*, 44 Me. 79.

So where a line tree is destroyed by one of the adjoining proprietors, the other may maintain trespass against him, whether his interest be several, or as a tenant in common. *Dubois v. Beaver*, 25 N. Y. 123.

tenant in common also may sue his co-tenant in common in trespass for turning him or his servants off the land, or out of the house holden in common(*h*).

421 *Tenant and reversioner*.—The actual occupier of real property is always entitled to maintain an action for unjustifiable trespasses thereon; but the owner, who has parted with the possession in favor of a tenant or lessee, cannot maintain an action for trespass. But if an injury is done to his reversionary estate, he is entitled to an action on the case for damages. If a house or land is occupied merely by the servant of the owner, the occupation of the servant is the occupation of the owner (*ante*, pp. 335, 336), and the latter, being then the occupier as well as the owner, may sue for any temporary trespass or injury, rendering his occupation less profitable or commodious; but where the land has been demised to a lessee, who has entered thereon, and is clothed with the possessory interest, the lessee, and not the landlord, is the proper party to sue for a trespass upon the property, unless the wrongful act complained of imports a damage to the reversionary estate(*i*). Where the injury is of a permanent nature, and deteriorates the marketable value of the property, so that, if the landlord or reversioner was to sell it, it would fetch less money in the market, there is, as we have seen, a damage to the reversionary estate, in respect of which the reversioner may maintain an action on the case(*k*). "The removal of the smallest portion of soil must, in general, be esteemed an injury to the reversion, because it tends to alter the evidence of title"(*l*).

In the case of permanent injuries to buildings, from trespasses or acts of negligence by strangers, the tenant is entitled to sue in respect of the immediate residential injury, and the reversioner in respect of the diminished saleable value of the property(*n*). Where trees have been injured by a stranger, the lessor and the lessee may both sue in

(*h*) *Murray v. Hall*, 7 C. B. 454; 18 Law J., C. P. 161. *McGill v. Ash*, 7 Barr. 397. If one tenant in common erects a building upon a portion of the land held in common, this will be such an ouster of the co-tenants as will entitle them to maintain trespass. *Bennett v. Clemence*, 6 Allen (Mass.), 10.

(*i*) *Dobson v. Blackman*, 9 Q. B. 991. *Tobias v. Cohn*, 36 N. Y. 363. *Wood v. Williamsburgh*, 46 Barb. (N. Y.) 601. *Lyfora v. Toothaker*, 39 Me. 28. *Holmes v. Seeley*, 19 Wend. 507. *Gilbert v. Kennedy*, 22 Mich. 17.

(*k*) *Ante*, pp. 85, 173, 242, 243. As to injuries from the removal of fixtures, *Hare v. Horton*, 5 B. & Ad. 727. See *Curtiss v. Hoyt*, 19 Conn. 154.

(*l*) Per Cur., *Alston v. Scales*, 4 Bing. 4.

(*n*) *Hosking v. Phillips*, 3 Exch. 168; *post*, Damages. *Van Deusen v. Young*, 29 N. Y. 9. *George v. Fisk*, 32 N. H. 32.

A reversioner who has wrongfully regained possession of leased land may maintain trespass against a mere stranger who has disturbed his possession. *Rollins v. Clay*, 33 Me. 132.

respect thereof; the lessor for the damage done to the body of the tree, the lessee for the loss of the shade and fruit(o). So may the copyholder and the lord(p). But the reversioner cannot, as we have seen, maintain an action against a stranger for entering upon land in the occupation of his lessee, and with carts and horses trampling down the soil and grass, though the entry be made in the exercise of an alleged right of way, as the act is not attended with any permanent injury to the reversion. "Such an act," observes Parke J., "done while the premises were out on lease, would not be evidence of any right as against the reversioner"(q).

If several persons are entitled to the reversion as joint-tenants, co-parceners, or co-heirs in gavelkind, all of them should be joined, as we have seen (*ante*, p. 85), as plaintiffs in an action for an injury to the reversion(r). So, if there are several occupiers or tenants of the injured property, all should be made plaintiffs in an action for damage done to the possessory interest in the premises. Tenants in common, also "should join in actions personal, as trespass in breaking into their houses, breaking their inclosure or fences, feeding, wasting or befouling their grass, cutting down their timber, fishing in their piscary, etc., and shall recover jointly their damages, because in those actions, though their estates are several, yet the damage survives to all, and it would be unreasonable to bring several actions for one single trespass"(s).

422 *Parties to be made defendants.*—Actions for trespasses and injuries to real property may be brought either against the hand actually committing the injury, or against the person by whose order or authority the act was done. A master is liable, as we have seen, for any act done by his servant in the course of executing his orders; and, therefore, where a master ordered his servant to lay some rubbish near his neighbor's wall, but so that it might not touch the wall, and the servant used ordinary care in executing the orders of his master, but some of the rubbish nevertheless ran against the wall, it was held, that the master was liable in trespass(t). But to render the master liable for the trespass of the servant, the servant must, as we have seen (*ante*, p. 30), be acting in the execution of the master's business, or for the master's benefit.

(o) *Bedingfield v. Onslow*, 3 Lev. 209.

(p) *Jefferson v. Jefferson*, ib. 131.

(q) *Baxter v. Taylor*, 4 B. & Ad. 75. *Ante*, pp. 174, 175.

(r) *Bac. JOINT-TENANTS*, K. *Deering v. Moor*, Cro. Eliz. 554. *Ante*, p. 244.

(s) *Bac. Abr. JOINT-TENANTS*, K; *post*, ch. 20.

(t) *Gregory v. Piper*, 9 B. & C. 591; 4 M. & R. 500.

If fences are allowed to go to ruin, and cattle escape and trespass upon the adjoining land, the action for the injury must be brought against the owner of the trespassing beasts, or the person who is by law bound to uphold the fence(*ante*, p. 149). An action for the non-repair of fences cannot be supported against the landlord when the land is in the possession of a tenant; for it is, as we have seen, the duty of the actual occupier to repair and maintain fences, and not the duty of the landlord(*u*).

Where several persons have been jointly concerned in the commission of a trespass, they may, in general, be sued jointly as principals, or the plaintiff may sue any of them separately at his election(*v*).

423 *Declaration for trespass upon land—Venue.*—The rule that the name of the county from which the jury are to come to try the action is to be stated in the margin of the declaration(*post*, ch. 21), does not apply to actions for trespass to land, where the place in which the trespass was committed is described in the body of the declaration. The cause of action for an injury to realty is local, and must, unless the venue is changed by judge's order, be tried in the county where it arises, and where the property is situate(*x*); but any defect in naming the place of trial, or laying the venue, is cured by the statute 16 & 17 Car. 2, ch. 8(*y*). The close or place in which the trespass was committed must be designated in the declaration by name, or abutments, or other description, or the plaintiff may be ordered to amend with costs, or give such particulars as the court or judge may think reasonable(*z*). The description should correspond with the state of the premises at the time of the commission of the trespass, and not at the time of the delivery of the declaration(*a*). It should be reasonably accurate, and the name and situation of the close should be specified(*b*), and the trespass must be proved to have been committed at the place named(*c*).

(*u*) *Cheetham v. Hampson*, 4 T. R. 318.

(*v*) *Ld. Kenyon, C.J., Mitchell v. Tarbutt*, 5 T. R. 651; *post*, ch. 20. Trespass *quare clausum fregit* will lie against a railroad corporation or any other private corporation. *Main v. North-Eastern R. R. Co.*, 12 Rich. Law (S. C), 82.

(*x*) *Chapman v. Morgan*, 2 Greene (Iowa), 374. And see *Pike v. Elliott*, 36 Ala. 69.

(*y*) *Simmons v. Lillystone*, 8 Exch. 441; 22 Law J., Exch. 218. *Warren v. Webb*, 1 Taunt. 379.

(*z*) Reg. Gen. 16 Vict. 18; 1 Ell. & Bl. App. lxxxii. See, to the contrary, *Palmer v. Tuttle*, 39 N. H. 486; *Noyes v. Colby*, 10 Foster (N. H.), 143. And see *Broughton v. Broughton*, 4 Rich. 104.

(*a*) *Humfrey v. London & North-Western R. R. Co.*, 7 Exch. 325; 22 Law J., Exch. 149.

(*b*) *Crocker v. Crompton*, 1 B. & C. 489. In Indiana and Alabama it has been held that an allegation that a trespass was committed in a specified county is a sufficient description of the *locus in quo*. *Jean v. Sandiford*, 39 Ala. 317. *Shippler v. Isenhower*, 27 Ind. 36. And see *Hall v. Mayo*, 97 Mass. 416; *Rice v. Hathaway*, Brayt. 231.

(*c*) *Simmons v. Lillystone*, *supra*. *Wheeler v. Rowell*, 7 N. H. 515. *Manning v. M'Donnell*, 3 Brev. 3. See *Hall v. Mayo*, 97 Mass. 416; *Jean v. Sandiford*, 39 Ala. 317; *Knowles v. Dow* 20 N. H. 135; *Porter v. Sullivan*, 7 Gray (Mass.), 441; *King v. Dunn*, 21 Wend. 253.

Where there is a general district of land known by one general name, and there are several occupiers in the same district, each person may call his own part of the district by the general name(*d*).

The plaintiff may allege generally, "that the defendant broke and entered certain land of the plaintiff, called, etc., and depastured the same with certain cattle"(*e*). If special damages has resulted to the plaintiff from excavations made by the defendant in the soil of the plaintiff, the nature of the damage should be stated(*f*).

If the plaintiff declares as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of the reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto; and the want of such an allegation is cause for arresting the judgment(*g*).

424 *What may be given in evidence under the plea of not guilty.*—In actions for trespasses upon land, the plea of not guilty operates as a denial of the defendant's having committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession, of that place; which, if intended to be denied, must be traversed specially. All other pleas in denial must take issue on some particular matter of fact alleged in the declaration; and all matters in justification, and in confession and avoidance of the cause of action must be pleaded specially(*h*).

425 *Of pleas denying the plaintiff's title or right of possession.*—If the defendant intends to dispute the plaintiff's right of possession of, or title to, the land or messuage on which the trespass is alleged to have been committed, he must plead a plea, alleging that such land or messuage was not the land or messuage of the plaintiff, or a plea of *liberum tenementum*, which is a plea alleging that such close or land was the soil and freehold of the defendant. Under the plea that the land or messuage is not the plaintiff's, both the possession and title are in issue(*i*);

(*d*) *Cooke v. Jackson*, 9 D. & R. 496.

(*e*) 15 & 16 Vict. ch. 76, Sched. Whether the beasts get there from being driven there by the plaintiff, or whether they go there of their own accord, from want of proper custody exercised over them, "is all one," *ante*, pp. 149, 327.

(*f*) *Ante*, pp. 87, 178.

(*g*) *Baxter v. Taylor*, 4 B. & Ad. 74. *Jackson v. Pesked*, 1 M. & S. 234. *Althause v. Rice*, 4 E. D. Smith (N. Y. C. P.), 347.

(*h*) Reg. Gen. Hill. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxii., lxxxii.; *post*, ch. 21. See *Hill v. Morey*, 26 Vt. 178; *Todd v. Jackson*, 2 Dutch. (N. J.) 525; *Ward v. Bartlett*, 12 Allen (Mass.), 419; *Snider v. Myers*, 3 W. Va. 195.

But it has been held that the defendant may, under the general issue, show a right of way over the close. *Strout v. Berry*, 7 Mass. 335. Or soil and freehold in himself. *Monumoi v. Rogers*, 1 Mass. 159.

(*i*) *Jones v. Chapman*, 2 Exch. 803; 18 Law J., Exch. 456; overruling *Whittington v. Boxall*, 5 Q. B. 143.

but this is not the case with the plea of *liberum tenementum*, which admits the plaintiff's possession, but denies his title(*k*). Under these pleas, the defendant may show that the plaintiff is the trespasser, and not the defendant(*l*).

426 *Of the plea of liberum tenementum, or plea of freehold.*—The plea of *liberum tenementum*, is a plea alleging that the close or land in which the trespass was committed was the soil and freehold of the defendant. This plea, as it has justly been observed, though held valid on account of long usage, is bad in reasoning, because the defendant may be a trespasser, though he is himself the freeholder; and to make the plea a consistent defence, it has been held that it admits such a possession in the plaintiff as would enable him to maintain the action against a wrong-doer, and to assert a freehold in the defendant, with a right to the immediate possession as against the plaintiff(*m*). The plea was originally invented for the purpose of driving the plaintiff to prove his title to the land in dispute. And if the declaration goes on to charge the defendant with having expelled the plaintiff from the dwelling-house, and seized and removed his goods, the plea covers and justifies the expulsion and removal of the goods, as well as the breaking and entering the house(*n*); but such a plea is no answer to an assault upon the person(*o*).

427 *Replication—Estoppel.*—To a plea of *liberum tenementum* the plaintiff may reply, that the defendant ought not to be admitted to plead the plea, because, etc. (showing some ground of estoppel); and the defendant must answer the replication by a rejoinder: but if a party means to insist on an estoppel, he must take the first opportunity of doing so which the pleadings afford him; if he fails to do this, he leaves the matter at large, so that the jury may decide upon the evidence before them, without regard to an estoppel(*p*). If an estoppel cannot be pleaded it may be relied on nevertheless at the trial(*q*).

428 *Of the plea of leave and license—Equitable defence.*—The form of the plea of leave and license is, that the defendant did what is complained

(*k*) *Sloccombe v. Lyall*, 6 Exch. 119. *Gilchrist v. McLaughlin*, 7 Ired. 310. *Keener v. Kauffman*, 16 Md. 296. But a plea that the close was the close and soil of the defendant, is not a plea of *liberum tenementum*, and the defendant has only to prove the right of possession. *Millison v. Holmes*, 1 Carter (Ind.), 45. See *Appleby v. Obert*, 1 Harr. 336.

(*l*) *Burling v. Read*, 11 Q. B. 908; 19 Law J., Q. B. 291.

(*m*) *Ryan v. Clark*, 14 Q. B. 71; 18 Law J., Q. B. 269.

(*n*) *Meriton v. Coombes*, 9 C. B. 787; 19 L. J., C. P. 336. *Taylor v. Cole*, 1 Smith's L. C. 119-127, 6th ed.

(*o*) *Roberts v. Taylor*, 1 C. B. 117. *Tribble v. Frame*, 3 Monr. 13.

(*p*) *Feversham v. Emerson*, 11 Exch. 385; 24 Law J., Exch. 254.

(*q*) *Whittaker v. Jackson*, 23 Law. J., Exch. 181.

of by the plaintiff's leave(*r*). Under this plea it may be shown that the plaintiff granted to the defendant a right to enter upon his land, or granted him a lease thereof, or a license to occupy, or leave to enter upon and take possession of the *locus in quo*, and expel the plaintiff therefrom(*s*). Proof may be given under this plea of an exception of timber-trees in a lease made by the defendant to the plaintiff, or a reservation in a parol demise of hedges, trees, and thorn-bushes, with the lop and top, giving the defendant a right to enter upon the land, for the purpose of cutting and carrying away the trees or the loppings of the hedges and bushes(*t*); or it may be shown that the plaintiff took the defendant's goods, and carried them on to his own land; whereupon the defendant entered upon the plaintiff's land, with his (implied) leave, and carried them back to the place from whence the plaintiff took them(*u*). If the plea does not extend to and cover the whole of the trespasses to which it is pleaded, the plaintiff will be entitled to judgment(*x*). Whenever a person has been induced to lay out money upon the land of another, upon the faith of a verbal agreement, that in consideration of the expenditure the person laying out his money shall enjoy an easement, privilege, or profit upon the land, the privilege cannot in equity be withdrawn, as we have seen, by the landlord, without tendering full compensation for the expenditure(*y*); but the verbal agreement or parol license is not pleadable, it seems, by way of equitable defence to an action for trespass, inasmuch as, to constitute a good equitable defence, the fact must be such as to entitle the defendant to absolute and unconditional relief, or to a perpetual injunction(*z*).

429 *Special pleas of matters in confession and avoidance—Matters of excuse.*
—All matters in confession and avoidance are required to be specially pleaded(*a*), such as the defence that the defendant's cattle escaped

(*r*) 15 & 16 Vict. c. 76, Sched. B., No. 44.

(*s*) *Kavanagh v. Gudge*, 7 M. & Gr. 316; 7 Sc. N. R. 1025. That a license must be specially pleaded to be available, see *Hill v. Morey*, 26 Vt. 178; *Hollenbeck v. Rowley*, 8 Allen (Mass.), 473; *Stambaugh v. Hollabaugh*, 10 Serg. & R. 357; *Gambling v. Prince*, 2 N. & M. 138; *Hetfield v. Central R. R. Co.*, 5 Dutch. (N. J.) 571.

Proof of a lease will not support a plea of license. *Johnson v. Carter*, 16 Mass. 443.

(*t*) *Hewitt v. Isham*, 7 Exch. 77; 21 Law J., Exch. 35.

(*u*) Vin. Abr. TRESPASS, 1a. *Patrick v. Colerick*, 3 M. & W. 485. As to breaking open an office to get at books and papers, see *Burridge v. Nicholetts*, 6 H. & N. 383; 30 Law J., Exch. 145. See *Chase v. Jefferson*, 1 Houston (Del.), 257.

(*x*) *Barne v. Hunt*, 11 East, 451.

(*y*) *Laird v. Birkenhead Rail. Co.*, Johns. 500. *Unity Joint Stock Banking Assoc. v. King*, 25 Beav. 79; 27 Law J., Ch. 585. *Ante*, pp. 186, 187.

(*z*) *Hyde v. Graham*, 32 Law J., Exch. 27. *Wakley v. Froggatt*, 33 Law J., Exch. 5. *Addison on Contracts*, ch. 28, s. 2, 6th ed. But see *Allen v. Walker*, L. R., 5 Exch. 187.

(*a*) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxi., lxxxii.

from the defendant's land, and trespassed on the land of the plaintiff, through the neglect of the plaintiff to repair fences which he was bound by contract or by prescription to repair and maintain. Pleas of this sort must show how the obligation to repair arises(b).

- 430 *Pleas justifying a trespass*—Every defendant who justifies his entering or remaining upon the land of the plaintiff against his will, and, therefore, *primâ facie*, against right, is bound to show, on the face of his plea, such circumstances as establish his right in abridgment of the general rights of property(c). If he justifies his entry in the exercise and enjoyment of a profit à prendre, or an easement (*ante*, p. 96), he must set forth in his plea the foundation of his right, showing whether he claims by grant or by prescription, or under a mere personal license of pleasure—which extends only to the individual licensee, and cannot be exercised by his servants—or under a license of profit, which enables his servants to justify under it(d).

If the defendant claims under a particular estate, he must in his plea aver the continuance of that estate. Thus, if he derives his title from a tenant-for-life, he must aver and prove the continuance of the life interest(e). Every plea of justification in trespass must, of course, extend to and cover the whole of the trespasses intended to be justified(f); but it need not be pleaded to acts which are not relied upon as trespasses, but are mere matters of aggravation, and not of substantive charge(g). Where the declaration charges the defendant with breaking and entering the plaintiff's house, and expelling him therefrom, a plea of justification, showing a good cause for the breaking and entering, is a full answer to the declaration, for the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation. If the plaintiff means to insist on the expulsion as making the defendant a trespasser *ab initio*, he must new assign it(h).

- 431 *Justification of trespass under the powers and provisions of an Act of Parliament*.—Where the plaintiff complained that the defendant had built a bridge which encroached upon and projected over the land of the plaintiff, it was held that the defendant might plead generally

(b) *Faldo v. Ridge*, Yelv. 74, 75; *ante*, p. 149.

(c) *Hayling v. Okey*, 8 Exch. 545.

(d) *Ante*, pp. 96, 97. *Wickham v. Hawker*, 7 M. & W. 78. *Moore v. Earl of Plymouth*, 1 Moore, 346; 3 B. & Ald. 66. *Bartlett v. Prescott*, 41 N. H. 493.

(e) *Dayrell v. Hoare*, 12 Ad. & E. 368.

(f) *Curlew v. Laurie*, 12 Q. B. 640.

(g) *Pratt v. Pratt*, 2 Exch. 413. *Davison v. Wilson*, 11 Q. B. 903.

(h) *Taylor v. Cole*, 3 T. R. 297; 1 Smith's L. C. 119-127, 6th ed.

that the several acts, matters, and things of which the plaintiff complained were lawfully done by the defendant, in exercise and by virtue of the powers given to the defendant by an Act of Parliament, made, etc., and intituled, etc.(i). When the defendant justifies the demolition of a house under the powers and provisions of the Metropolis Local Management Act, or of a portion of a house projecting beyond the general line of the street under the Metropolis Local Management Act (25 & 26 Vict. c. 102) ss. 75 and 107(k), it must be shown that the person damnified had an opportunity of being heard before the board prior to the exercise of the power(l).

432 *Pleas justifying the breaking and entering a dwelling-house without warrant(m)* to make an arrest for felony, or to prevent the commission of murder, must show, in the first case, that a felony had been committed, and that there was reasonable ground for believing that the felon was in the house(n); and, in the second case, that the life of some person inside the house was really in danger; that there were calls for assistance; that the door was fastened; and that it was necessary to break it open and enter the house, and render assistance for the preservation of life(o).

433 *Of pleas of justification under a prescriptive title.*—When the defendant justifies, under a prescriptive right to enter and take a profit of the soil (*ante*, p. 112, *et seq.*), he must set forth in his plea an enjoyment as of right, and without interruption for the full period of thirty years before the commencement of the action(p). And when he claims only an easement, he must set forth a similar enjoyment for the period of *twenty* years. The Prescription Act, 2 & 3 Wm. 4, c. 71 (*ante*, p. 138), enacts (s. 5) that in all pleadings where, before the passing of the Act, the party claiming might by law have alleged his right generally, without averring the existence of the right from time immemorial, such general allegation shall be deemed sufficient; and if the same shall be denied, all the matters mentioned and provided in the Act, which are applicable to the case, shall be admissible in evidence to sustain

(i) *Beaver v. Mayor, etc., of Manchester*, 26 Law J., Q. B. 311. *Watkins v. Gt. Northern Rail. Co.*, 16 Q. B. 961. As to the replication to this plea, see *Brine v. Gt. West. Rail. Co.*, 31 Law J., Q. B. 101, and *post*, ch. 16.

(k) 18 & 19 Vict. c. 120, s. 76. *Brutton v. St. George's, Hanover Square (Vestry of)*, L. R. 13 Eq. Ca. 339.

(l) *Cooper v. Wadsworth Board, etc.*, 14 C. B., N. S. 180.

(m) As to justification under warrant and in execution of legal process, see *post*, ch. 18.

(n) *Smith v. Shirley*, 3 C. B. 142.

(o) *Handcock v. Baker*, 2 B. & P. 260.

(p) *Jones v. Price*, 3 Sc. 376; 2 B. N. C. 52. *Clayton v. Corby*, 2 Q. B. 813. *Holford v. Han-kinson*, 5 Q. B. 584. *Cooper v. Hubbuck*, 12 C. B., N. S. 460.

or rebut such allegation; and that in all actions and pleadings wherein it would have been necessary, before the passing of the Act, to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof *as of right*, by the occupiers of the tenement, in respect whereof the same is claimed, for such of the periods named in the Act as may be applicable to the case; and if the other party intends to rely on any proviso, exception, incapacity, disability, contract, agreement, or any matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the claimant (*ante*, p. 140). A person who pleads a right or privilege in gross, not annexed or appurtenant to an estate in land (*ante*, p. 115), must show something more than that he is in possession as occupier. He must show that he is either heir or assignee of the person to whom the right is supposed to have been granted(*q*).

The nature of the right should be correctly set forth on the face of the plea; and if the exercise of it is limited to a particular purpose, if it is a right, for example, to enter upon land for the purpose of digging stones and sand for the necessary repair of a dwelling-house, it should be so stated, and that the dwelling-house was out of repair(*r*). When the defendant justifies under a plea of a right of common, he must by his plea set forth the nature of the right, and show whether he claims by grant or by prescription. If the right be subject to restriction or qualification as to the number of the cattle, or the time of enjoyment, it must be so stated(*s*). If the right claimed be a right of common by prescription for all commonable cattle, levant and couchant upon a particular farm (*ante*, p. 125), the defendant should set forth by his plea that, at the time of the alleged trespass, he was possessed of a messuage, farm, or land, the occupiers whereof, for thirty years before the commencement of the action, enjoyed, as of right, and without interruption, common of pasture over the land of the plaintiff for all their commonable cattle, levant and couchant upon the messuage, farm or land of the defendant at all times, or at all usual or customary times of the year, as the case may be, and that the alleged trespass was a user by the defendant of the said right of common(*t*).

434 *Pleas of justification in the exercise of a right of way.*—When the defendant justifies under a plea of a right of way, he should show the

(*q*) *Bailey v. Stevens*, 12 C. B., N. S. 91; 31 Law J., C. P. 226. *Ante*, p. 119.

(*r*) *Peppin v. Shakespeare*, 6 T. R. 748.

(*s*) 1 Wms. Saund. 18, n. 4, 346b.

(*t*) 15 & 16 Vict. c. 78, Sched. pl. 47.

nature of the right, and whether it is claimed by grant or by prescription, or as a way by necessity (*ante*, p. 133, *et seq.*) (*u*), setting forth in the last case the circumstances whereby the land over which the way is claimed became chargeable with the servitude(*x*). When the plea sets forth a title by prescription, it usually states that the defendant, at the time of the alleged trespass, was possessed of a messuage or land, the occupiers whereof, for twenty years before the suit, enjoyed, as of right and without interruption, a way on foot and with horses and carriages, and cattle, as the case may be, backwards and forwards from a certain public highway over the land of the plaintiff to the land of the defendant, at all times of the year, for the more convenient occupation of the messuage and land of the defendant, and that the alleged trespass was a user by the defendant of the said way(*y*). The plea need not name or describe by metes and bounds the lands and closes in respect of which the right is claimed. A general description is sufficient; and if the plaintiff wants detailed information, he must apply for particulars(*z*). The nature of the right should be correctly stated; and if the enjoyment of it is limited to particular times or periods, or to particular purposes, it should be so stated in the plea(*a*). There is one difference between pleading a public and a private way. In the former case, it is not necessary to set out the termini; in the latter, both must be set out with certainty. It is not necessary, however, to set out the intervening closes over which the way passes(*b*).

To an action of trespass for deviating from a highway and trampling down the plaintiff's inclosure, a plea showing that the plaintiff himself stopped up the highway, so that the defendant could not pass, wherefore the defendant went over the plaintiff's close, doing as little damage as he could, constitutes an answer to the action(*c*).

435 *Replications traversing the prescriptive right set up by the defendant's pleas.*—The fact of the defendant's having the right claimed by his plea may be put in issue by a replication traversing the allegation of the right as set forth in the plea. If the right is claimed by grant, and the answer is that the grant has ceased to operate, the replication must show in what way the grant has ceased to operate(*d*). Though

(*u*) *Howton v. Frearson*, 8 T. R. 50. *Buckby v. Cowles*, 5 Taunt. 311.

(*x*) *Bullard v. Harrison*, 4 M. & S. 392. *Proctor v. Hodgson*, 10 Exch. 824.

(*y*) 15 & 16 Vict. c. 76, Sched. 46. *Jones v. Price*, 3 B. N. C. 52; 3 Sc. 376.

(*z*) *Holt v. Daw*, 16 Q. B. 995.

(*a*) *Higham v. Rabett*, 5 B. N. C. 624. *Bartlett v. Prescott*, 41 N. H. 493.

(*b*) *Simpson v. Lethwaite*, 3 B. & Ad. 233.

(*c*) *Absor v. French*, 2 Show. 28.

(*d*) *Parry v. Thomas*, 5 Exch. 41.

a prescription pleaded be larger than is necessary for the defendant's justification, the plaintiff must nevertheless traverse the whole of it. Since the Prescription Act, a plea setting up a right to a flow of water through a watercourse, and a right to enter upon the adjoining land for the purpose of cleansing and scouring the watercourse, is held to be a plea of the enjoyment of one entire prescriptive right, and is to be treated as one entire thing, and not as setting up two separate prescriptions. If a man pleads a prescriptive right to turn on cows, also a right to turn on horses, and also a right to turn on sheep, the plea sets up one entire right, and the plaintiff should traverse the whole(e).

436 *Traverse of the enjoyment as of right and without interruption.*—When the enjoyment as of right and without interruption is traversed by the plaintiff's replication, the defendant must show an uninterrupted rightful enjoyment, and his claim may be answered by proof of a license, written or parol, for a limited period, falling short of the period relied on. Any evidence negating the continued enjoyment as of right is admissible under this issue; and every time that leave is asked for and obtained there is a break in the continuance of the enjoyment(f), because each asking of leave is an admission that, at that time, the asker had no right. Hence it follows that, not only asking leave, but an agreement commencing within the period, may be given in evidence under the general traverse, notwithstanding the words of the fifth section of the Prescription Act; for the party cannot and does not rely on it as an answer to an enjoyment as of right, which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement, but as showing that there was not, at the time when the agreement was made, an enjoyment as of right, and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years(g).

If the plaintiff chooses to reply, and sets up a tenancy for life, he excludes the time of that tenancy, and drives the defendant to show thirty years' enjoyment, either wholly before the tenancy for life, if it be still subsisting, or partly before and partly after, if it be ended. But it has been said, "What if there had been an interruption for two years during the tenancy for life, and within thirty years before the action, is the plaintiff to be deprived of the benefit of such interrup-

(e) *Peter v. Daniel*, 5 C. B. 568.

(f) *Monmouth Canal Co. v. Harford*, 1 C. M. & R. 631.

(g) *Tickle v. Brown*, 4 Ad. & E. 383. *Bright v. Walker*, 1 C. M. & R. 219. *Ante*, p. 154, *et seq.*

tion?" The answer is, "No: although the tenant for life cannot, by acquiescence, burthen the estate, he may, by resistance, free it; and if the plaintiff chooses to avail himself of that resistance, he may traverse the enjoyment as of right for thirty years, and show the interruption." The defendant will not then be allowed to give the tenancy for life in evidence, in order to avoid the effect of the interruption(*h*).

437 *Replications traversing the enjoyment of a right of way.*—Under a replication denying that the defendant had used a way for forty years as of right and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment during any part of the time, as that it was used by stealth, or in the absence of the occupier of the close, and without his knowledge, or that the land was let on lease, and that the user and enjoyment were without the privity of the landlord, and that the latter had no means of knowing what was done upon the land to the prejudice of the inheritance, and could not therefore have prevented it (*ante*, p. 135), or that the enjoyment was a precarious enjoyment, by leave and license, or any other circumstances which negative the fact that it was a user and enjoyment as of right(*i*).

All acts showing that the defendant's user, although as of right and without interruption for the period specified, was not such a user as would, before the Prescription Act, have been sufficient to establish a claim by prescription or grant, must be replied specially, and cannot be given in evidence under a traverse of the right of way alleged in the plea(*k*).

438 *Facts and circumstances which must be specially replied, and cannot be given in evidence under a general traverse of the enjoyment as of right and without interruption for the periods named in the Prescription Act.*—By the fifth section of the Prescription Act (*ante*, p. 140), it is enacted that if the party resisting the claim intends to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter thereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation. "The greatest difficulty," observes Lord

(*h*) *Clayton v. Corby*, 2 Q. B. 825.

(*i*) *Beasley v. Clarke*, 3 Sc. 263.

(*k*) *Kinloch v. Neville*, 6 M. & W. 795. Where the defendant justifies a trespass under the plea of a right of way, the plaintiff may traverse the alleged right, and at the same time newly assign for other trespasses committed *extra viam*. *Cheswell v. Chapman*, 42 N. H. 47.

Denman, “arises from the language of the concluding paragraph of this fifth section of the Prescription Act, and more particularly from the words, ‘or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment.’ As all these matters are required to be specially pleaded, and forbidden to be given in evidence under a general traverse of the enjoyment as of right, it is plain that they are treated by the legislature as consistent with such an enjoyment; and as, by the rules of pleading and of logical reasoning, every allegation by way of answer which does not deny the matter to which it is proposed as an answer is taken to confess it, we must conclude that the legislature used the words ‘as of right’ in such a sense as that a party confessing the enjoyment as of right for forty years, or twenty, as the case may be, may account for and avoid the effect of it by alleging, in the one case, a consent or agreement, provided it be by deed or writing (see sec. 2), and in the other, any contract, etc., written or parol (see sec. 5). It follows that the words ‘as of right’ cannot be confined to an adverse right from all time, as far as evidence shows; for if they were so confined, such enjoyment, once confessed, could not be avoided by replying that it was held by contract which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words ‘enjoyment as of right’ cannot be confined to enjoyment under a strict legal right, for then a ‘consent or agreement’ in ‘writing,’ not under seal, of which the second section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words ‘claiming right thereto,’ in the second section, otherwise there will be incongruities in the construction of the Act. It seems, therefore, that the enjoyment as of right must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions, of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user, or by deed conferring the right, or though not strictly lawful to the extent of excusing a trespass, as by a consent or agreement in writing, not under seal, in case of a plea for forty years, or by such writing, or parol consent or agreement, contract, or license, in case of a plea for twenty years (*ante*, p. 139). According to this view of the Act, a license in writing must be replied to a plea of forty years’ enjoyment, if it cover the whole

time, and the same of a parol license, in case of a plea for twenty years"(l).

439 *Replication of the existence of a tenancy for life during part of the period of enjoyment relied upon by the plea.*—Where there has been a thirty years' notorious enjoyment of a profit à prendre during a tenancy for life had with the knowledge and acquiescence of the owner of the fee, so as to be an enjoyment as of right within the statute against the inheritance (*ante*, pp. 143, 144), the tenancy for life must be specially pleaded by the reversioner, in order to exclude such thirty years' enjoyment from the computation of the prescriptive period under the statute. Thus where, in an action of trespass, the defendant pleaded an uninterrupted user and enjoyment of a profit à prendre for thirty years under s. 1 of 2 & 3 Wm. 4, c. 71, and the plaintiff, by his replication, traversed the enjoyment, and the defendant, at the trial, proved enjoyment for thirty years next before the action, it was held that the plaintiff was not at liberty to prove a tenancy for life during part of those thirty years, as he had not set it up by his replication(m).

440 *Rejoinder traversing the fact of the existence of the tenancy for life during part of the period of enjoyment.*—If a tenancy for life during the thirty years' period be replied and traversed by the rejoinder, the defendant may insist that the thirty years' enjoyment alleged in the plea is made up of time preceding and following the tenancy for life(n).

441 *Evidence at the trial—Proof on the part of the plaintiff.*—If the plaintiff in his declaration has alleged that he is possessed of a close, and proves possession either of the surface or of the subsoil and minerals beneath the surface, he sustains his declaration(o). Under the plea of not guilty, the plaintiff must be prepared to prove the commission, by the defendant, his servants or agents, of the trespass of which he complains(p). Where it was proved that the plaintiff was tenant of certain rooms in the defendant's house, and that the defendant unlawfully locked the door and kept him out, it was held that the jury might infer that there had been an actual entry by the defendant into the plaintiff's rooms, so as to support an allegation in a declaration that the defendant broke and entered the rooms of

(l) Per Cur., *Tickle v. Brown*, 4 Ad. & E. 382.

(m) *Pye v. Mumford*, 11 Q. B. 675.

(n) *Clayton v. Corby*, 2 Q. B. 813.

(o) *Cox v. Glue*, *ante*, p. 75.

(p) *Ante*, p. 358. Com. Dig. TRESPASS.

the plaintiff and expelled him therefrom(*q*). To fix the defendant with a trespass committed by the hand of another, it must be proved that the act was done by command of the defendant, or that it was done for his benefit, and that he subsequently adopted and ratified the act(*r*).

Where the declaration alleged that the defendant entered the plaintiff's dwelling-house, and continued therein for eight days, it was held that the plaintiff was entitled to show a trespass committed by the defendant in the dwelling-house on any of those days, and that the plaintiff need not prove that the defendant continued there the whole time; but, when various subsequent acts of trespass are given in evidence, it ought to appear that they were all in continuation, or in furtherance, of the original wrongful act(*s*).

442 *Proof under a traverse of the plaintiff's possession, or right of possession, of the locus in quo.*—If the defendant, by his plea, denies the plaintiff's possession, or right of possession, of the *locus in quo*, the plaintiff must be prepared with general evidence of actual or constructive possession at the time of the commission of the alleged trespass. If the soil and freehold of the *locus in quo* are proved to be in the plaintiff, the possession is also presumed to be in him, unless there be some evidence to the contrary(*t*), for possession follows the property when there is no actual possession in another person(*u*). Actual(*uu*) or constructive(*v*) possession, without proof of any title to the soil and freehold, is quite sufficient to support an action against a wrong-doer; for he who commits a trespass upon the possession of another, being himself a wrong-doer, has no right to put the other party to proof of title. A lessee of the vesture or herbage, or a purchaser of growing crops, who has a right to the use of the land for

(*q*) *Lane v. Dixon*, 3 C. B. 776.

(*r*) *Ante*, pp. 30-34; *post*, ch. 20, s. 2.

(*s*) *Percival v. Stamp*, 9 Exch. 174.

(*t*) *Parke, B., Hebbert v. Thomas*, 1 C. M. & R. 864.

(*u*) *Rex v. Mayor, etc., of London*, 4 T. R. 26. *Terpenning v. Gallup*, 8 Clarke (Iowa), 74. *Snider v. Myers*, 3 W. Va. 195. *McGran v. Bookman*, 3 Hill (S. C.), 265. *Safford v. Basto*, 4 Mich. 406. *Shipman v. Baxter*, 21 Ala. 456. *Gillespie v. Dew*, 1 Stew. 229. *Aikin v. Buck*, 1 Wend. 466. *Warren v. Cochran*, 10 Foster (N. H.), 379.

(*uu*) *Brown v. McCloud*, 3 Head (Tenn.), 280. *Catterlin v. Douglass*, 17 Ind. 213. *Albin v. Lord*, 39 N. H. 196. *Rogan v. Perry*, 6 Wis. 194. *Black v. Grant*, 50 Me. 364. *Barstow v. Sprague*, 40 N. H. 27. *Hunt v. Rich*, 38 Me. 195. *Tyson v. Shucry*, 5 Md. 540. *Linard v. Crossland*, 10 Texas, 462. *Chandler v. Walker*, 1 Foster (N. H.), 282. *Moor v. Campbell*, 15 N. H. 208. *Inskeep v. Shields*, 4 Harring. 345; *Barnstable v. Thatcher*, 3 Met. 239. *Larue v. Russell*, 26 Ind. 386.

(*v*) *Terpenning v. Gallup*, 8 Clarke (Iowa), 74. *Cohon v. Simmons*, 7 Ired. 189. *Graham v. Houston*, 4 Dev. 232. *Leadbetter v. Fitzgerald*, 1 Pike, 448. *Wilson v. Bushnell*, id. 465. *Davis v. Clancy*, 3 M'Cord, 422. *Bulkley v. Dolbeare*, 7 Conn. 233. But see *Stean v. Anderson*, 4 Harring. 209; *Webb v. Sturtevant*, 1 Scam. 181.

bringing the crops to maturity, and has, consequently, an interest in the soil, may maintain an action for a trespass upon his close or land, against any person who wrongfully comes upon the land, or interferes in any way with the growing crops(x); but a purchaser of crops arrived at maturity, who has bought them with a view to their immediate severance as chattels, and has no interest in the soil, cannot maintain an action for a trespass upon the land, but must confine his cause of action to a claim for damages for an injury to goods and chattels(y).

Very slight evidence of possession is sufficient to establish a *prima facie* title to sue for an injury to realty, such as the occupation of the soil with stones and rubbish, which have been placed thereon by order of the plaintiff, and kept there for some short time without molestation, or the building of a wall, or a dam, mound, or fence, which goes on for some weeks without interruption, and is then knocked down(z); or the inclosure or cultivation of a piece of waste ground, the mowing of the grass thereof; or the pasturing of a cow thereon; for mere occupancy of land, however recent, gives a good title to the occupier, whereon he may recover as against all who cannot prove an older and better title in themselves(a). The digging of pits in a common, and throwing out heaps of earth, are *prima facie* proof of ownership of the heaps cast out, so as to support an action against a wrong-doer for carting away the heaps(b).

A mere intruder may have a possession sufficient to enable him to maintain an action against a person who does an injury to that possession; but he cannot maintain any action in which it would be necessary to prove title(c).

To maintain the action, however, there must in all cases be proof,

(x) Crosby v. Wadsworth, 6 East, 609. See Roads v. Overseers of Trumpington, L. R., 6 Q. B. 64; Dolloff v. Danforth, 43 N. H. 219.

(y) Parker v. Staniland, 11 East, 366. Evans v. Roberts, 5 B. & C. 837.

(z) Every v. Smith, 26 Law J., Exch. 345. Dyson v. Collick, 5 B. & Ald. 600; 1 D. & R. 225. But see Allen v. Suseng, 1 Cold. (Tenn.) 204; Tappan v. Barnham, 8 Allen (Mass.), 65.

(a) Gatteris v. Cowper, 4 Taunt. 547. Matson v. Cooke, 6 Sc. 184; 4 B. N. C. 392. Possession of land under a levy is sufficient to maintain trespass against a mere stranger. Blaisdell v. Roberts, 37 Me. 239. See Cressy v. Sawyer, 18 N. H. 95.

The cutting of wood and timber on a tract of woodland for over twenty years, under a claim of title, will support an action of trespass against one having no title. Kilborn v. Rewee, 8 Gray, 415. And see Rogan v. Perry, 6 Wis. 194.

But a mere occupant of land cannot maintain trespass against the true owner. Merriam v. Willis, 10 Allen (Mass.), 118. Inskeep v. Shields, 4 Harring. 345. Nor can the person having the title bring trespass *quare clausum fregit* against one having actual possession. Vance v. Beatty, 4 Rich. 104. Amick v. Frazier, Dudley, 340. But the owner of real estate, if in possession, may maintain trespass against one also in possession and claiming title as a tenant in common with the owner. Hunting v. Russell, 2 Cush. 145.

(b) Northam v. Bowden, 11 Exch. 72.

(c) Harper v. Charlesworth, 4 B. & C. 589. Hurd v. West, 7 Cow. 752.

either of title or of actual or constructive possession by the plaintiff at the time the trespass was committed(*d*). Where, therefore, the plaintiff held some marsh-land under a tenant for life, so that his interest ceased on the death of the tenant for life, and at the time of the determination of the life-interest, and down to the time of the commission of the trespass, and the commencement of the action, the plaintiff had no servants or cattle, or anything upon the land to show that he continued in possession of it, it was held that there was no proof that he was possessed of the land, and that his action was not maintainable(*e*).

Where certain commissioners of sewers placed a dam in a public navigable river, the soil or bed of which was not vested in them, it was held that they had no such possession of the dam as would enable them to maintain an action against a wrong-doer for pulling it down(*f*). But if it be proved that contractors or commissioners of public works have got the permission of the owner of the soil for the erection of their works, or it be shown that they or their servants were in the actual possession of the works at the time of the commission of the trespass, this will be sufficient to enable them to maintain the action(*g*).

Where a landowner gave the plaintiff license or permission to build a bridge on his land, for the use of the public, and the plaintiff built the bridge, and the defendant afterwards removed the parapets and carried away the stones, it was held that, on the severance of the stones from the land, they became chattels, the property in which was vested in the plaintiff, and that he was entitled to maintain an action against the defendant for carrying them away(*h*).

Navigation commissioners authorized by statute to make a river navigable and form towing-paths, on making compensation to the adjoining landowners, have no such possession of the soil of the towing-path, or of the artificial river-banks formed by deepening the river, and throwing out the soil from the bed to the sides of the stream, as will enable them to maintain an action for a trespass for cutting down trees growing in the soil of the towing-path or the banks, although

(*d*) See *Harrison v. Blackburn*, 34 L. J., C. P. 109; *Halligan v. Chicago and Rock Island R. Co.*, 15 Ill. 558; *Vance v. Beatty*, 4 Rich. 104; *Church v. Meeker*, 34 Conn. 421; *Ridgely v. Bond*, 17 Md. 14; *Dejarnett v. Haynes*, 23 Miss. 600; *Congregational Society v. Baker*, 15 Vt. 119; *Richardson v. Palmer*, 38 N. H. 212; *Weitzler v. Marr*, 46 Penn. St. 463; *Brown v. Thomas* 26 Miss. 334.

(*e*) *Brown v. Notley*, 3 Exch. 221; 18 Law J., Exch. 39.

(*f*) *Duke of Newcastle v. Clark*, 8 Taunt. 621.

(*g*) *Dyson v. Collick*, 5 B. & Ald. 600.

(*h*) *Harrison v. Parker*, 6 East, 154.

they may have been in the habit of repairing, mowing, and trimming the banks, and exercising acts of ownership over them(*i*).

Proof of the possession of the key of a building is no proof of the possession of the building itself(*k*).

If the plaintiff has come into the possession of the land after the trespass was committed, the trespass is not a trespass against him; and he cannot maintain an action in respect of it(*l*), unless it is a continuing trespass(*m*).

443 *Proof by the reversioner*.—When the action is brought by the reversioner in respect of some injury to his reversionary estate, proof of the receipt of rent by him will be *primâ facie* proof of his title to the reversion. Thus, in an action by the reversioner for cutting down trees on land in the possession of his tenant, proof of payment of rent by the latter to the plaintiff is *primâ facie* evidence of the plaintiff being the reversioner, and of the trees being his property(*n*).

444 *Heir-at-law*.—To sustain an action by an heir-at-law for trespasses committed upon land descended to him, where he is not in possession of the land, but the action is brought against a trespasser who contests his title, there must be proof of entry by the heir, and, after entry, his right of possession relates back, so as to support an action against a wrong-doer for a trespass committed at an antecedent period(*o*).

445 *Proof of disseisin and re-entry*.—If one disseises me, and during the disseisin he cuts down the trees or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him for the trees, grass, corn, etc.; for, after my regress, the law, as to the disseisor and his servants, supposes the freehold always continued in me(*p*). By his re-entry the disseisee is remitted to his first possession, as if he had never been out of possession(*q*). A person, therefore, who has the freehold and a

(*i*) *Hollis v. Goldfinch*, 1 B. & C. 218. *Ante*, pp. 107, 351.

(*k*) *Revett v. Brown*, 5 Bing. 7.

(*l*) *Pilgrim v. Southampton, etc.*, Rail. Co., 18 Law J., C. P. 332.

(*m*) *Holmes v. Wilson*, 10 Ad. & E. 503.

(*n*) *Jayne v. Price*, *ante*, p. 333. *Daintry v. Brocklehurst*, 3 Exch. 209.

(*o*) *Barnett v. Earl of Guildford*, 24 Law J., Exch. 281; 11 Exch. 19. In New Hampshire, an heir or devisee may maintain trespass without first making an entry. *Dexter v. Sullivan*, 34 N. H. 478.

(*p*) *Liford's case*, 11 Co. Rep. 51a. *Dewey v. Osborn*, 4 Cow. 329. *King v. Baker*, 25 Penn. St. 604. *Cleveland v. Jones*, 3 Strobb. 479, note. And see *Abbott v. Abbott*, 51 Me. 575; *Cutting v. Cox*, 19 Vt. 517.

In New Hampshire, a disseisee having a right of entry as against his disseisor, may maintain trespass *quare clausum fregit* against the disseisor continuing in possession, for acts subsequent to the original disseisin, without first making an actual entry. *Carter v. Beals*, 44 N. H. 408.

(*q*) *Holcome v. Rawlins, Moore*, 461.

right to the possession of land may, by a peaceable entry upon the land, acquire sufficient possession of it to enable him to maintain an action for a trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land(*r*). It is not necessary that the person who makes the entry should declare that he enters to take possession. It is sufficient if he does any act to show his intention, and, having regained constructive possession by his peaceable entry upon the unlawful possession of the occupier, and being entitled to treat the latter as a trespasser, all those who come upon the land without title, after such vesting of possession, are trespassers, and liable to be sued as such. If a landlord, having a right to the possession of land on the expiration of a lease, sends his agent to the land to demand possession, and the agent enters and makes the demand, this is a sufficient entry to clothe the landlord with the constructive possession, so as to enable him to sue in trespass all persons who subsequently come upon the land by the authority of the tenant(s).

446 *Evidence for the defence.*—Under a traverse of the allegation in the declaration, that the close was the close of the plaintiff, the defendant is at liberty to show title in himself, or some other person under whose authority he claims to have acted(*t*).

If the defendant relies upon a plea of *liberum tenementum* (*ante*, p. 361), he must prove that the land whereon the alleged trespass was committed was his own soil and freehold, and that he was entitled to the possession of it as against the plaintiff. By this plea the defendant admits, as we have seen, that the plaintiff is in possession, and that he himself is, *primâ facie*, a wrong-doer; but he undertakes to show a title in himself which shall do away with the presumption arising from the plaintiff's possession. He may do this either by showing title by deed in the usual way, or by proving a possessory title for twenty years(*u*). If, under this plea, the defendant establishes a title to that part of the close on which the alleged trespass was committed, he will be entitled to a verdict; for he is not bound to prove a title to the whole close, unless he has upon the record expressly undertaken to prove the whole close to be his soil and freehold(*x*).

When the plaintiff has in his declaration described by name or by

(*r*) *Butcher v. Butcher*, 7 B. & C. 402; 1 M. & R. 220. *Litchfield v. Ready*, 5 Exch. 939.

(*s*) *Hey v. Moorhouse*, 8 Sc. 168; 6 B. N. C. 52.

(*t*) *Jones v. Chapman*, 2 Exch. 812. See *Gilbert v. Felton*, 5 Gray (Mass.), 406; *Jewett v. Foster*, 14 Gray (Mass.), 495; *Miller v. Decker*, 40 Barb. (N. Y.) 228; *Beach v. Livergood*, 15 Ind. 496.

(*u*) *Brest v. Lever*, 7 M. & W. 595.

(*x*) *Smith v. Royston*, 8 M. & W. 386. *Phillips v. Phillips*, 1 N. J. 42.

abuttals the close in which, as he alleges, the trespass was committed, and the defendant pleads *liberum tenementum* generally, the defendant cannot, by showing that he himself is possessed of a close of the same name and in the same vill, turn the plaintiff round, and prevent him from proving a trespass in his own close, as named in the declaration(y). The defendant must make out his title to the freehold on the very spot described in the declaration; and, on his proving a *primâ facie* right to enter the close because it is his freehold, it will be competent to the plaintiff to prove that it has been demised to him, and to show his lease, if he have one(z). Where separate trespasses are alleged to have been committed in three different closes, specifically described in the declaration, and the defendant, by his plea, says, in effect, that each of them was his own soil and freehold, the issues will be taken distributively, so that the plaintiff may have a verdict as to one close, and the defendant as to another(a).

447 *Proof of leave and license.*—If the defendant relies upon a plea of leave and license, he must prove either an express permission from the plaintiff to the defendant to come upon the land(b), or circumstances from which such a permission may fairly be implied(c). If, after a parol license to use a way has been granted, the licensor locks a gate across the way, this is a revocation of the license, and the licensee cannot lawfully break open the gate to use the way(d). A licensee can of course, take no better title or authority than the licensor himself possesses; and, therefore, if one tenant in common gives to the defendant license or permission to dig and carry away soil, or brick-earth, or turf, from the estate holden in common, this will give the defendant no right or title as against the other co-tenant in common, and will afford no answer to an action brought by the latter for a trespass(e). If the license or permission of the wife, daughter, or servant of the plaintiff has been obtained by the defendant, this will be no evidence of a license from the plaintiff, unless the surrounding circumstances show that the wife, daughter, or servant had the plaintiff's express or implied authority to grant the license(f). Under a general plea of leave and license, the defendant is bound to prove a

(y) *Cocker v. Crompton*, 1 B. & C. 491. *Lemprière v. Humphrey*, 3 Ad. & E. 186.

(z) *Harvey v. Brydges*, 14 M. & W. 441; 1 Exch. 261.

(a) *Pythian v. White*, 1 M. & W. 223.

(b) *Kavanagh v. Gudge*, 7 M. & Gr. 316.

(c) *Ditcham v. Bond*, 3 Campb. 524. *Martiu v. Houghton*, 45 Barb. (N. Y.) 253.

(d) *Hyde v. Graham*, 32 Law J., Exch. 27. See *Jamieson v. Milleman*, 3 Duer (N. Y.), 255.

(e) *Wilkinson v. Hagarth*, 12 Q. B. 846.

(f) *Taylor v. Fisher*, Cro. Eliz. 246. *Holdringshaw v. Rag*, ib. 876.

license co-extensive with all the acts of which the plaintiff complains; for if some of those acts are not covered and authorized by the license, the plaintiff will be entitled to damages in respect of them. A license to a defendant to have the key of a house, and to enter it when he pleases, will not authorize the defendant to enter the house otherwise than by the door, in the ordinary way. If, therefore, the defendant, having lost the key, enters the house by a window, he commits a trespass; and if evil-disposed persons, following his example, get into the house through the same window, and rob the house, the defendant will be responsible for the damage done(*g*).

Where a man is licensed to do a thing, it necessarily implies that he may do everything without which the thing authorized to be done cannot be done (*ante*, pp. 104, 105). If, therefore, the plaintiff has authorized the defendant to sell furniture and effects in the plaintiff's house, the license extends to all such assistants as may be necessary to enable the defendant to effect the sale and remove the goods(*h*). A plea of leave and license is not supported by proof that the plaintiff sold to the defendant certain goods and chattels which were deposited on the plaintiff's premises, and that the defendant entered upon the premises to remove the goods, for there is no implied authority to a purchaser to enter upon the vendor's land and help himself to the goods. There must be an express agreement to that effect(*i*).

A license obtained by wilful misrepresentation and deceit is a mere nullity, and will not justify or excuse a trespass by a defendant who was a party to the misrepresentation(*k*). And if there has been a mistake and misunderstanding between the parties without fraud, the license will be a nullity(*l*), but the misunderstanding will go in reduction of damages in an action for the unintentional trespass. Under a replication denying the fact of the license, the plaintiff may prove that it was revoked, with notice to the defendant prior to the commis-

(*g*) *Ancaster v. Milling*, 2 D. & R. 714.

(*h*) *Dennett v. Grover*, Willes, 195.

(*i*) *Williams v. Morris*, 8 M. & W. 488. *McLeod v. Jones*, 105 Mass. 403. A sale of chattels, which are at the time upon the land of the seller, will authorize an entry upon the land to remove them, if by the express or implied terms of the sale, that is the place where the purchaser is to take them. *Id.* *Nettleton v. Sikes*, 8 Metc. 34. *Giles v. Simonds*, 15 Gray, 441. *Drake v. Wells*, 11 Allen, 441. *McNeal v. Emerson*, 15 Gray, 384. *Wood v. Manley*, 11 Ad. and El. 34. See *Long v. Buchanan*, 27 Md. 502. A license is implied because it is necessary in order to carry the sale into complete effect, and is therefore presumed to have been in contemplation of the parties. It forms part of the contract of sale. *McLeod v. Jones*, 105 Mass. 403. But there is no such inference to be drawn when the property, at the time of sale, is not upon the seller's premises, or where by the terms of the contract it is to be delivered elsewhere. *Id.*

(*k*) *Roper v. Harper*, 4 B. N. C. 20.

(*l*) *Bridges v. Blanchard*, 1 Ad. & E. 551. See *Davies v. Marshall*, 10 C. B., N. S. 697.

sion of the trespass(*m*). A parol license to enjoy an easement over or upon the soil and freehold of another is at once determined, as we have seen, by a transfer of the property, and the grantee of the license is consequently a trespasser, if he afterwards enters upon the land in the exercise and enjoyment of his supposed right, although he has received no notice of the transfer(*n*).

448 *Proof of pleas of justification*.—If the defendant has pleaded a plea justifying the trespass in the exercise of a privilege, profit à prendre, or easement, he must prove his right or title to the enjoyment of the incorporeal hereditament, either under an express or implied grant (*ante*, p. 101, *et. seq.*), or by prescription (*ante*, p. 133, *et. seq.*); and he must make out his justification as to that part of the close named in the declaration in which the trespass is proved to have been committed(*o*); but it is not necessary, in support of pleas of user and enjoyment under the Prescription Act, to show an actual exercise of the right in the very spot, when it is parcel of a larger tract. It is sufficient to show user and enjoyment over the larger tract under such circumstances, that it may reasonably be inferred that the right extended over the whole of the larger tract, including the spot in question(*p*).

449 *Proof of right of way—Pleas of justification*.—If the defendant justifies in the exercise of a right of way (*ante*, pp. 104, 105, 143, 164, 169), he must prove a right co-extensive with the right claimed(*q*). If he proves a larger and more extensive right than he claims, but the right claimed is included in the more extended right proved, there is, as we have seen, no variance. Thus a plea of a right of foot-way is supported by proof of a right of way for carts or carriages, as a carriage-way always includes a foot-way(*r*). A plea of a right of way in the occupiers of certain premises may be established by proof that the defendant is seised of a freehold or copyhold estate in such premises, and that they are in the occupation of a tenant to whom he has demised them; for a landlord may be constructively an occupier so as to give him a right to use a way appurtenant to his own premises, although those premises are in the possession of a tenant. The landlord of a tenement to which a right of way is appurtenant may, while the tenement is in the occupation of a tenant, lawfully use the way to remove

(*m*) *Adams v. Andrews*, 15 Q. B. 291. *Barnes v. Hunt*, 11 East, 451; *ante*, pp. 98, 99.

(*n*) *Wallis v. Harrison*, *ante*, p. 120.

(*o*) *Bassett v. Mitchell*, 2 B. & Ad. 105. *Wood v. Wedgewood*, 1 C. B. 277.

(*p*) *Peardon v. Underhill*, 16 Q. B. 123.

(*q*) *Brunton v. Hall*, 1 Q. B. 792.

(*r*) *Davies v. Stephens*, 7 C. & P. 571; *ante*, pp. 181, 182.

an obstruction, and to assert the right of way, or to view waste, or to demand rent, or for any other purpose connected with the exercise of his rights or duties as a landlord(s).

A justification of trespass, under a custom for all the inhabitants of a particular town to walk and ride over a close of arable land at all seasonable times in the year was held bad, because it appeared that the trespass was committed when the corn was standing, and it was held that "seasonable time" was partly a question of law and partly of fact(t).

450 *Proof of deviations extra viam in the case of private ways.*—When a way has once been assigned, or a prescriptive right to go in any particular direction established, the course or direction of the way cannot be altered by one party without the consent of the other. A grant of a right of way to and from a particular dwelling-house, coach-house, and stables, will not enable the defendant to go to and from an adjoining spot which he can reach from the same line of road. If there be a grant of a way to a particular corner of a field, the grantee can go to no other part(u). Where *T* had a way over the close of *H*, and *H* ploughed and sowed his close, leaving a way in an unploughed place in the same close, it was held that *T* was not bound to use the new unploughed way, but was entitled to go where the ancient way was. *H* may, however, use the new way as long as it lies open; but if the owner afterwards stops up the new way, he has no right to remove the obstruction and pass along it(x). In the case of a public highway out of repair, passengers have a right to go upon the adjoining land, but this is not the case with a private way. If the passenger deviates, he commits a trespass(y).

If a man has a right of way to a close called *A*, he cannot justify using the way to go to *A*, and from thence to another close of his own adjoining to *A*(z).

(s) *Proud v. Hollis*, 1 B. & C. 9; 2 D. & R. 31. A defence to an action of trespass *quare clausum fregit* may be sustained by proof of a right of way over the premises from the plaintiff's grantor, before the conveyance of the premises to the plaintiff. *Walker v. Newhouse*, 14 Mo. 373.

(t) *Bell v. Wardell*, Willes, 202. *Mounsey v. Ismay*, *ante*, p. 122.

(u) *Henning v. Burnett*, 8 Exch. 193. *Skull v. Glennister*, 33 Law J., C. P. 185. See *Davenson v. Lamson*, 21 Pick. 72; *Shroder v. Brenneman*, 23 Penn. St. 348.

(x) *Horne v. Widlake*, Yelv. 141; *Noy*, 128. *Reignolds v. Edwards*, Willes, 283. See *ante*, p. 164.

(y) *Taylor v. Whitehead*, 2 Doug. 747. *Bullard v. Harrison*, 4 M. & S. 393. *Miller v. Bristol*, 12 Pick. 550. *Holmes v. Serly*, 19 Wend. 507. *Capers v. M'Kee*, 1 Strobb. 168. *Williams v. Safford*, 7 Barb. 309. *Bakeman v. Talbot*, 31 N. Y. 366, 372. *Campbell v. Race*, 7 Cush. 408. *State v. Northumberland*, 44 N. H. 631.

(z) 1 Roll. Abr. 391. (CHIMIN. PRIVATE) cited *Allan v. Gomme*, 11 Ad. & E. 770.

451 *Proof of a public right of way.*—Nothing done by a lessee, without the knowledge or consent of the owner of the fee, will, as we have seen (*ante*, p. 269), give a right of way to the public; and the public can take no larger or more extensive right of way than the owner of the fee thinks fit to grant or to allow. “They must take *secundum formam doni*, and if they cannot take according to that, they cannot take at all. If a restriction cannot by law exist as to a public way, then the grant is only a license revocable.” Where, therefore, a landowner suffered the public to use for several years a road through his estate for all purposes except that of carrying coals, it was held that this was either a limited dedication of the road to the public or no dedication at all, but only a license revocable; and that a person carrying coals along the road, after notice not to do so, was a trespasser(*a*).

452 *Proof of a right of way over vacant or waste strips of land extending alongside a private thoroughfare.*—“When,” observes Lord Tenterden, “I see a space of fifty feet, through which a road passes between inclosures set out under an Act of Parliament, I am of opinion that, unless the contrary be shown, the public are entitled to the whole of that space, although, perhaps, from economy, the whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees inclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun”(*b*). A highway board, therefore, or other authority having jurisdiction over a highway set out under an Enclosure Act, are justified in cutting down trees growing on the space between the highway as actually used, and its boundary as set out in the Enclosure Act, but not, it seems, in selling them, as against the owner of the soil in which they grew(*c*).

453 *Proof of entry on the plaintiff's land for the purpose of depositing thereon the plaintiff's own goods, or removing therefrom the goods of the defendant.*—In Rolle's Abridgment it is said, “If a man comes into my close with an iron bar and sledge, and there breaks my stones, and after departs and leaves the sledge and bar in my close, in an action of trespass for taking and carrying of them away, I may justify the taking of them and putting them in the close of the plaintiff

(*a*) Marquis of Stafford v. Coyney, 7 B. & C. 257. As to proof of dedication of way, see *ante*, p. 265, *et seq.*

(*b*) Rex v. Wright, *ante*, p. 272.

(*c*) Turner v. Ringwood Highway Board, L. R., 9 Eq. Ca. 418. See Phifer v. Cox, 21 Ohio St. 248; Cole v. Drew, 44 Vt. 49.

himself next adjoining, especially giving notice of it to the plaintiff, inasmuch as they were brought into my close of his own tort; and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them by tort of the plaintiff”(d). An entry on the plaintiff's land may be justified on the ground that the plaintiff took the defendant's goods and carried them on to his own land, wherefore the defendant entered upon the plaintiff's land and took his goods back again(e); but the entry is not justifiable from the mere fact of the plaintiff's goods being on the defendant's land. It must be shown that they came there by the plaintiff's act(f).

454 *Of the damages recoverable in actions for trespasses upon real property.*—

All damages which naturally result from the wrongful act of the defendant, and are directly traceable thereto, may be recovered by the plaintiff, if he claims them in the declaration(g). Where the plaintiff, being desirous of letting his house, placed the key under the control of the defendant, and, the key having been carried away, the defendant got a ladder and entered the house through a bed-room window, which had no fastenings, and showed some strangers over the house, and a few nights afterwards the house was entered, apparently by the same window, and valuable property of the plaintiff was stolen, it was held that the defendant was responsible in an action of trespass for the loss the plaintiff sustained by the robbery(h).

455 *Trespasses on land after notice or warning not to trespass.*—Surrounding circumstances of aggravation will materially influence the amount of damages to be recovered for a trespass upon land. Where the plaintiff, a gentleman of fortune, was shooting upon his estate, and the defendant, a banker and magistrate, and member of parliament, went up to the plaintiff and told him he would join his shooting party, and the plaintiff declined, and ordered him off his land, and gave him notice not to shoot there; but the defendant swore that he would shoot there, and did so, and threatened and defied the plaintiff, and the jury gave 500*l.* damages, the court refused to disturb the verdict. “I do not know,” observes Gibbs, C.J., “upon what principle we can grant a rule for a new trial in this case, unless we were to lay it down

(d) *Cole v. Maundy*, 1 Roll. Abr. TRESPASS, 1 pl. 17, p. 566. *Rea v. Sheward*, 2 M. & W. 426.

(e) 3 Vin. Abr. TRESPASS, 1. As to breaking open a door to get at books and papers, see *Burridge v. Nicholetts*, 30 Law J., Exch. 145; *Blades v. Higgs*, ib. C. P. 349, *post*, p. 336; *ante*, p. 9.

(f) *Patrick v. Colerick*, 3 M. & W. 485. *Anthony v. Haney*, 1 M. & Sc. 306; 8 Bing. 186. *Williams v. Morris*, 8 M. & W. 488. See *McLeod v. Jones*, 105 Mass. 403.

(g) *Ante*, pp. 90, 91, 185; and *post*, ch. 22.

(h) *Ancaster v. Milling*, 2 D. & R. 714.

that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock before his window, and that a man intrudes and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a half-penny for you, which is the full extent of all the mischief I have done,' would that be a compensation?"(i).

Where a landlord entered upon premises demised to his tenant, without asking the leave of the latter, and sold the timber-trees standing in the hedge-rows, and caused them to be felled, cut up, and removed, and great damage was done to the growing crops of the tenant, and the latter brought an action against the landlord for damages, and recovered 100*l.* beyond the net value of the whole of the crops, the court declined to interfere to have the amount of damages reconsidered, although they were of opinion that the jury had taken an exaggerated view of them(k).

456 *Damages in respect of trespasses in dwelling-houses.*—The law guards with great jealousy and watchfulness the peaceable possession by every man of his dwelling-house, and enables all who have been disturbed in the enjoyment thereof to recover substantial damages from every wilful and intentional intruder, though no actual pecuniary damage can be proved to have been done in point of fact either to property or the person(l). "Rights of action of this sort are given," observes Lord Denman, "in respect of the immediate and present violation of the possession of the plaintiff, independently of his right of property; they are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in the value of property may have occurred"(m).

(i) *Merest v. Harvey*, 5 Taunt. 441.

(k) *Williams v. Currie*, 1 C. B. 847. See *Bousall v. McKay*, 1 Houston (Del.), 520. Exemplary damages may be given in an action of trespass *quare clausum fregit*, where there are such circumstances of aggravation, of insult, or of malice, as would warrant the recovery of such damages in any other form of action. *Perkins v. Towle*, 43 N. H. 220. *Nagle v. Mullison*, 34 Penn. St. 48. *St. Peter's Church v. Beach*, 26 Conn. 355. *Major v. Pulliam*, 3 Dana, 584. See *Druse v. Wheeler*, 22 Mich. 439.

But the right to award exemplary damages does not depend on whether the entry was malicious or otherwise. *Deraughn v. Heath*, 37 Ala. 595. *Goetz v. Ambs*, 27 Mo. 28.

But in no case can vindictive damages be recovered from the estate of a deceased trespasser, no matter how aggravated the trespass may have been. *Wright v. Donnell*, 34 Texas, 291.

(l) *Sears v. Lyons*, 2 Stark. 318.

(m) *Rogers v. Spence*, 13 M. & W. 581.

457. *Assessment of damages in cases of injury to buildings.*—The amount of damages to be recovered in an action of tort for the wrongful and malicious demolition of a house in the actual occupation of the owner, seems to be peculiarly for the consideration of a jury. The question for them to determine is, what sum of money will repair the injury done to the plaintiff by the loss of his house, and what sum will be required to replace the house, as nearly as practicable, in the situation and state in which it was at the time of the commission of the injury(*n*).

458. *Assessment of damages for digging and carrying away coal and earth.*—

In an action for a trespass in taking away the plaintiff's coal, he is entitled to recover the value of the coal at the time of its severance from the soil, and the trespasser cannot claim any deduction therefrom in respect of the expense incurred by him in getting or severing the coal(*o*), unless there is a real disputed title, or the defendant has taken the coal inadvertently under a *bonâ fide* belief that he had a right to do so, in which case the jury may give such an amount only as the plaintiff would have obtained from the defendant on a sale of the coal(*p*). This value is the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth(*q*). The plaintiff is also entitled to compensation for any damage done beyond the removal of the coal, *e.g.*, for all injury done to his soil by digging, and for the trespass committed in dragging the coal along the adit of his mine, etc.(*r*). The estimate of the loss from the removal of the coal depends upon the value of the coal at the time of its severance from the soil; and the defendant has no right to any deduction in respect of royalty payable by the plaintiff to the mine-owner on coals got from the mine(*s*).

Where an action was brought for digging into the plaintiff's close, and carrying away therefrom large quantities of earth, soil, etc., it was held that the plaintiff was entitled, by way of compensation, to what the land was worth to him, and not to the amount which would be required to enable the plaintiff to replace the soil which had been taken away(*t*).

(*n*) *Duke of Newcastle v. Hundred of Broxtowe*, 4 B. & Ad. 282.

(*o*) *Martin v. Porter*, 5 M. & W. 352. See *Lynvi Co. v. Brogden*, L. R., 11 Eq. Ca. 188; *Phillips v. Homfray*, L. R., 6 Ch. App. 770.

(*p*) *Wood v. Morewood*, 3 Q. B. 440n. See *Hilton v. Woods*, L. R., 4 Eq. Ca. 432; *Jegon v. Vivian*, L. R., 6 Ch. App. 742.

(*q*) *Lynvi Co. v. Brogden*, *Phillips v. Homfray*, *supra*.

(*r*) *Jegon v. Vivian*, *supra*.

(*s*) *Wild v. Holt*, 9 M. & W. 672. *Morgan v. Powell*, 3 Q. B. 283.

(*t*) *Jones v. Gooday*, 8 M. & W. 146. *Mueller v. St. Louis, etc., R. R. Co.*, 31 Mo. 262.

459 *Assessment of damages in respect of trespasses by diseased cattle.*—If, in consequence of an unlawful entry of diseased cattle into the plaintiff's close, the plaintiff's cattle have become infected with the disease, this is a matter of aggravation of damages, and may be recovered, if claimed in a declaration for the trespass(u).

460 *Assessment of damages where the plaintiff has no certain or determinate interest in the property.*—If the plaintiff is only tenant on sufferance or tenant at will, the damages may be merely nominal. Where a trespass, of which the plaintiff complained, consisted in pulling down a wall between the close of the plaintiff and an adjoining close of the defendant, in doing which a few bricks and some mortar fell upon the plaintiff's land, and no evidence was given as to the nature of the plaintiff's interest in the premises, and the jury gave 1s. damages, it was held, that as the plaintiff had not proved that he had any interest in the land beyond that which results from the bare possession, he had not shown himself to be entitled to any greater damages than the jury had given(x). But where the plaintiff proves that he is in the actual occupation and possession of the land and crops growing thereon, he will be entitled to recover exemplary damages from the trespassers who wrongfully enter upon the land, and trample down and injure the crops, although he is only tenant-at-will; for if a stranger subvert land leased at will, the lessee may bring an action against him and have damages for the profits; and the lessor may have another action, and recover damages for the destruction of the land(y). But as the injury consists of two parts, an injury to a temporary right in the lessee and to the permanent freehold of the lessor, the damages must be assessed with reference to their several interests; for where different persons have distinct rights in the subject-matter of a trespass, the compensation must be to each in proportion to the injury he has received. One of them cannot claim that part of the compensation which belongs to another; nor can the satisfaction made to one be a bar to an action brought by the other(z).

461 *Apportionment of damages as between tenant and reversioner(a).*—In the case of injuries to trees, the damages from the immediate loss of the

(u) *Anderson v. Buckton*, 1 Str. 192. *Barnum v. Van Dusen*, 16 Conn. 200.

(x) *Twyman v. Knowles*, 13 C. B. 224.

(y) 2 Roll. Abr. 551.

(z) *Chambre, J., Attersoll v. Stevens*, 1 Taunt. 194. The damages which a plaintiff may lawfully recover in an action of trespass must be appropriate to the tenure by which he holds; and he cannot lawfully recover any damages except such as affect his own right. *Gilbert v. Kennedy*, 22 Mich. 5.

(a) *Ante*, pp. 91, 92, 185, 255, 256.

shade and fruit of the trees are recoverable by the occupier or lessee; the damage from the loss of the timber and body of the tree falls to the reversioner(b). To entitle the reversioner to damages, it must be shown that the trespass or injury for which he sues is of a permanent nature; for he is not entitled to sue, as we have seen (*ante*, pp. 70, 145), in respect of mere temporary trespasses, where the repetition of the act, without interruption, would not destroy any right of the reversioner, or establish any adverse right against him; but if the injury complained of is a damage to the inheritance, so that if the reversioner wanted to sell the reversion, the injury would lessen the value of it, substantial damages are recoverable. In an action for an injury to the plaintiff's reversionary interest, by pulling down a house in the occupation of the plaintiff's yearly tenant, it was held that the diminution in the saleable value of the premises was the true criterion of damage, and that the jury should consider how much less the land was worth in consequence of the loss of the house(c). The cutting and carrying away soil is a permanent injury to the reversioner, and an infringement upon his proprietary right, though no actual damage be done to the land(d).

462 *Damages recoverable from one of several co-trespassers.*—Where, in an action for a trespass by the defendant, with horses, etc., upon the plaintiff's land; it appeared that the defendant was the huntsman of the Berkeley hounds, and that he followed the hounds, accompanied by a large concourse of persons on foot and on horseback, over the plaintiff's land, and destroyed the fences, and injured the crops, Lord Ellenborough held that the defendant was answerable for the whole of the damage, and directed the jury not to estimate the damage according to the mischief which the defendant had individually occasioned by his trespass, but according to the aggregate amount of mischief done by him, and his co-trespassers, and the hounds(e).

463 *Damages recoverable from tenants who hold over wrongfully after the expiration of a notice to quit.*—Where a tenant holds over, after the expiration of a notice to quit, the landlord is entitled to recover from him any reasonable damages and costs that may have been sustained by him in an action at the suit of a person to whom he had contracted to let the premises, but to whom he was prevented from delivering pos-

(b) *Bedingfield v. Onslow*, 3 Lev. 211.

(c) *Hosking v. Phillips*, 3 Exch. 168.

(d) *Alston v. Scales*, 2 M. & Sc. 6; 9 Bing. 3.

(e) *Hume v. Oldacre*, 1 Stark. 352; and see *post*, ch. 22.

session through the wrongful act of such tenant(*f*). If the premises have been sublet, and the subtenant holds over against the will of the tenant, the landlord can recover against the tenant as damages the value of the premises for the time he is kept out of possession, and the costs of ejecting the under-tenant(*g*).

464 *Trespass for mesne profits*.—The action of trespass for mesne profits is consequential to the recovery in ejectment(*h*), for as no damages are recoverable in ejectment except between landlord and tenant(*i*), nor any costs where judgment is obtained for want of appearance(*k*), and as by bringing ejectment the claimant treats the person in possession as a trespasser from the day mentioned in the writ, and cannot therefore sue him for rent under an agreement(*l*), or for use and occupation subsequent to that period(*m*), the person entitled to the possession of the land would be without remedy to recover the profits of the land, from the date of the service of the writ to the time of the delivery of the land by the sheriff, were it not for this action. In cases between landlord and tenant, indeed, mesne profits are recoverable on the trial of the ejectment upon proof of the claimant's title, that the defendant or his attorney was served with due notice of trial, and of the amount of mesne profits due; but this case is specially provided for by the 214th section of the statute above referred to(*n*); which proceeds to enact that nothing shall prevent any landlord from bringing an action for the mesne profits that have accrued from the date of the verdict to the day of delivery of possession of the premises. And in cases other than between landlord and tenant the rule is as above stated.

In this action accordingly the plaintiff is entitled to recover, 1st, compensation for the use and occupation of the premises recovered during the time they were actually or constructively occupied by the defendant(*o*); 2ndly, compensation for any special damage that the plaintiff may be legally entitled to in respect of the trespasses, provided it has been claimed in the declaration, as if the defendant has shut up an inn (being the premises in question) and has thereby destroyed the custom(*p*); and lastly, the costs of the action of eject-

(*f*) *Bramley v. Chesterton*, 2 C. B., N. S. 605.

(*g*) *Henderson v. Squire*, L. R., 4 Q. B. 170.

(*h*) Lord Mansfield, C.J., in *Aslin v. Parker*, 2 Burr. 668.

(*i*) 15 & 16 Vict. c. 76, s. 214.

(*k*) *Ibid.* sched. A., Nos. 14, 15.

(*l*) *Jones v. Carter*, 15 M. & W. 718.

(*m*) *Birch v. Wright*, 1 T. R. 378.

(*n*) And see *Smith v. Tett*, 9 Exch. 307.

(*o*) *Doe v. Harlow*, 12 A. & E. 40. See *Doe v. Challis*, 17 Q. B. 166.

(*p*) *Dunn v. Large*, 3 Dougl. 335.

ment(*q*). The damages under the first head, however, are not confined to the mere rent of the premises, but the jury may give more if they please, as for the plaintiff's trouble in the recovery of the premises, etc.(*r*).

The action may be brought, although proceedings in error upon the ejectment may be pending(*s*), and the production by the plaintiff of a judgment by default in a previous action of ejectment for the same premises is sufficient evidence of the plaintiff's title from the date of the writ(*t*), and also, as it seems, of the defendant's possession of the premises at that date(*u*). If, however, the plaintiff seeks to recover mesne profits from a day anterior to that on which possession was claimed in the writ of ejectment, he must be prepared to prove his title in the usual way(*x*). The action is a local one(*y*), and may be brought by one tenant in common against his co-tenant(*z*). The defendant, if in possession by his under-tenant, is not liable for the wrongful holding over of such sub-tenant(*a*), unless he has authorized it(*b*).

465 *Prevention of trespasses by injunction*.—The Court of Chancery will not grant an injunction against a temporary trespass by a wrong-doer, inflicting no permanent injury upon the property, and being only a source of temporary annoyance or discomfort, as there is ample remedy at common law for such injuries, and the wrong-doer may at once be turned off the land(*c*). But whenever trespasses have been repeated again and again, so as to become a nuisance, an injunction will be granted against the persevering wrong-doer(*d*). Neither will the court interfere to protect a dry, strict legal title to property held for the benefit of the public, where the holder has no beneficial enjoyment therefrom, and no real substantial injury has been done to the property(*e*). But where the trespasser comes upon the land in the possession of the plaintiff or his tenants, and commits acts of destructive

(*q*) *Pearse v. Coker*, L. R., 4 Exch. 92; 38 Law J., Exch. 82.

(*r*) *Goodtitle v. Tombs*, 3 Wils. 121.

(*s*) *Donford v. Ellys*, 12 Mod. 138.

(*t*) See *Wilkinson v. Kirby*, 15 C. B. 430.

(*u*) *Pearse v. Coker*, *supra*.

(*x*) See *Barnett v. Earl of Guildford*, 11 Exch. 32.

(*y*) *Cole on Ejectment*, p. 638.

(*z*) *Goodtitle v. Tombs*, *supra*.

(*a*) *Mansfield, C.J., Burne v. Richardson*, 4 Taunt. 720.

(*b*) *Doe v. Harlow*, *supra*.

(*c*) *Mortimer v. Cottrell*, 2 Cox, 205. *Att.-Gen. v. Hallett*, 16 M. & W. 581. *Jerome v. Ross*, 7 Johns. ch. 315. *Smith v. Pettengill*, 15 Vt. 82.

(*d*) *Coulson v. White*, 3 Atk. 21. *McGune v. Palmer*, 5 Rob. (N. Y.) 607. *Stevens v. Beekman*, 1 Johns. Ch. 318. *Hart v. Mayor of Albany*, 3 Paige, 213.

(*e*) *Wandsworth Board of Works v. S. W. Rail. Co.*, 31 Law J., Ch. 854.

tréspass, either by mining, or quarrying, or cutting down timber without a color, or shadow, or pretence of title, and the property may be destroyed before you can arrest the proceedings at law, there is a case for an injunction(*f*). Whenever, also, the trespass is of such a nature that irreparable injury will be caused by the repetition of it, and the defendant repeats, or threatens to repeat it, an injunction will be granted to restrain him from so doing. Thus, where the defendant had removed stones protecting the plaintiff's sea-wall, and an action of trespass has been brought, and damages recovered, and the defendant after that began again to remove stones, and by so doing exposed the plaintiff's land to inundation, the court granted an injunction(*g*).

But the court will not interfere, at the suit of an owner of property, to restrain a mere stranger from vexatiously distraining on, or otherwise molesting, his tenants in possession of the property(*h*), unless the defendant is a pauper, and the wrongful acts are of such a nature that the recovery of damages at law would not constitute an adequate remedy(*i*). And when the assistance of the court is not invoked for the protection and preservation of property from depredation by a trespasser, but to prevent the enjoyment of a privilege, such as a right of way claimed on one side and denied on the other, the court will not interfere by injunction but leave the parties to their legal remedy.

Thus, where a tramroad had been made by the defendants across the farm of the plaintiff, with the license and permission of the occupying tenant, but without the knowledge and consent of the plaintiff, who resided at a distance, and the plaintiff filed a bill for an injunction to prevent the defendants from entering upon the land and using the tramway, the court refused to interfere. "The thing here complained of," observes the Lord Chancellor, "has been done. The tramroad has, with the leave of the tenant in possession, been completed, and the court is asked by the bill to restrain the defendants, who, having finished the undertaking, are now in the daily use and occupation of it, from continuing so to use it, and from interrupting the servants and workmen of the plaintiff in their attempts to destroy it. In other words, the court is virtually asked to eject the defendants, and authorize the plaintiff's themselves to take possession of the tramroad. The

(*f*) *V.-C. Wood, in Talbot (Earl) v. Hope Scott*, 4 Kay & J. 113. *Thomas v. Oakley*, 18 Ves. 186. *Cowper (Earl) v. Baker*, 17 Ves. 128. *Lonsdale (Earl) v. Carwen*, 3 Bligh, 168, n. See *Livingston v. Livingston*, 6 Johns. Ch. 497; *Scudder v. Trenton Delaware Falls Co.*, Saxton, 694; *Irwin v. Davidson*, 3 Ired. Ch. 311; *West Point Iron Co. v. Reymert*, 45 N. Y. 703.

(*g*) *Chalk v. Wyatt*, 3 Mer. 688.

(*h*) *Best v. Drake*, 11 Hare, 369.

(*i*) *Hodgson v. Duce*, 2 Jur. N. S. 1014.

case originally may have been a case of waste—waste occasioned by the cutting of the tramroad and the laying the iron rails over the plaintiff's land; but what is now claimed by the defendants is simply a right of way; and if they are not entitled to that right, they are mere trespassers, and the plaintiffs have their proper legal remedy against them as such "(k).

However, in cases where irreparable injury would be caused before the right could be properly determined at law, the Court of Chancery will interfere by injunction to restrain trespasses by a stranger(l).

(k) *Deere v. Guest*, 1 Myl. & Cr. 522.

(l) *Lond. & North-West. Rwy. v. Lanc. & Yorkshire Rwy.*, L. R., 4 Eq. Ca. 174. *West Point Iron Co. v. Reymert*, 45 N. Y. 703.

CHAPTER VII.

OF TRESPASS AND CONVERSION OF CHATTELS—TITLE TO CHATTELS.

SECTION I.—*Of trespass and conversion of chattels.*—Trespass upon personalty—Conversion of chattels—Wrongful destruction of chattels—Conversion by purchasers without title—When a demand and refusal must be proved—Demand of goods not in the possession of the defendant—Demand of goods in the hands of public officers, etc.—Conversion of chattels by railway companies and bailees—Conversion of bills, notes, and negotiable securities—Conversion by one of several partners, joint-tenants, or tenants in common—Conversion of trust property—Conversion by parties claiming a lien upon chattels—Extinguishment of liens.

SECTION II.—*Of the title to chattels personal.*—Title to chattels which have been increased in value by a wrong-doer—Title to timber severed from the inheritance—Title to chattels by finding—Title to game and animals *feræ naturæ*—Title of the hunter and the fisherman—Title by gift—Right to deeds, leases, bonds, and securities—Right of property in letters sent by post—Right of possession of deeds and securities as between trustee and cestui que trust—Title by purchase in market overt—Title by private sale—Colorable transfers—Title of innocent purchasers from fraudulent vendors—Title to chattels in the hands of bailees—Title by delivery order, or by purchase from sheriffs—Title to bills and notes—Title to the property of bankrupts—Contracts or dealings with the bankrupt without notice—Executions levied on the property of bankrupts—Transfers of property by bankrupts constituting an act of bankruptcy—Reputed ownership of bankrupts—Possession of chattels by manufacturers, workmen, depositaries, factors, and commission agents for sale—Possession by bankrupt cestui que trust and bankrupt trustees—Goods in the apparent possession of the bankrupt—Title to trust property—Alteration of the right of property in chattels after recovery of judgment in an action for a conversion of them.

SECTION III.—*Remedies for the wrongful conversion of chattels.*—Recapture of goods wrongfully seized or stolen—Parties to actions for a conversion—Joinder of parties—Staying proceedings—Pleadings, defences, and evidence—When the defendant is estopped from disputing the title of the plaintiff—Evidence under pleas of justification—Assessment of damages.

SECTION I.

OF TRESPASS AND CONVERSION OF CHATTELS.

466 *Trespass upon personalty*.—If one man meddles with the goods and chattels of another, either by laying hold of, removing, or carrying away inanimate things, or by striking, chasing, or driving cattle, sheep, and domestic animals in which the owner has a valuable property, he is guilty of a trespass, and is responsible in damages, unless the act can be justified on the ground that it was done in necessary self-defence of the person, or of property, or of one's absolute or relative rights, or in obedience to some legal or personal authority, or can be excused on the ground that it was the result of inevitable accident, or was caused by the negligent or wrongful act of the plaintiff himself(a); as where a man wrongfully suffers his cattle to trespass upon my land, or leaves thereon corn or hay which he ought to have removed, and his cattle get injured, or his corn or hay is eaten by my beasts. In these cases he has no remedy for the injury, as it was caused by his own default(b).

If a man's goods and chattels obstruct me in the exercise of my right of way, I have a right to remove them. If he places a horse and cart in the way of the access to my house, or before my door, so that I cannot drive up to it, I have a right to lay hold of the horse and lead him away, and, if necessary, to whip him to make him move on(c). So, if a person's goods are placed on my ground, I may lawfully remove them(d); and if his cattle or sheep come upon my land, I may chase them and drive them out(dd). Where the defendant with a little dog chased the plaintiff's sheep out of his grounds, where they were trespassing, and the sheep went into another man's land next adjoining, and the dog pursued them there, and the defendant did his

(a) *Ante*, pp. 2, 24-28; *post*, ch. 8. CONTRIBUTORY NEGLIGENCE.

(b) *Webb v. Paternoster*, Godb. 282, pl. 401. *Farmer v. Hunt*, Brownl. 220.

(c) *Slater v. Swann*, 2 Str. 872. So if a person hitch a horse to my shade tree, I may lawfully remove him to a safe place. *Gilman v. Emery*, 54 Me. 460. But otherwise if the horse is hitched to a post to the use of which the owner of the horse has an equal right with myself. *Bruch v. Carter*, 3 Vroom (N. J.), 554.

(d) *Cole v. Maundy*, Roll. Abr. TRESPASS, 1, pl. 17, p. 566. *Rea v. Sheward*, 2 M. & W. 426. *Grier v. Ward*, 23 Geo. 145.

(dd) A person may lawfully turn a horse trespassing on his land into the highway, without becoming liable for its subsequent loss. *Humphrey v. Douglass*, 10 Vt. 71; *id.* 11 Vt. 22. *Cory v. Little*, 6 N. H. 213.

best to recall his dog, but the dog could not be recalled at once, and the plaintiff sued the defendant for chasing and worrying his sheep, it was held that the action was not maintainable, as the defendant had not incited the dog to chase the sheep after they had left his premises, but he had done his best to call the dog off(e). But the chasing of trespassing beasts with a mastiff dog is unlawful, and if any damage is done to them by such a dog, the plaintiff will be responsible for a trespass(f).

If a dangerous animal is let loose by a man who is acquainted with its ferocious disposition, and the animal bites or otherwise violently injures another, an action for a trespass is maintainable against the person who set it free(g).

If a dog chases conies in a warren, or game in a preserve, or deer in a park, or sheep in a fold, he may be killed by the owner of the animal to prevent their destruction(h), but not after the chasing is discontinued and the peril has ceased(i).

If a chattel has been lost by one man and found by another, the finder has an implied license or authority from the owner to take the chattel and keep it for his use(k). But though the taking of a chattel may be lawful in the first instance, yet if the person who has taken it abuses it, uses it, or wastes it, he may render himself a trespasser *ab initio*, and disable himself from justifying or excusing the original taking, as well as any of his subsequent dealings with the property(l).

467 *Conversion of chattels*.—If a man, who has no right to meddle with goods at all, takes them and removes them from one place to another, an action may be maintained against him for a trespass, but he is not guilty of a conversion of them, unless he removed the goods for the purpose of taking them away from the plaintiff, or of exercising some dominion or control over them for the benefit of himself or of some

(e) *Mitten v. Faudrye*, Poph. 161, cited 4 Burr. 2094. The owner of land may rightfully set a dog on trespassing cattle, unless there is something in the size, character or habits of the dog, or in the mode of setting him on which would negative the idea of ordinary care or prudence in so doing. *Wood v. La Rue*, 9 Mich. 158. *Davis v. Campbell*, 23 Vt. 236. But where a person fails to exercise reasonable care in driving out trespassing cattle, he will be liable to the owner for injuries thereby occasioned. *Totten v. Cole*, 33 Mo. 138. See *James v. Caldwell*, 7 Yerg. 38; *Painter v. Baker*, 16 Ill. 103.

(f) *King v. Rose*, 1 Freem. 347. See *ante*, p. 30.

(g) *De Grey*, C.J., 3 Wils. 410. *Leame v. Bray*, *ante*, p. 2. *Marsh v. Jones*, 21 Vt. 378. *McCaskill v. Elliot*, 5 Strobb. 196. But see *Stumps v. Kelly*, 22 Ill. 140.

(h) *Wadhurst v. Damme*, Cro. Jac. 45. *Barrington v. Turner*, 3 Lev. 28. *King v. Kline*, 6 Barr. 318. *Brown v. Hoburger*, 52 Barb. (N. Y.) 15.

(i) *Janson v. Brown*, 1 Campb. 41. *Wells v. Head*, 4 C. & P. 568.

(k) *Isack v. Clarke*, 1 Roll. Rep. 130.

(l) *Oxley v. Watts*, 1 T. R. 12. *Attack v. Bramwell*, 32 Law J., Q. B. 146. And see *post*, ch. 11, s. 1.

other person(*m*). Thus, where the plaintiff and defendant, who were porters on the custom-house quay, had each small boxes in a hut on the quay, for storing small parcels of goods until they could be put on board ship, and the plaintiff placed some goods in the hut in such a manner that the defendant could not get to his box without removing them, which he accordingly did, but forgot to put them back again, and the goods were lost, it was held that the defendant had a right to remove the goods, and so far was in no fault; but as he had not returned them to the place where he found them, there might be ground for an action for a trespass in meddling with them, but that there was no conversion of them, as the defendant had not in anywise disturbed the plaintiff's dominion or ownership over the property(*n*).

It has never yet been held that the single act of removing a chattel, independent of any claim over it, either in favor of the person himself or any one else, amounts to a conversion of the chattel. If a gate has been wrongfully erected by the plaintiff, so as to obstruct the defendant's right of way, and the defendant pulls down and carries away the gate and places it on his own land, in a convenient situation for the plaintiff to fetch it away, if he thinks fit so to do, this does not amount to a conversion of the gate(*o*). "Suppose," observes Rolfe, B., "I, seeing a horse in a ploughed field, thought it had strayed, and, under that impression, led it back to pasture, it is clear that an action would lie against me for a trespass; but would any man say that this amounted to a conversion of the horse to my own use"(*p*)? "Scratching the panel of a carriage would be an act of trespass, but no conversion of the carriage"(*q*). But any asportation of a chattel for the use of the defendant or some third person is a conversion of it, because it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places.

If a man has possession of my chattel and refuses to deliver it up, knowing or having the means of knowing that I am the owner of it, this is an assertion of a right inconsistent with my general dominion over the chattel, and the use which at all times and in all places I am entitled to make of it, and consequently amounts to an act of conver-

(*m*) See *Falke v. Fletcher*, 34 Law J., C. P. 146. *Sparks v. Purdy*, 11 Mo. 219.

(*n*) *Bushel v. Miller*, 1 Str. 129.

(*o*) *Houghton v. Butler*, 4 T. R. 364.

(*p*) *Fouldes v. Willoughby*, 8 M. & W. 551.

(*q*) *Alderson, B.*, ib. 549.

sion(r). Therefore, if a man who is intrusted with the goods of another puts them into the hands of a third person, contrary to orders, it is a conversion. So if the pawnee of goods, with a power of sale, sells them before the day stipulated for the exercise of the power of sale has arrived(s). If a person, without my permission, take my horse to ride, and leave it at an inn, this is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me, and it is different from the case of a 'misdelivery of goods merely owing to a mistake(t). If a vendor who has sold goods on credit resells the goods before the day of payment has arrived, he is guilty of a conversion(u). And so he is, though the purchaser make default in payment, unless he has given the purchaser due notice of his intention to sell(x). However, if a person has obtained possession of goods under color of a pretended contract of sale on credit, and with the preconceived intention of never paying for them, it is competent to the vendor to consider the contract as a nullity, and treat the fraudulent purchaser as a person who has tortiously got possession of the goods(y). If a man enters the house of another, and takes an inventory of his goods, and gives him notice that they are distrained for rent and will be sold, this is evidence of a conversion(z). So if a man takes the property of another without his consent, by abuse of the process of the law, this is an act of conversion(a). And if a person aids and assists in the sale of goods under a fraudulent and

(r) *Baldwin v. Cole*, 6 Mod. 212. *Burroughs v. Bayne*, 5 H. & N. 296; 29 Law J., Exch. 188. See *Boyce v. Brockway*, 31 N. Y. 490; *Cobb v. Dows*, 9 Barb. (N. Y.) 242; *Everett v. Coffin*, 6 Wend. 603; *Williams v. Merle*, 11 Wend. 80; *Saltus v. Everett*, 20 Wend. 267; *Hoffman v. Cason*, 22 Wend. 285; *Cowell v. Hill*, 4 Denio, 323; *Allen v. Crary*, 10 Wend. 349; *Murray v. Burling*, 10 Johns. 175; *Hutchinson v. Bobo*, 1 Bailey, 546; *Fuller v. Tabor*, 39 Me. 519.

(s) *Johnson v. Stear*, 33 Law J., C. P. 130. *Pigott v. Cubley*, *ibid.* 134. See *Lawrence v. Maxwell*, 53 N. Y. 19.

(t) *Syeds v. Hay*, 4 T. R. 264. *Tear v. Freebody*, 4 C. B., N. S. 263. A person who hires a horse to go to a particular place or to go a specified distance, and who goes to another place or a greater distance, is guilty of a conversion of the horse. *Fish v. Ferris*, 5 Duer, 49. *Lucas v. Trumbull*, 15 Gray (Mass.), 306. *Disbrow v. Tenbroeck*, 4 E. D. Smith (N. Y.), 397. *Campbell v. Stokes*, 2 Wend. 137. *Wheelock v. Wheelwright*, 5 Mass. 104. *Woodman v. Hubbard*, 5 Foster (N. H.), 67. *Homer v. Thwing*, 3 Pick. 492. And the same rule applies to one who borrows a carriage to be used in a particular place, and sends it heavily loaded to another place. *Hart v. Skinner*, 16 Vt. 138. But the receipt of payment for such use, with full knowledge of all the facts, will be a bar to an action of trover based on the wrongful use. *Rotch v. Hawes*, 12 Pick. 136.

(u) *Chinnery v. Viall*, 28 Law J., Exch. 180; 5 H. & N. 293. *Martindale v. Smith*, 1 Q. B. 389.

(x) *Page v. Cowasjee Edulgee*, L. R., 1 P. C. O. 127. *A fortiori* therefore if the vendor retakes possession of the goods and resells them. *S. C.*

(y) *Ferguson v. Carrington*, 9 B. & C. 59. *Ash v. Putnam*, 1 Hill, 302. *Hunter v. Hudson River I. & M. Co.*, 20 Barb. 494. *Root v. French*, 13 Wend. 570. And see *Nichols v. Pinner*, 18 N. Y. 295; *Gage v. Eppersen*, 2 Head (Tenn.), 669.

(z) *Neilau v. Hanny*, 2 Car. & K. 710. *Needham v. Rawbone*, 6 Q. B. 771 n.

(a) *Grainger v. Hill*, 5 Sc. 577; 4 B. N. C. 221. See *Sanborn v. Hamilton*, 18 Vt. 590; *Chambers v. Lewis*, 28 N. Y. 454.

void warrant of attorney, he may render himself responsible for a conversion of the property(*b*).

If a sheriff sells more goods than are sufficient to satisfy an execution, he is liable for a conversion in respect of the excess. Whether he has sold more than was necessary is a question of fact in each particular case(*c*). If a judgment-debtor, against whom execution is issued, has a qualified interest only as a bailee in goods seized by the sheriff, and the sheriff, having no notice of the qualified interest, sells them absolutely, he is not, it seems, guilty of the conversion by the mere act of selling. It must be shown that he parted with the possession of the goods, and caused them to be used and damaged by the purchaser(*d*). If a landlord distrains and carries away goods, and, after selling enough to satisfy the rent in arrear, returns the surplus to the demised premises from whence they were taken, there is no conversion by the landlord of any part of the property, he having dealt with it no otherwise than he was by law entitled to do(*e*).

A mere negligent dealing with goods by a bailee to whom they have been delivered (*post*, ch. 9), is not a conversion of them. He may be liable to an action for negligence, but not to an action for a conversion, which only lies where some dominion is asserted by the defendant over the chattel, the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is, to a certain extent, guilty of a conversion; but where there is no unlawful taking of possession or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion. If the goods of one man are consigned to another, whether rightfully or wrongfully, the consignee is justified in depositing them in a place of safe custody, and their destruction there without his default, cannot make him guilty of a conversion(*f*).

468 *Wrongful destruction of chattels*.—Every wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it, whereby the owner is deprived of the use of it in its original state, is a conversion of it. Thus, the taking of wine from a cask, and filling the cask up with water, is a conversion of all the wine(*g*). If a bailee of a cask of

(*b*) *Billiter v. Young*, 6 Ell. & Bl. 1.

(*c*) *Aldred v. Constable*, 6 Q. B. 381. See *Dezell v. Odell*, 3 Hill, 215; *Deurrey v. Fox*, 22 Barb. 523; *Fitzgerald v. Blake*, 42 Barb. 513.

(*d*) *Lancashire Wagon Co. v. Fitzhugh*, 6 H. & N. 502; 30 Law J., Exch. 281. See *McCoughy v. McCaw*, 31 Ala. 447.

(*e*) *Evans v. Wright*, 2 H. & N. 527; 27 Law J., Exch. 50.

(*f*) *Heald v. Carey*, 11 C. B. 993.

(*g*) *Richardson v. Atkinson*, 1 Str. 577. *Deuch v. Walker*, 14 Mass. 500. See *Young v. Mason*, 8 Pick. 551.

wine consumes part of the wine, this, as against him, is a conversion of the whole of the wine; but he cannot himself set up and rely upon it as a conversion of the whole, so as to enable him in any way to take advantage of his own wrong(*h*). But to constitute a conversion by reason of the destruction of chattels by the defendant, it must be shown that he destroyed them with the intention of taking to himself the property in them, or deriving some benefit from them, or with the intention of depriving the plaintiff of the possession or use of them; for if the defendant, finding property belonging to the plaintiff encumbering his close, destroys it in endeavoring to remove it, without intending needlessly and wantonly to effect its destruction, this is no conversion of the property(*i*).

469 *Fixtures severed from the inheritance* so as to become personal chattels, may be made the subject of an action for a conversion, but not whilst they are annexed to the freehold, and form part of the realty(*k*).

470 *Conversion of chattels by purchasers without title*.—According to Lord Holt, the very assuming to one's self the property and right of disposing of another man's goods is a conversion of them(*kk*); "and certainly," observes Lord Ellenborough, "a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect"(*l*). And if such person acts as

(*h*) *Patteson, J., Philpott v. Kelley*, 3 Ad. & E. 106.

(*i*) *Simmons v. Lillystone*, 8 Exch. 442; 22 Law J., ib. 217.

(*k*) *Colégrave v. Dios Santos*, 2 B. & C. 78. *Tift v. Horton*, 53 N. Y. 377. *Smith v. Bensen*, 1 Hill, 176. *Fryatt v. Sullivan Co.*, 5 id. 116. *Russell v. Richards*, 1 Fairf. 429. *Ford v. Cobb*, 20 N. Y. 344. *Adams v. Goddard*, 48 Me. 212. *Overton v. Williston*, 31 Penn. St. 155. *Schuchardt v. Mayor, etc., of New York*, 53 N. Y. 202, 210.

(*kk*) *Gilman v. Hill*, 36 N. H. 311. *Webber v. Davis*, 44 Me. 147. *Dickey v. Franklin Bank*, 32 id. 572.

(*l*) *M'Combie v. Davies*, 6 East, 540. *Carey v. Bright*, 58 Penn. St. 70. *Cooper v. Newman*, 45 N. H. 339. *Gilmore v. Newton*, 9 Allen (Mass.), 171. *Anderson v. Nicholas*, 28 N. Y. 600. *Deering v. Austin*, 34 Vt. 330. *Newkirk v. Dalton*, 17 Ill. 413. *Hills v. Snell*, 104 Mass. 173.

A purchase in good faith from one who has no title and no right to transfer the property, will not constitute a defence to an action of conversion. Id.

As a general rule, any unauthorized appropriation of personal chattels will be sufficient of itself to enable the true owner to maintain an action for their conversion. But this rule is not applicable where the act of appropriation can be justified as having been authorized in any manner by the owner of the property. *Hills v. Snell*, 104 Mass. 173.

Thus, when upon a conditional sale the property is delivered and time given for compliance with the condition, one who purchases and resells the property before the right to perfect the title, by such compliance, has been terminated, is not liable for a conversion to the general owner who subsequently resumes his right to its possession. *Vincent v. Cornell*, 13 Pick. 294.

When the owner has given to another, or permitted him to have, control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property, or exercises such dominion over it as is warranted by the authority thus given. *Strickland v. Barrett*, 20 Pick. 415. *Burbank v. Crooker*, 7 Gray, 168. *Chase v. Blaisdell*, 4 Minn. 90.

agent for another who subsequently, although without a knowledge that the sale was illegal, adopts it, the latter will also be liable(*m*).

471 *When a demand and refusal must be proved, in order to establish a conversion.*—When the chattels of the plaintiff have not been wrongfully taken possession of by the defendant, but have come into his hands in a lawful manner, he cannot be made responsible for a conversion of them until they have been demanded of him by the owner, or the person entitled to the possession of them, and he has refused to deliver them up(*mm*). Whenever, therefore, the goods of one man have lawfully come into the hands of another, the owner, or person entitled to the possession of them, should go himself, or send some one with a proper authority, to demand and receive them; and if the holder of the goods then refuses to deliver them up, or permit them to be removed, there will be evidence of a conversion(*n*); for “whoever,” observes Holt, C.J., “takes upon himself to detain another man’s goods from him without cause, takes upon himself the right of disposing of them,” and is guilty of a conversion(*o*). The demand and refusal do not in themselves constitute the conversion. They are evidence of a conversion at some previous period(*p*).

472 *What is a sufficient demand and refusal.*—If, when goods are demanded, the person in possession of them refuses to deliver them except upon a condition which he has no right to impose(*q*), such as the giving a receipt in writing for the goods(*r*), that is tantamount to an absolute refusal, and he is guilty of a conversion. If the person in

(*m*) *Hilbery v. Hatton*, 33 Law J., Exch. 190. Whether an agent who had merely negotiated the sale to a third person would also be liable, *quære*, see *Fowler v. Hollins*, L. R., 7 Q. B. 616.

(*mm*) *Yeager v. Wallace*, 57 Penn. St. 365. *Carleton v. Lovejoy*, 54 Me. 445. *Sherry v. Picken*, 10 Ind. 375. *Polk v. Allen*, 19 Mo. 467. *Hall v. Robinson*, 2 N. Y. 293.

Where the original taking was tortious, no demand or refusal is necessary before commencing an action of trover. *Farrington v. Payne*, 15 Johns. 431. *Moses v. Walker*, 2 Hilt. (N. Y. C. P.) 536. *Yeager v. Wallace*, 57 Penn. St. 365. *Pilsbury v. Webb*, 33 Barb. (N. Y.) 213. *Paige v. O’Neal*, 12 Cal. 483. *Davis v. Webb*, 1 McCord, 213. *Jones v. Dugan*, id. 428. *Woodbury v. Long*, 8 Pick. 513.

Either a wrongful taking, an illegal assumption of ownership, an illegal use or misuse, or a wrongful detention of chattels, will constitute a conversion; but it is in the last case only that a demand and refusal is necessary to show a conversion. *Glaze v. McMillion*, 7 Port. 279. *St. John v. O’Connell*, id. 466. Where an actual conversion is shown, a demand and refusal are not necessary. *Earle v. Van Buren*, 2 Halst. 344. *Tompkins v. Haile*, 3 Wend. 406. *Newsum v. Newsum*, 1 Leigh, 86. *Jewett v. Partridge*, 3 Fairf. 243. *Hines v. McKinney*, 3 Mo. 382. *Dunnahoe v. Williams*, 24 Ark. 264. *Esmay v. Fanning*, 9 Barb. 176.

(*n*) *Thorogood v. Robinson*, 6 Q. B. 772. *Magee v. Scott*, 9 Cush. (Mass.) 148. *Jessop v. Miller*, 1 Keyes (N. Y.), 321.

(*o*) *Baldwin v. Cole*, 6 Mod. 212.

(*p*) *Wilton v. Girdlestone*, 5 B. & Ald. 847. *Jessop v. Miller*, 1 Keyes (N. Y.), 321. *State v. Patten*, 49 Me. 383. *Munger v. Hoss*, 28 Barb. (N. Y.) 75. *Hill v. Covell*, 1 N. Y. 522.

(*q*) *Davis v. Vernon*, 6 Q. B. 450. *Cobbett v. Clutton*, 2 C. & P. 471

(*r*) *Barnett v. Crys. Pal. Co.*, 2 F. & F. 443.

possession of the goods says, when the goods are demanded of him, that he shall do nothing but what the law requires, and does not produce or tender the goods, this is evidence of a conversion of them(s). But though he at first refuses, if he afterwards, and before a writ is issued against him, goes to the plaintiff and offers to deliver them up to him, the effect of the previous refusal is done away with, and there is then no evidence of a conversion(t). If the demand is for the delivery of an article to the plaintiff in some particular state and condition, a refusal to comply with the demand is not necessarily a conversion, as the defendant may not be bound, or may be totally unable, to deliver the article in the state required(u).

So, if the demand is too large; if the plaintiff, being entitled to demand five beasts, requires seven, and the defendant refuses to give up seven, such a refusal is no evidence of a conversion of the five which were never demanded(x). If the goods are not in the possession and under the control of the defendant, he is not guilty of a conversion in refusing to deliver them(xx). If, therefore, at the time of the demand, they have been distrained or attached under legal process, and are in the actual custody of the law, it is no longer in the defendant's power to deliver them up, and he cannot be made responsible for a conversion(y). So where a mortgagee of a vessel demanded possession of it, and it was accordingly delivered to him, but at the time of delivery money was owing to the crew for wages, and the crew took proceedings against the vessel in the Admiralty Court, and the mortgagee had in consequence to pay money to regain possession of the ship, it was held, nevertheless, that he could not recover in an action of trover(z).

"Authorities are not wanting to show that a party is not guilty of a conversion because he does not at once restore the chattel, where it is not at the moment in his possession and under his own immediate

(s) *Davies v. Nicholas*, 7 C. & P. 339.

(t) *Hayward v. Seaward*, 1 M. & Sc. 459.

(u) *Rushworth v. Taylor*, 3 Q. B. 700.

(x) *Abington v. Lipscomb*, 1 Q. B. 780.

(xx) *Robinson v. Hartridge*, 13 Fla. 501. *Kelsey v. Griswold*, 6 Barb. 456. *Whitney v. Slau-son*, 30 Barb. 276. *Andrews v. Shattuck*, 32 Barb. 396. *Fillmore v. Horton*, 31 How. (N. Y.) 424. *Buck v. Ashley*, 37 Vt. 475. *Johnson v. Couillard*, 4 Allen (Mass.), 446.

A demand and refusal to deliver will not render a person guilty of conversion of chattels which, at the time of the demand, are not in existence. *Salt Springs National Bank v. Wheeler*, 48 N. Y. 492. The accidental loss or destruction of a chattel by one lawfully in possession, is not a conversion. *Ib.* *Dwight v. Benton*, 1 Pick. 50. *Cairns v. Bleeker*, 12 Johns. 300. *Jervis v. Jolliffe*, 6 Johns. 9.

(y) *Verrall v. Robinson*, 2 C. M. & R. 495. *Stiles v. Davis*, 1 Black (U. S.), 101. *Jenner v. Jolliffe*, 9 Johns. 387. See *Rogers v. Weir*, 34 N. Y. 463.

(z) *Johnson v. Royal Mail Steam Packet Co.*, L. R., 3 C. P. 38.

control"(a). The ground of the action of trover is a wrongful conversion, and there must be some evidence to show the defendant to be a tort-feasor. Where, therefore, all that appeared was that some wine-warrants, the property of the plaintiff, came to the hands of the defendant in her representative character as administratrix of her deceased husband, that she handed them over to her attorney, and, when the plaintiff demanded them, said they were in her attorney's hands, it was held that this was no evidence of a conversion(b).

If there be a demand in words, and*also a demand in writing, both being perfect, either of them may be proved as evidence of the conversion(c).

473 Goods not in the possession of the defendant at the time of the demand.—

A man cannot be made a bailee (*post*, ch. 9) of goods against his will, and, therefore, if things are left at his house, or upon his land, without any consent or agreement on his part to take charge of them, he is not thereby made a bailee of them(d); and if the goods are demanded of him, and he says he will have nothing whatever to do with the goods, such a declaration in answer to a demand of the goods, is no evidence of a conversion of them(e). Where the defendant, on entering into possession of some premises which he had taken on lease, found thereon some timber which had been deposited there by the permission of the previous occupier, and the plaintiff, to whom the timber belonged, demanded it of the defendant, who said, "If you will bring any one to prove it is your property, I will give it to you, and not else;" it was held that this qualified refusal, taken in connection with the surrounding circumstances, and the absence of all evidence of any intermeddling with the timber by the defendant, did not amount to evidence of a conversion(f).

474 Goods found.—If a man finds goods and the owner comes and demands them, and the finder says that he will not deliver them to him until he is satisfied that he is the owner of them, and keeps the good no longer than is reasonably necessary to enable him to make due inquiry, this is no conversion of the property(g).

475 Goods deposited in the hands of public officers, servants and bailees.—

Any officer of the customs having the charge or custody of any goods

(a) Wilde, C.J., *Towne v. Lewis*, 7 C. B. 611.

(b) *Canot v. Hughes*, 2 Sc. 663; 2 B. N. C. 448.

(c) *Smith v. Young*, 1 Campb. 439.

(d) *Lethbridge v. Phillips*, 2 Stark. 544.

(e) *Hawkes v. Dunn*, 1 Cr. & J. 527; See *Bowman v. Eaton*, 24 Barb. 528.

(f) *Green v. Dunn*, 3 Camp. 216. n.

(g) *Isack v. Clarke*, 1 Roll. Rep. 130.

which have come to his hands under the laws relating to the customs, may refuse delivery thereof until proof shall be given to his satisfaction that the freight due upon the goods has been paid(*h*). Where goods, which have been left at sea, are deposited in the hands of an admiral or public officer, to be kept in his custody until salvage has been paid, and he refuses to give them up until it is ascertained whether salvage is due or not, such qualified refusal does not amount to a conversion(*i*). A servant, who has been intrusted with the custody of goods by his master, does not do his duty if he gives them up on the demand of a stranger, without a previous application to his master for instructions. A refusal, therefore, by a servant to deliver up goods he has received from his master, without an order or authority from the latter, is a qualified, reasonable and justifiable refusal, and no evidence of a conversion(*k*). The servant has a right to say, "I received the goods from my master, and he ought to have an opportunity of admitting or rejecting your title, and of giving his instructions to me in the matter" (*post*, s. 2); but if, after having had an opportunity of receiving, or having received, the instructions of his master, he sets up, or relies upon the title of the latter, and gives an absolute and unqualified refusal to deliver up the goods, he will then, if the person demanding the goods be entitled to the possession of them, be guilty of a conversion(*l*).

If the owner of goods has delivered them to a bailee (*post*, ch. 9) to keep for him, so that the bailee has received the goods under a valid title, and the bailor, subsequently to the bailment, has, by bill of sale, transferred all his interest to a stranger, who demands the goods of the bailee, and the latter refuses to deliver them up until he has had time to receive the directions of the bailor, there is no evidence of a conversion(*m*). In an action for a conversion of chattels, it was held by Lord Kenyon, that where the demand of the things for which

(*h*) 22 & 23 Vict. c 37, s. 2. Trover may be maintained against a collector of customs who wrongfully detains the goods of an importer, and the officer cannot defend himself under the instructions of the secretary of the treasury. *Fiedler v. Maxwell*, 2 Blatchf. Ct. Ct. 552. A post-master who improperly detains a newspaper, although under the color of the laws of the United States, will be guilty of conversion, and may be proceeded against even in a justice's court. *Teal v. Felton*, 1 N. Y. 537; *id.* 12 How. (U. S.) 284.

(*i*) *Clark v. Chamberlain*, 2 M. & W. 83. *Kerford v. Mondel*, 28 Law J., Exch. 303.

(*k*) *Alexander v. Southey*, 5 B. & Ald. 249. *Mires v. Solebay*, 2 Mod. 245. Where an agent comes into the possession of personal property for his principal, he is not bound to deliver it to the rightful owner; and a demand and refusal, thus explained, is no evidence of a conversion. *Carey v. Bright*, 58 Penn. St. 70. See *Hunt v. Kane*, 40 Barb. (N. Y.) 638.

(*l*) *Lee v. Robinson*, 25 Law J., C. P. 249.

(*m*) *Lee v. Bayes*, 18 C. B. 607; 25 Law J., C. B. 249. *Europ. & Austr. R. M. Co. v. R. M. St. P. Co.*, 30 Law J., C. P. 247. *Sheridan v. New Quay Co.*, 4 C. B., N. S. 618. *Dowd v. Wadsworth*, 2 Dev. 130.

the action is brought is not made by the owner, who deposited them with the defendant, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know whether the things belong to him or not, and therefore keeps them until that is ascertained, or that the person who applies is not properly empowered to receive them, or until he is satisfied by what authority he applies, that is not such a refusal as is evidence of a conversion(*n*). And if the defendant has a *bonâ fide* doubt as to the title of the claimant, it must be shown that a reasonable time was given him for clearing up that doubt(*o*). But if he sets up the title of his bailor, and affirms him to be the owner, or gives an absolute, unqualified refusal to deliver up the chattels, there is, as we have seen, evidence of a conversion(*p*). Where a pony-chaise was delivered to a workman to be painted, and the latter deposited it in the hands of a person who refused to deliver it up to the owner, unless the latter either produced the person who placed the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property, without doing either the one or the other(*q*).

If a bailor has no title at the time of the bailment, the bailee can have none, for the bailor can give no better title than he has himself(*r*). The right to chattels personal, therefore, may be tried in an action against the bailee; but the situation of the bailee, in cases of disputed ownership to goods in his hands, is not one without remedy. He is not bound to ascertain the right. He may file a bill of interpleader in a court of equity(*s*); or if he is sued in the superior courts, or the county palatine courts, he may obtain relief under the 1 & 2 Wm. 4, c. 58 (*post*, ch. 9, s. 2), which enables defendants sued in those courts to obtain a stay of proceedings in the action until the rights of the adverse claimants are ascertained by a judicial decision in the manner therein provided. If the bailee forbears to adopt one or other

(*n*) *Solomons v. Dawes*, 1 Esp. 82. *Beckley v. Howard*, 2 Brevard, 94. *Blankenship v. Berry*, 28 Texas, 448. *Robertson v. Crane*, 27 Miss. 362. *Ingalls v. Bulkley*, 15 Ill. 224. *Rogers v. Weir*, 34 N. Y. 463.

(*o*) *Pillot v. Wilkinson*, 32 Law J., Exch. 201; 34 *ibid.* 22. *Rogers v. Weir*, 34 N. Y. 463.

(*p*) *Pillot v. Wilkinson*, *supra*. *Woodley v. Coventry*, 2 H. & C. 164. *Rogers v. Weir*, 34 N. Y. 463. *Robertson v. Crane*, 27 Miss. 362. *Ball v. Liney*, 48 N. Y. 6. But the rule is otherwise where the chattel is not at the time of the demand in the possession of the bailee, as where it has been stolen from him. *Buck v. Ashley*, 37 Vt. 475.

(*q*) *Buxton v. Baughan*, 6 C. & P. 674.

(*r*) *Biddle v. Bond*, 6 B. & S. 225; 34 Law J., Q. B. 137. *Ball v. Liney*, 48 N. Y. 6; *Story's Eq. Jur.* § 805. *Redfield on Car.* § 712. *Batat v. Hartley*, L. R., 7 Q. B. 504.

(*s*) See *Sablicich v. Russell*, L. R., 2 Eq. Ca. 441.

of these modes of proceeding, and makes himself a party in the matter by retaining the goods for the bailor, he must stand or fall by the title of the latter(*t*).

476 *Fraudulent deposits*.—If the deposit of goods with a bailee has been made in furtherance of a fraud, and the bailee has notice of the fraud, the assistance of the Court of Chancery may be obtained for the purpose of enabling the bailee to keep possession of the goods, and prevent the owner of them from obtaining the benefit of a fraud(*u*).

477 *Conversion of goods by railway companies*.—If goods are brought by mistake, and without right, and delivered at a railway station, the station-master has no right to detain them after demand by the owner, and the tender of any reasonable expense due upon them. Where, therefore, a station-master said, in answer to a demand of some goods, "The goods were brought to our station by an intermediate line, which has no right to send goods here, and I shall send them back," it was held that the railway company was liable for the conversion of the goods(*x*). But in order to fix the company, it must be shown that the wrongful act was done by their authority; that is by some person acting for them within the scope of his authority(*y*).

478 *Conversion of bills and notes*.—A man who holds a bill of exchange for a particular purpose has no right, without authority, to go and receive money on the bill, and if he does so, he is responsible for a conversion of the instrument(*z*). If, therefore, a bill of exchange or negotiable security is delivered into the hands of an agent or mandatory, that he may get it discounted, and he neglects to do so, and pays away the bill or note in furtherance of his own purposes, he is responsible for a conversion of the security(*a*); but if he pursues the

(*t*) *Ld. Tenterden, Wilson v. Anderton*, 1 B. & Ad. 456. *Atkinson v. Marshall*, 12 Law J., Exch. 117. *Rogers v. Weir*, 34 N. Y. 463.

(*u*) *Hunt v. Maniere*, 34 Law J., Ch. 142.

(*x*) *Rooke v. Mid. Rail. Co.*, 16 Jur. 1069.

(*y*) *Glover v. Lond. & N.-W. Rwy., etc.*, 5 Exch. 66. Where baggage is wrongfully detained by a railroad company, a demand of an agent of the company, who is charged with the whole duty of receiving, keeping, and delivering property will be sufficient, and a demand of the directors unnecessary. *Cass v. New York and New Haven R. R. Co.*, 1 E. D. Smith (N. Y. C. P.), 522. A mere delay in delivery by the company will not amount to a conversion. *Briggs v. New York Central R. R. Co.*, 28 Barb. (N. Y.) 515.

(*z*) *Alsager v. Close*, 10 M. & W. 583.

(*a*) *Cranch v. White*, 1 B. N. C. 414. *Atkins v. Owen*, 4 Ad. & E. 819. The maker of a negotiable promissory note can maintain an action for its conversion against a person, who, before it has any legal inception wrongfully negotiates it to a *bona fide* holder for value. *Decker v. Mathews*, 12 N. Y. 313. So an action of trover may be maintained against one who purchases a note with knowledge of the claim of another thereto, and collects it. *Allison v. King*, 25 Iowa, 56. So the maker of an accommodation note may maintain trover against the payee, who, after it has been discounted and taken up according to agreement, subsequently claims to hold it as a valid instrument against the maker. *Park v. McDaniels*, 37 Vt. 594. So

authority given him, and gets the bill discounted, but misapplies the proceeds, he is not responsible for the conversion of the security, but for the misapplication of the money(*b*).

If a person takes a bill or note after it becomes due, or under such circumstances of suspicion as should have prompted inquiry, he takes it with all its infirmities, and with the risk of its having been lost or stolen(*c*).

479 *Conversion of lost or stolen bank-notes or negotiable securities.*—If a bill of exchange, bank-note, or promissory note is lost, and the finder refuses to deliver the instrument to the owner on demand, he is guilty of a conversion of it, and is responsible in damages to the extent of the full value of the security. If the instrument is payable to bearer, and the finder, before any demand is made upon him, delivers the note to another, he is exempt from all further responsibility in respect of it(*d*). If the person to whom it is transferred took the note with knowledge of the infirmity of the title of the person from whom he received it(*e*), or if it is transferred to him for the mere purpose of enabling him to sue upon it, and he has given no value for the instrument, he will have no better title than the person from whom he has received it(*f*), and will be responsible for a conversion if he fails to deliver it up to the owner on demand. But if he is a *bonâ fide* holder for value, and took and discounted the note without any knowledge that the person from whom he received it had no title to it, he becomes the lawful owner of the instrument, and may retain it or pay it away(*g*). If he has given full value for the instrument, that is in general conclusive evidence of *bonâ fides*. If, on the other hand, he has paid a small sum for a bank-note of large value, payable on demand, that would be evidence the other way(*h*). The whole burthen

the maker of a note may maintain trover against the payee who refuses to deliver up the note on demand after it has been fully paid, or who, after such payment, disposes of the note. *Stone v. Clough*, 41 N. H. 290. But see *Lowremore v. Berry*, 19 Ala. 130.

So where an agent has authority to receive a note payable to his principal, in discharge of a debt due the latter, but takes it payable to himself, he will be liable for the conversion of the note after demand and refusal. *McNear v. Atwood*, 5 Shep. 434.

Where a note has been delivered to an agent to be negotiated and is pledged by him for a loan to himself at an unlawful rate of interest, and the pledgee has sold the note on non-payment of the loan, the owner of the note may, after demand and refusal, maintain trover against the pledgee. *Kentgen v. Parks*, 2 Sandf. (N. Y.) 60.

(*b*) *Palmer v. Jarmain*, 2 M. & W. 282. See *Neale v. Weare Bank*, 3 Allen (Mass.), 202.

(*c*) *Goggerley v. Cuthbert*, 2 B. & P. N. R. 170.

(*d*) *Canot v. Hughes*, *ante*, p. 400.

(*e*) *Burn v. Morris*, 2 Cr. & M. 579. *Marsh v. Marshall*, 53 Penn. St. 396.

(*f*) *Bailey v. Bidwell*, 13 M. & W. 73.

(*g*) *Miller v. Race*, 1 Burr. 452; 1 Smith's L. C., 6th ed., 468. *Grant v. Vaughan*, 3 Burr. 1524. *Lawson v. Weston*, 4 Esp. 57.

(*h*) *Raphael v. Bank of England*, 17 C. B. 173. *De Witt v. Perkins*, 22 Wis. 473.

of impeaching the title of the holder of the instrument falls upon the plaintiff, who disputes that title(*i*). It is enough for him to show that he lost the instrument, or that it has been stolen from him, and that immediately after the loss or the robbery it was found to be in possession of the defendant(*k*). The latter is not bound, from proof of those circumstances alone, to account for his possession of the security(*l*). But if the note is one of unusual value, and is found in the possession of the defendant immediately after the loss, and the latter declines to say from whom he received it, or to give reasonable information of the circumstances under which he became possessed of it, he would be required to prove that he gave value for the instrument(*m*); and if it was payable to bearer on demand, and he gave much less than its real value, and took it from a total stranger, without making an inquiry, and under circumstances which ought to have aroused suspicion in the mind of any prudent person, this will be evidence to show that he took it with knowledge of the infirmity of the title of the person from whom he received it, and to fix him with that infirmity of title. Gross negligence and want of caution are not in themselves sufficient to defeat the title of the holder, where he has given value for the security(*n*); but gross negligence may be evidence of *mala fides*, though it is not the same thing(*o*).

In the case of stolen notes, if the possession is recent, and the surrounding circumstances such as to show that the defendant stole the note, or received it into his possession knowing it to have been stolen, the plaintiff cannot maintain his action unless he has prosecuted for the felony (*ante*, pp. 41-42). In all cases he should use diligence to apprise the public of his loss(*p*).

480 *Conversion of chattels by one of several partners, joint-tenants, or tenants-in-common.*—The authorities seem to show that one partner or joint-tenant of a chattel cannot maintain an action against his co-tenant for a conversion of the chattel, in consequence of his having taken upon himself to sell the subject-matter of the joint ownership by sale

(*i*) *Worc. Co. Bank v. Dorch. & Milt. Bank*, 10 Cush. 489. *Wyer v. Dorch.*, etc., Bank, 11 Cush. 51.

(*k*) *Miller v. Race*, *supra*.

(*l*) *King v. Milsom*, 2 Campb. 5.

(*m*) *Bailey v. Bidwell*, 13 M. & W. 76.

(*n*) *Bayley, J., Backhouse v. Harrison*, 5 B. & Ad. 1105. *Raphael v. Bank of England*, 17 C. B. 161, overruling *Snow v. Leatham*, 2 C. & P. 317. *Snow v. Peacock*, 11 Moore, 286; 3 Bing. 405; and *Easley v. Crockford*, 3 M. & Sc. 701; 10 Bing. 243. And see *post*, s. 2, Title to bills and notes.

(*o*) *Goodman v. Harvey*, 4 Ad. & E. 876. *Arbouin v. Anderson*, 1 Q. B. 504.

(*p*) *Beckwith v. Corral*, 11 Moore, 337; 3 Bing. 444.

not in market overt, as the sale under such circumstances only transfers to the purchaser the vendor's interest in the chattel, and renders the purchaser co-tenant only with the other part-owners; but if the chattel be destroyed or sold in market overt, so as to transfer the entire property in the chattel to the purchaser, and oust the other part-owners of their proprietary rights, the sale would then amount to a conversion of the property, and the vendor would be answerable in damages to his other co-tenants^(q).

In Littleton (sect. 323) it is said that, "if two be possessed of chattels personal in common, and one take the whole to himself out of the possession of the other, the other has no remedy but to take this from him who hath done the wrong, to occupy in common, etc., when he can see his time"^(r). "This section of Littleton," observes Maule, J., "as it seems to me, is to be understood thus—that there may be dispositions of the subject-matter of the tenancy in common which will amount to a conversion, if done by a stranger, that are not so if done by a tenant in common. But I do not think that it therefore follows that no dealing with the thing by one of two tenants in common, which does not amount to a total annihilation of it, can be a conversion as against his co-tenant. It may be that the co-tenant may, if he think fit, follow the thing and make title to it, notwithstanding its sale and delivery to a third person. But it does not follow that where one tenant in common has dealt with the chattel to an extent exceeding his authority, as where he sells it out and out to a purchaser who carries it away, it would militate against a true understanding of the older authorities to hold that the co-tenant may treat that as a conversion"^(s).

(q) *Cresswell, J., Mayhew v. Herrick*, 7 C. B. 249. *Barnardiston v. Chapman*, cited 4 East, 121. *Wheeler v. Wheeler*, 33 Me. 347. *Smyth v. Tankersley*, 20 Ala. 212. *Wilson v. Reed*, 3 Johns. 175. *Hyde v. Stone*, 9 Cow. 231. *Gilbert v. Dickerson*, 7 Wend. 450. *Raines v. McNarry*, 4 Humph. 356. *Weid v. Oliver*, 21 Pick. 559. *Cowles v. Garrett*, 30 Ala. 341. *White v. Osborn*, 21 Wend. 72.

(r) See *Holiday v. Camsell*, 1 T. R. 658.

(s) *Mayhew v. Herrick*, 7 C. B. 229. It is a general rule that one tenant in common, or joint owner of property cannot maintain an action of trover against another, unless an actual destruction of the property or something equivalent is shown. *Reston v. Morris*, 1 Dutch. (N. J.) 173. *Lucas v. Wasson*, 3 Dev. 398. *Campbell v. Campbell*, 2 Murph. 65. *Strong v. Colter* 13 Min. 82. *Williams v. Nolen*, 34 Ala. 167. *Hunt v. Darling*, 14 Vt. 214. *St. John v. Standring*, 2 Johns. 468. *Seldon v. Hiccock*, 2 Cal. 166. *Wilson v. Reed*, 3 Johns. 175. *Mersereau v. Norton*, 15 Johns. 179.

If a tenant in common assumes and exercises exclusive ownership of the common property, repudiating the rights of the co-tenant, he is guilty of a conversion. *Swartwout v. Evans*, 37 Ill. 442. If he is bound by contract to divide the common property at a specified place, but appropriates it all to his own exclusive use under a claim of exclusive right, and under circumstances which render a division in the manner contemplated by the contract impossible, he is guilty of conversion. *Ripley v. Davis*, 15 Mich. 75.

If one of two partners carries off the partnership property, and pledges it without the knowledge or assent of the other, this is not a conversion of the property by the pledgor, and does not render him liable to be sued by his co-partner, as he has a right to pledge to the extent of his limited interest, and to create a lien upon the partnership property(*t*). Where one of two partners became bankrupt, and the solvent partner directed the defendants to sell some partnership property in their hands, and the defendants sold it and received the proceeds of the sale, it was held that the assignees of the bankrupt partner had no right to recover any of the proceeds of the sale from the defendant by action at law, but that they must proceed for an account in the court of bankruptcy or in a court of equity(*u*).

Wherever the act done by the one tenant in common operates as a total destruction of the thing held in common, there is then a wrong done to the other tenant in common, in respect of which an action is maintainable. "If one of two tenants be of a dove-house, and the one destroys the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action for a trespass"(*x*) "for there can be no tenancy in common of a thing destroyed"(*y*).

481 *Conversion of trust property*.—Every person who fraudulently receives or possesses himself of trust property is converted by the Court of Chancery into a trustee for the parties beneficially interested in such property, and they have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust(*z*).

If he mixes the common property with other property in such a manner that it cannot be distinguished, and sells the whole mass, he will be guilty of a conversion of the share of the co-tenant. *Redington v. Chase*, 44 N. H. 46.

So if two persons voluntarily mingle grain in a common bin, they become tenants in common of the grain; and if one sells the whole mass, he is liable to his co-tenant in an action of trover. *Nowlen v. Colt*, 6 Hill, 461.

So, where one of two joint owners of a promissory note sells or destroys it, or delivers it up to the maker to be cancelled or destroyed without the authority of the other, he is guilty of a conversion of the note. *Winner v. Penniman*, 35 Md. 163.

Where two tenants in common of a quantity of grain have agreed to divide it, and have settled the amount belonging to each, but without effecting an actual separation, the tenancy in common is severed by the apportionment, and one to whom a portion has been allotted but not delivered, may maintain an action for the conversion of that portion in the possession of his former co-tenant after a demand for its possession and a refusal to deliver it. *Lobdell v. Stowell*, 51 N. Y. 70.

(*t*) *Jones v. Brown*, 25 Law J., Exch. 345. *Fennings v. Ld. Grenville*, 1 Taunt. 248. But he would, it seems, be entitled to an action of account under the 4 Anne, c. 16, s. 27. *Jacobs v. Seward*, L. R., 5 Engl. & Ir. App. 464.

(*u*) *Morgan v. Marquis*, 9 Exch. 145. *Edwards v. Hooper*, 11 M. & W. 363. See 32 & 33 Vict. c. 71.

(*x*) Co. Litt. 200a, 200b.

(*y*) 14 Vin. Abr. 516, JOINT-TENANTS.

(*z*) *Rolfe v. Gregory*, 34 Law J., Ch. 274.

482 *Right of lien.*—“If a defendant, having a lien upon goods (*post*, ch. 9), refuses to deliver them up on demand, and claims to retain them on grounds quite distinct from a claim of lien, his refusal will be evidence of a conversion, and the existence of the lien will be no answer to an action for the conversion of the property(*a*). But a person does not waive his right of lien merely by omitting to mention it when the goods are demanded; and if he claims a right to detain them, in respect of two separate sums claimed to be due to him, and he has a lien only in respect of one of those sums, his refusal is no evidence of a conversion, unless the sum in respect of which the lien exists is tendered(*b*). “Where a person,” observes Alderson, B., “has no right of property in goods in his possession, but merely a right of lien, he has no right to sell them; and if he does sell the goods, he thereby puts an end to his lien”(*c*); but where goods have been deposited as security for a loan of money to be repaid on a day certain, there is an implied power of sale in case of default in payment on the day named(*d*). An unauthorized dealing with a pledge will not, it seems, revest the property in the pledgor, so as to entitle him to bring trover or detinue for the article pledged, though it may give him a special action of tort for any damage actually caused by such unauthorized proceeding(*e*). And it has been held in equity, that a lender of money on the security of railway stock has no right to realize the security during the currency of the loan, and that, if he does so, the owner may recover from him the price he got for the stock, if it is to his interest to do so(*f*). ”

(*a*) *Cannee v. Spanton*, 8 Sc. N. R. 714; 7 M. & Gr. 903. *Dirks v. Richards*, 5 Sc. N. R. 534; 4 M. & Gr. 574. *Weeks v. Goode*, 6 C. B., N. S. 367. See *Heine v. Anderson*, 2 Duer (N. Y.), 318; *Everett v. Coffin*, 6 Wend. 603. See *Holbrook v. Wright*, 24 Wend. 169; *Everett v. Salatus*, 15 Wend. 474.

(*b*) *Scarfe v. Morgan*, 4 M. & W. 281. *Kerford v. Mondel*, 28 Law J., Exch. 303. In order to constitute a conversion of goods by parties who have a right to a lien for a general balance beyond the charges on the goods, there must be a refusal to deliver after a demand and tender on the part of the owner. *Wagenblast v. McKean*, 2 Grant's Cas. (Penn.) 393.

Where there is no lien against goods except for freight and expenses, an offer to pay these charges, and a demand and refusal of the goods, is sufficient evidence of a conversion. *Id.*

(*c*) *White v. Spettigue*, 13 M. & W. 608.

(*d*) *Pigot v. Cubley*, 15 C. B., N. S. 701; 33 Law J., C. P. 134. *Addison on Contracts*, 6th ed., ch. 9, s. 2. See *Story on Bailments*, s. 308.

(*e*) *Donald v. Suckling*, L. R., 1 Q. B. 585. *Halliday v. Holgate*, L. R., 3 Exch. 299.

(*f*) *Langton v. Waite*, L. R., 6 Eq. Ca. 165. The case of *Lawrence v. Maxwell*, decided by the Court of Appeals of New York, is a valuable illustration of the principles stated in the text, and one of great importance in settling the rights of pledgor and pledgee of collateral securities. The action was brought for the alleged conversion of certificates for four hundred shares of Atlantic Mail Steamship Company's stock, delivered by the plaintiff to the defendant, a gold and stock broker, as security against any loss which the latter might sustain on purchases and sales of gold, to be made on account of the former. The transactions resulted in a loss of \$11,600.22, which amount the plaintiff tendered to the defendant and demanded a return of the certificates. The defendant replied that he could not deliver them as they were not in his possession. Upon the trial the defendant offered to prove a custom and

Where the plaintiff had agreed to buy of the defendant a stack of hay for 86*l.*, to be paid for when taken away, and to be removed by the 31st of May, and part only of the hay was paid for, and removed by the time appointed, whereupon the defendant, in the month of August following, cut up and consumed the residue of the hay, and the plaintiff afterwards tendered the unpaid purchase-money, and demanded the hay, and sued the defendant for converting it to his own use, it was held that the defendant's lien on the hay was determined by the act of conversion; that from the moment the defendant used the hay in a manner inconsistent with his claim of lien, his lien ceased, and a right of possession accrued to the purchaser(*g*). Where, however, some apples which had been sold by the defendant to the plaintiff at an agreed price, to be paid on a given day, were deposited in a kiln in an outhouse on the defendant's premises, and the key of the kiln was given by the defendant to the plaintiff, but the defendant kept the key of the outer door of the outhouse, and, the day of payment being passed, the defendant gave the plaintiff notice to take and pay for the apples, and, no attention being paid to this notice, the defendant carried them away and resold them, and the plaintiff then brought an action for a conversion of them, it was held that the defendant was entitled to a verdict under a plea denying the plaintiff's right of possession of the apples(*h*).

usage, known to the plaintiff, by which brokers may use by hypothecation or otherwise, securities received by them as a margin on similar transactions. The court held that "property pledged may, with the assent of the pledgor, express or implied, be used by the pledgee in any way consistent with the general ownership and ultimate rights of the former to have the property when the lien shall be discharged; that whatever right the pledgee may have, ceases the instant the obligation of the pledgor is discharged and the pledge is thereupon released; that if property is then lawfully out of the possession of the pledgee, it is his duty at once to regain the possession and restore it to the pledgor; and a neglect or refusal to do this renders him liable to an action as for a conversion of the property; and that an authority in the pledgee to sell the pledge is inconsistent with the contract of bailment, and a custom or usage will not avail thus to vary the terms of the agreement." *Lawrence v. Maxwell*, 53 N. Y. 19.

(*g*) *Curr v. Cuthbert*, 12 Law J., Exch. 309.

(*h*) *Wilgate v. Keeple*, 3 M. & Gr. 100; 3 Sc. N. R. 358.

SECTION II.

OF THE TITLE OF CHATTELS PERSONAL(i).

483 *Title to things altered by a wrong-doer.*—If a man takes away the chattel of another, either by design or accident, and alters it, or improves it, he has no right to detain it from the owner until his alterations and improvements have been paid for. If a man wrongfully takes away my carriage, and without any authority from me, sends it to a coachmaker to be repaired or painted, I am entitled to the possession of my carriage without paying for the repairs or painting”(j).

(i) As to title by bill of sale, see Addison on Contracts, 6th ed., p. 136, *et seq.*; *Massey v. Sladen*, L. R., 4 Exch. 13; *Mercer v. Peterson*, L. R., 3 Exch. 104. As to goods in the “apparent possession” of the assignor within the meaning of the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 7, see *Robinson v. Briggs*, L. R., 6 Exch. 1, and *post*, p. 440. As to what is a bill of sale requiring registration or not, see *Johnson v. Ossenton*, 38 L. J., Exch. 76; *Byerley v. Prevost*, L. R., 6 C. P. 144. As to priority between two holders of bills of sale, see *Ex parte Allen*, L. R., 11 Eq. Ca. 209. As to title to ships, see Addison on Contracts, 6th ed., pp. 136-8, 254, 255; *Johnson v. Royal Mail Steam Packet Co.*, L. R., 3 C. P. 38.

(j) *Hiscox v. Greenwood*, 4 Esp. 174. “It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if during its continuance, the wrong-doer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the manufactured article still belongs to the owner of the original material, and he may retake it or recover its improved value in an action for damages. And if the wrong-doer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. But if the chattel wrongfully taken, afterwards come into the hands of an innocent holder, who believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and he may recover its value as it was when the conversion or consumption took place.” *Ruggles, J.*, in *Silsbury v. McCoon*, 3 N. Y. 379. See, also, *Wetherbec v. Green*, 22 Mich. 311; *Britts v. Lee*, 5 Johns. 348; *Curtis v. Groot*, 6 Johns. 163; *Chandler v. Edson*, 9 Johns. 362; *Hyde v. Cookson*, 21 Barb. 104; *Baker v. Wheeler*, 8 Wend. 508; *Snyder v. Veaux*, 2 Rawle, 427; *Riddle v. Driver*, 12 Ala. 590; *Ryder v. Hathaway*, 21 Pick. 306; *Sedg. on Dam.* 484.

Where a wilful trespasser takes a quantity of corn from the owner and converts it into whiskey, the property is not changed, and the owner may recover the value of the whiskey in an action of trover. *Id.* The same rule has been applied where a wilful trespasser converted a tree into shingles. *Betts v. Lee*, 5 Johns. 349. Or into charcoal. *Curtis v. Groat*, 6 Johns. 169. Or into plank or boards. *Brown v. Sax*, 7 Cow. 95. *Wingate v. Smith*, 20 Me. 287. But where timber to the value of twenty-five dollars is sold by one having no title thereto, to

Where the defendant and the plaintiff being at play, the plaintiff thrust his money into the defendant's heap, and so intermingled the coins that it became impossible to separate them, it was adjudged that the whole heap belonged to the defendant; and Coke, J.C., said, "The law is, that if J. T. have a heap of corn, and J. D. will intermingle his corn with the corn of J. T., the latter shall have all the corn, because this was done by J. D. of his own wrong"(k). And this case was put by Anderson: "If a goldsmith be melting of gold in a pot, and as he is melting it I will cast gold of mine into the pot, which is melted altogether with the other gold, I have no remedy for my gold, but have lost it; and if a man take my garment and embroider it with silk or gold, or the like, I may take back my garment; but if I take the silk from you, and with this face or embroider my garment, you shall not take my garment for your silk which is in it, but are put to your action for taking of the silk from you"(l).

484 *Title to timber severed from the inheritance.*—Whenever timber-trees are severed from the freehold, either by the act of God, as by tempest, or by a trespasser and by wrong, the timber belongs to the person who has the first estate of inheritance, whether in fee or in tail; and he may bring an action for the conversion of it, or file a bill against the wrong-doer for an account. If, therefore, the tenant-for-life cut down timber, the timber belongs to the person entitled to the first estate of inheritance(m). But if the wrong-doer has himself the first estate of inheritance, the Court of Chancery will not allow him to take advantage of his own wrong, but will direct the value of the timber to be invested and accumulated for the benefit of the remaindermen who may afterwards become entitled to the property(n).

485 *Title to chattels by finding.*—The finder of a lost article is entitled to

a purchaser having no knowledge of the defect of title, and who subsequently manufactures the same into hoops of the value of seven hundred dollars, the title to the timber is changed by the substantial change of identity, and the actual owner cannot maintain replevin for the hoops. *Wetherbee v. Green*, 22 Mich. 311.

(k) *Warde v. Eyre*, 2 Bulstr. 323. See *Stephenson v. Little*, 10 Mich. 433; *Wetherbee v. Green*, 22 Mich. 311; *Fart v. Ten Eyck*, 2 Johns. Ch. 62; *Gordon v. Jenney*, 16 Mass. 465; *Treat v. Barber*, 7 Conn. 280; *Barron v. Cobleigh*, 11 N. H. 561; *Robinson v. Holt*, 39 N. H. 567; *Roth v. Wells*, 29 N. Y. 486; *Beach v. Schmultz*, 20 Ill. 185; *Willard v. Rice*, 11 Metc. 493; *Jenkins v. Steanka*, 19 Wis. 123; *Hesseltine v. Stockwell*, 30 Me. 237.

If a person fraudulently or wrongfully take logs which are the property of another, and manufacture them into boards, and then so intermingle them with other boards of his own so that they cannot be distinguished, the owner of the logs may maintain replevin or trover for the whole pile of boards. *Wingate v. Smith*, 7 Shep. 287. See *Root v. Bonnema*, 22 Wis. 539.

(l) *Anon.*, Poph. 38. See *Wetherbee v. Green*, 22 Mich. 311.

(m) *Bewick v. Whitfield*, 3 P. Wms. 263. *Whitfield v. Bewit*, 2 P. Wms. 241.

(n) *Powlett v. Duchess of Bolton*, 3 Ves. 377. *Tullit v. Tullit*, Ambli. 370. *Dare v. Hopkins*, 2 Cox, 110.

the possession of it as against all persons except the real owner, but he must be an "innocent finder," and must not have taken possession of the property feloniously or fraudulently, knowing, or having the means of knowing, the owner of it, and neglecting to deliver it up to him(o). Where a chimney-sweeper's boy found a jewel, and carried it to a goldsmith's shop to know what it was worth, and delivered it into the hands of the goldsmith's apprentice; who, under the pretence of weighing it, took out the stone, and offered the boy three-halfpence for it, which the boy refused, and insisted upon having the jewel back, whereupon the apprentice delivered him the socket without the stone, and an action was brought against the master for a conversion of the jewel, it was ruled "that the finder of a chattel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and, consequently may maintain an action for the conversion of it"(p).

Where the plaintiff, on leaving the defendant's shop, picked up a small parcel which was lying on the shop-floor, and showed it to the shopman, and the parcel, on being opened, was found to contain bank-notes, and the plaintiff requested the defendant to keep the notes, and deliver them to the owner, and the defendant advertised for the owner, and after the lapse of three years, no owner appearing to claim them, the plaintiff applied to the defendant for the notes, offering to pay the expenses of the advertisements, and to indemnify the defendant against any claim in respect of the notes, and the defendant refused to deliver them up, it was held that the plaintiff was entitled to recover them, or the value of them, and that the circumstance of the notes being found by the plaintiff inside the defendant's shop, in the defendant's own house, did not give the defendant any right to detain them as against the plaintiff, who found them there(q).

486 *Title to wild birds and animals feræ naturæ*—*Right of the hunter to the game he kills*.—So long as animals *feræ naturæ* remain upon a man's land they belong to him, but the moment they leave his land his possessory property is gone; and this is so, even if they be hunted out of his land by a trespasser, and although they be killed by the trespasser on another man's land. The property in wild grouse is not absolute in any one. So long as the wild bird is upon a man's land he has a

(o) *Buckley v. Cross*, 32 Law J., Q. B. 129.

(p) *Armory v. Delamirie*, 1 Str. 505. *Mathews v. Harsell*, 1 E. D. Smith (N. Y.), 393. *Clark v. Malory*, 3 Harring. 68. *McLaughlin v. Waite*, 9 Cow. 670.

(q) *Bridges v. Hawkesworth*, 21 Law J., Q. B. 75.

possessory property in it, but as soon as it flies or goes off his land, his property is gone(*r*). If *A* starts a hare in the ground of *B*, and hunts it and kills it there, the property continues all the while in *B*; but if *A* starts a hare in the ground of *B*, and hunts it into the ground of *C*, and kills it there, the property has been held to be in *A*, the hunter, although he is liable to actions of trespass on the lands both of *B* and *C*(*s*). Where rabbits were snared and killed in Lord Exeter's land by poachers, and were sold by them to a dealer in game, it was held that the rabbits were the property of Lord Exeter, on whose land they were started and killed, and not the property of the dealer in game(*t*). And where rabbits are bred in a warren, the owner of the warren has a right of property in the rabbits so long as they remain on his land, but as soon as they leave his land his right of property in them is gone(*u*).

Where the Bishop of London granted to the defendant a lease of land for a term of years, excepting the trees and the herons and shovellers making their nests in the trees, and the defendant, during the lease, took some of the herons, and the bishop brought an action of trespass against him, it was held that he was entitled to recover the value of the herons; for although they were *feræ naturæ*, he had an interest in them by reason of the trees in which they built(*x*).

487 *Title of the fisherman to the fish he harpoons or nets.*—If a whale has been struck by a harpooner, the whale, so long as the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, is a fast fish, though during that time it is struck by a harpooner of another ship; and if the whale afterwards breaks from the first harpoon, but continues fast

(*r*) *Rigg v. Lonsdale*, 1 H. & N. 923, affirming *Lonsdale v. Rigg*, 11 Exch. 654; 25 Law J., Exch. 81. Otherwise where the wild bird has been wholly or partially tamed. *Amory v. Flynn*, 10 Johns. 102.

(*s*) *Holt, C.J., Sutton v. Moody*, 1 Ld. Raym. 250. *Churchward v. Studdy*, 14 East, 249. But in order to vest the title in the hunter the animal pursued must be actually in his control at the time of the taking. *Butler v. Newkirk*, 20 Johns. 75. The mere fact of pursuit with the probability of immediate capture, will not vest the title in the hunter as against a third party who kills and carries away the animal pursued. *Pierson v. Post*, 3 Caines, 175.

A swarm of wild bees belongs to the person who first hives them; but if they fly from the hive of the owner to the lands of another, the former retains a qualified property in them so long as he can keep them in view, and possesses the power to pursue and identify them. *Goff v. Killo*, 15 Wend. 550. Until bees have been hived and reclaimed they belong to the owner of the lands upon which they are found. *Gillet v. Mason*, 7 Johns. 16. *Ferguson v. Miller*, 1 Cow. 243.

(*t*) *Blades v. Higgs*, 12 C. B., N. S. 501; 31 Law J., C. P. 151; 32 ib. 182; 34 ib. 236 (Dom. Proc.).

(*u*) *Bro. Abr. Property*, pl. 4. *Hadesden v. Gryssell*, *ante*, p. 131.

(*x*) *Bishop of London's case*, 14 Hen. 8, f. 1. See *Commonwealth v. Chace*, 9 Pick. 15

to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it(y). But although the harpoon comes out of the fish, or is detached from the line, yet if the whale is so entangled in the rope as to give the first strikers the same power over it as if the harpoon was fixed, the fish will still continue a fast fish, and be the property of the first strikers(z); and if the fish is unlawfully liberated by the wrongful interference of a third party, who afterwards harpoons it and secures it, it will, nevertheless, be the property of the first strikers(a). But if the interference of such third party takes place before the fisherman has got the fish into his power, or under his dominion and control, there can be no right of property in or title to, the fish(b). Thus, where the plaintiff, whilst fishing for pilchards, had nearly encompassed a vast quantity of fish with a net, and would have captured the whole of them but for the interference of the defendant, who came with boats and sailors, and drove the fish into his own nets and captured them, it was held that the plaintiff could set up no title to the fish, as he never had them under his dominion and control, but ought to have sued the defendant for interfering with his nets, and unjustifiably preventing the plaintiff from exercising his occupation and calling of a fisherman, and catching the fish(c).

488 *Title to chattels by gift*.—If a verbal gift has been made of a piece of plate, or other valuable chattel, to a person to whom it has been delivered to be kept, the verbal gift, unaccompanied by any transfer of possession, cannot, it has been held, transfer any property in the chattel to the donee. There must be either an actual manual delivery, if the chattel is capable of manual occupation and delivery, or a constructive delivery, if the article is bulky and incapable of manual transfer(cc); or there must be a deed of gift under seal, in order to

(y) *Littledale v. Scraith*, 1 Taunt. 243, note (a). *Aberdeen Arctic Co. v. Sutter*, 6 Law T. R.; N. S. 229; 10 W. R. 516, H. L.

(z) *Hogarth v. Jackson*, M. & M. 58.

(a) *Skinner v. Chapman*, M. & M. 59, n.

(b) *Erle, J., Stevens v. Jeacocke*, 11 Q. B. 741.

(c) *Young v. Hichens*, 6 Q. B. 606. See the Sea Fisheries Act, 1868, 31 & 32 Vict. c. 45.

(cc) *Carleton v. Lovejoy*, 54 Me. 445. *Hanson v. Millett*, 55 Me. 184. *Peeler v. Guilkey*, 27 Texas, 355. *Casswell v. Ware*, 30 Ga. 267. *Reed v. Spaulding*, 42 N. H. 114. *Mechling's Appeal*, 2 Grant's cases (Penn.), 157. *Kidder v. Kidder*, 33 Penn. St. 268. *Wheatley v. Abbott*, 32 Miss. 343. *Ives v. Owens*, 28 Ala. 641. *Noble v. Smith*, 2 Johns. 52. *Grangiac v. Arden*, 10 Johns. 293. *Cook v. Husted*, 12 Johns. 188. *Huntington v. Gilmore*, 14 Barb. 243. *Hunter v. Hunter*, 19 Barb. 631. *Woodruff v. Cook*, 25 Barb. 505.

clothe the donee with the ownership and right of possession of the chattel(d). However, although the property in the chattels may not pass at law, an agreement not under seal may be sufficient to create such an equitable interest in them, as to justify the sheriff in not seizing them, while in the possession of the apparent owner, under a writ of *fi. fa.*(e).

489 *Title to clothes by hiring and service.*—Where the plaintiff had been hired as a servant by the defendant, at thirty guineas a year and a suit of clothes, and had, on entering the service, been provided with the clothes, it was held that they did not become his property, and that he could not sue his master for detaining them until he had served a year(f).

490 *Of the right to the possession of grants of arms, title-deeds, leases, bonds, and securities.*—A deed of grant of arms from the Herald's College is a sort of family document in which every member of the family whose claim to arms is dependent upon it, has an interest. Whatever member of the family, therefore, has got possession of it is entitled to keep it, but may be called on to produce it(g). But if the grant is taken out at the joint expense of three members of a family, the deed belongs to the survivor. The owner of a freehold estate has, in general, a right to the title-deeds, the right to the deeds following the right to the lands. Where, therefore, a man conveyed his freehold estate by way of mortgage to the plaintiff, and handed over to the plaintiff forged and counterfeit title-deeds, and then deposited the genuine deeds with a banker as security for a loan, and the plaintiff brought an action against the banker for the deeds, it was held that he was entitled to recover them(h). The tenant for life has a right to the title-deeds of the estate, and may maintain an action against a remainderman who has them in his possession and refuses to give them up(i); but on the death of the tenant for life the remainderman is entitled to the deeds(k). A lessee, to whom a lease has been delivered, has a right to the possession of the lease, both during the term and after its expiration, so that the lessor has no right to claim possession of it from

(d) *Irons v. Smallpiece*, 2 B. & Ald. 551. *Shower v. Pilek*, 4 Exch. 478; 19 Law J., Exch. 113. *Connor v. Traivick's adm'rs*, 37 Ala. 289.

(e) *Brown v. Bateman*, L. R., 2 C. P. 272.

(f) *Crocker v. Molyneux*, 3 C. & P. 470.

(g) *Stubs v. Stubs*, 1 H. & C. 257; 31 Law J., Exch. 510.

(h) *Newton v. Beck*, 3 H. & N. 220; 27 Law J., Exch. 272.

(i) *Allwood v. Haywood*, 32 Law J., C. P. 153. See *Newton v. Newton*, L. R., 4 Ch. App. 143. And as between trustee and cestui que trust, see *Stanford v. Roberts*, L. R., 6 Ch. App. 307.

(k) *Easton v. London*, 33 Law J., Exch. 34.

the lessee(l). The obligee of a bond also, to whom the bond has been delivered, is not bound to deliver it up to the obligor on being tendered the amount due upon it. The obligor is entitled to an acquittance or an acknowledgment of the receipt of the money due upon the bond, but not to the possession of the instrument itself(m). Neither is the payee of a note not negotiable bound to deliver up possession of the note to the maker on receiving the amount due upon it(n).

491 *Right to the possession of documents and securities for money as between trustee and cestui que trust.*—The person entitled to the beneficial interest in a contract or security for money is, in general, entitled to the custody of the document or writing by which the beneficial interest or money is secured. If, therefore, the defendant has obtained possession of a policy of insurance to which the plaintiff is equitably entitled, he is responsible for a conversion of the property if he fails to restore it after demand, as the person entitled to the equitable interest in the document is legally entitled to the custody of it(o).

492 *The right of property in letters* is in the receiver, or person to whom they are addressed and delivered, so far as regards the paper on which they are written. If, therefore, they get back into the hands of the writer, the receiver is entitled to have them returned to him; but he has no right to publish them without leave from the writer(p).

493 *Title to chattels by purchase in market overt.*—At common law the right of property in things sold is changed permanently by a sale in market overt(q), so that whoever buys goods and chattels in the open, public, legally constituted market, acquires an indefeasible title to the chattels so purchased, unless he buys with knowledge of an infirmity of title on the part of his vendor. But in order to put a check upon the transfer of stolen property, and induce persons who have been robbed to do their duty to society by prosecuting and convicting the thief, it is enacted by the 24 & 25 Vict. c. 96, s. 100, re-enacting the 7 & 8 Geo. 4, c. 29, s. 57, that if any person guilty of any such felony or misdemeanor as is mentioned in the Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property

(l) *Hall v. Ball*, 3 M. & Gr. 242. *Elworthy v. Sandford*, 34 Law J., Exch. 42.

(m) *Littledale, J.*, in *Wain v. Bailey*, 10 Ad. & E. 618.

(n) *Wain v. Bailey*, *supra*.

(o) *Oliver v. Oliver*, 11 C. B., N. S. 139; 31 Law J., C. P. 4.

(p) *Watson v. Maclean*, E. B. & E. 77. See *Woolsey v. Judd*, 4 Duer. (N. Y. S. S.), 379; *Eyre v. Higbee*, 15 How. (N. Y.) 45; *Grigsby v. Breckenridge*, 2 Bush (Ky.), 480.

(q) See *Crane v. London Dock Co.*, 33 Law J., Q. B. 224. As to the sale of a ship formerly engaged in acts of piracy, or of goods taken by pirates, to third persons, see *Reg. v. McCleverty*, L. R., 3 P. C. C. 673.

whatsoever, shall be indicted for such offence on behalf of the owner, his executor, etc., and convicted thereof, the property *shall be restored to the owner*, or his representative; and the court before whom any person shall be tried for any such felony or misdemeanor shall have power to award restitution thereof. The order of restitution, however, is not necessary to revest the right of property in the person robbed, under the above section, and to enable him to follow goods sold in market overt(r).

During the interval between the commission of the felony and the conviction the purchaser has a *prima facie* title, liable to be defeated by the conviction(s); and persons who purchase during that period, and have the good fortune to sell again before the conviction, cannot be subjected to an action for taking or converting the stolen property. Thus, where the plaintiff, who had been robbed of some sheep, and was prosecuting the thief, gave notice of the robbery to the defendant, who had purchased the sheep in market overt, not knowing them to have been stolen, and required the defendant to deliver up the sheep to him, which the defendant refused to do, and sold the sheep again before the conviction of the felon, it was held that the defendant was not responsible for a conversion. "The plaintiff," observes Buller, J., "could not demand the sheep of the defendant, merely because they had been stolen from him, for it was not then certain that the felony would be followed by a conviction of the offender." The plaintiff must prove that the sheep were his property, and that while they were so they came into the defendant's possession, who converted them to his

(r) Scattergood v. Silvester, 15 Q. B. 511; 19 Law J., Q. B. 447.

(s) Peer v. Humphrey, 2 Ad. & E. 495. The English doctrine that the owner of stolen property cannot bring his action against the thief or the purchaser from him until after the conviction of the thief for the larceny, and that an action will not lie against a *bona fide* purchaser of stolen goods in market overt if he has parted with the goods previous to the conviction of the thief, does not prevail in the State of New York. In that State the doctrine that the private injury is merged in the public wrong has been abolished by statute, and the English doctrine of markets overt has not been adopted. Therefore the owner of goods feloniously taken may bring his action to recover the property or its value without showing a conviction of the thief, and notwithstanding that the purchaser has parted with the property previous to the conviction. Hoffman v. Caron, 22 Wend. 285, n.

The English doctrine has also been repudiated in New Hampshire, Massachusetts, Kentucky, South Carolina, Connecticut, Illinois, and Indiana, and probably in the majority of the other States. See Pettingill v. Rideout, 6 N. H. 454; Cross v. Guthery, 2 Root, 90; Piscataqua Bank v. Turnley, 1 Miles, 312; Patton v. Freeman, Cox, 113; Hepburn's Case, 3 Bland, 114; Allison v. Farmer's Bank of Virginia, 6 Rand. 223; White v. Fort, 3 Hawks, 251; Robinson v. Culp, 1 Const. R. 231; Story v. Hammond, 4 Ohio, 376; Ballen v. Alexander, 6 Humph. 433; Blassingame v. Graves, 6 B. Mon. 38; Newkirk v. Dalton, 17 Ill. 413; Boston, etc. v. Dana, 1 Gray, 83; Short v. Barker, 22 Ind. 148; Statutes of Maine of 1844, ch. 102.

In support of the English doctrine, see Martin v. Martin, 25 Ala. 201; Foster v. Tucker, 3 Greenl. 458; Boody v. Keating, 4 Greenl. 164; Bell v. Troy, 35 Ala. 184; Hutchinson v. Bank of Wheeling, 41 Penn. St. 291.

use. But here the plaintiff's property did not revest in him till after the conviction of the felon; and from the time of the conviction the defendant has never had possession of the sheep(*t*).

494 *Title to chattels by private sale and transfer*.—A person who buys goods by private contract, and not by public sale in market overt, acquires no better title than that possessed by his immediate vendor. If he purchases, at a sheriff's sale or a pawnbroker's auction, property which the sheriff or the pawnbroker had no right to sell, he acquires no title as against the true owner of such property(*u*). Whenever, therefore, a purchaser buys of the servant or agent of the owner out of market overt, he takes the risk of the servant's having sold without authority; and if the servant had no authority to sell, and the purchaser refuses to give up the subject-matter of the sale on demand to the master, he is guilty of a conversion(*x*); but where the owner of good has intrusted another with the possession of goods in order that he may sell them, and the person so intrusted sells contrary to the secret instruction of the owner, the purchaser will nevertheless acquire a perfect and complete title by the sale(*y*).

A purchase of stolen property out of market overt does not convey any right of property in the thing sold to the purchaser, although he may have purchased *bonâ fide* for a valuable consideration, and without notice of the felony. A person, therefore, who has been robbed may follow the stolen property, and is entitled to recover it from *bonâ fide* purchasers who have not bought it in the open public market, although the thief has not been convicted of the felony. In like manner, if the property has been pledged with a pawnbroker, or any other person, he may sue the pawnbroker, or other pledgee, for detaining or converting the property, although he has not prosecuted the thief nor taken any steps to put the criminal law in motion(*z*). But if the pawnbroker or pledgee received the goods knowing them to have been stolen, the owner of the property cannot then maintain an action against the latter until he has prosecuted for the felony.

(*t*) *Horwood v. Smith*, 2 T. R. 756. *Gimson v. Woodfall*, 2 C. & P. 41.

(*u*) *Farrant v. —*, 3 Stark. 130. *Chapman v. Speller*, 14 Q. B. 621; 19 Law J., Q. B. 239. *Morely v. Attenborough*, 3 Exch. 500. *Williams v. Merle*, 11 Wend. 81; *Roberts v. Dillon*, 3 Daly (N. Y. C. P.) 50; *Spaulding v. Brewster*, 50 Barb. (N. Y.) 142; *Basset v. Green*, 2 Duval, (Ky.) 560; *Carter v. Simpson*, 7 Johns. 535; *Carpenter v. Stilwell*, 11 N. Y. 61; *Wood v. Colvin*, 2 Hill (N. Y.), 566.

(*z*) *Metcalf v. Lumsden*, 1 C. & K. 309. See *Cooper v. Newman*, 45 N. H. 339; *Gilmore v. Newton*, 9 Allen (Mass.), 171; *Derving v. Austin*, 34 Vt. 330; *Woster v. Sherwood*, 25 N. Y. 278; *Saltus v. Everett*, 20 Wend. 267.

(*y*) Addison on Contracts, 6th ed., p. 162.

(*z*) *White v. Spettigue*, 13 M. & W. 608. *Lee v. Bayes*, 18 C. B. 599.

Whenever by a contract of sale, made either by the plaintiff in person, or through the medium of his agent, both the right of property and the right of possession of the thing sold have passed to the plaintiff, he is entitled to maintain an action for the unlawful taking, detaining or converting of the thing which has thus become his own property. Where the plaintiff commissioned her brother to buy a cow for her when he should meet one which he thought would suit her, and the brother bought a cow, and as it was being driven home, and before the plaintiff knew of or had assented to the purchase, the cow was seized by a creditor of the brother, it was held that the plaintiff was entitled to maintain an action of trespass for the seizure of the cow, it being her property(a).

When specific ascertained chattels have been sold at a fixed price, the seller is bound to deliver them whenever they are demanded, upon payment of the price; but the buyer has no right to the possession of the chattels until he pays or tenders the price, unless the goods are sold upon credit(b). Where a debtor shipped goods on board a vessel at Newcastle, to be delivered to his creditor, the plaintiff, in London, and forwarded to the latter a receipt, signed by the mate, acknowledging the receipt of the goods on board, to be delivered to the plaintiff, it was held that the property and right of possession in the goods vested in the plaintiff so as to entitle him to maintain an action against a defendant for the non-delivery of the goods(c). Whether the property in goods, to which something remains to be done before they are ready to be delivered, passes to the buyer at the time of the sale, or on the completion of the goods, depends on the intention of the parties(d).

495 *Colorable transfers*.—If a transfer of property has been actually effected either by a deed of transfer or by actual delivery, it is not competent to either of the parties to the transfer to set up or show that it was done for the purpose of effecting a fraud on third persons. Acts done may be valid as between the parties, though void as to others. Thus, an assignment made for the purpose of defeating one of several creditors is a good deed as between the parties, but void as against creditors; but if there has been no actual transfer of the property, but only a deposit of chattels, in the hands of a bailee, for the purpose of defeating a creditor, the depositary cannot set up the fraudulent

(a) *Thomas v. Phillips*, 7 C. & P. 573. *Payne v. Brander*, 2 Stark. 568.

(b) *Bloxam v. Saunders*, 4 B. & C. 948.

(c) *Evans v. Nichol*, 4 Sc. N. R. 53; 3 M. & Gr. 614.

(d) *Young v. Matthews*, L. R., 2 C. P. 127.

character of the deposit in order to deprive the plaintiff of goods which are his property, and to which the depositary has no semblance of title(e).

496 *Title of innocent purchasers from fraudulent vendors.*—A contract for the sale of goods, though obtained by fraud, is perfectly good if the person defrauded thinks fit to rely upon it and enforce it; but the latter may, if he pleases, as soon as he discovers the fraud, and before the rights of innocent third parties have intervened, disaffirm and annul the contract(f), and treat the person who has been guilty of the fraud as a tort-feasor. If a vendor has parted with the possession of goods in fulfilment of a contract of sale, obtained by fraud on the part of the purchaser, he cannot, after the goods have been re-sold, and passed into the hands of a *bonâ fide* sub-purchaser, disaffirm the contract, and annul the title of the latter to the property; for where one of two innocent persons must suffer, it is considered to be more just that the burthen should fall upon the vendor who parted with the possession of his goods, who trusted to a lie, and was the victim of his own credulity; rather than upon the *bonâ fide* sub-purchaser, who trusted to the actual possession of the goods by the person with whom he dealt. "If this were not so," observes Jervis, C.J., "goods at all tainted by fraud might be followed through any number of *bonâ fide* purchasers—a most inconvenient and absurd doctrine; for a vendor who does not choose to avail himself of means of inquiry would thus, by trusting the vendee, be giving him unlimited means of defrauding the rest of the world"(g).

But if the relation of vendor and vendee does not subsist between the original owner and the person who commits the fraud, and the goods have been obtained by false pretences, and afterwards disposed of to a *bonâ fide* purchaser by sale not in market overt, the latter does not acquire a title to the goods as against the person who has been defrauded(h). Where, therefore, the plaintiff had sold a quantity of tartaric acid, to be delivered to the order of their purchaser, and one Anderson came to the plaintiffs and represented himself to be a sub-purchaser of the acid, and upon the strength of such representation obtained a delivery-order from the plaintiffs, and

(e) *Bowes v. Foster*, 2 H. & N. 779; 27 Law J., Exch. 262.

(f) See *Clough v. L. & N.-W. Rwy., L. R.*, 7 Exch. 26; *Lloyd v. Brewster*, 4 Paige 537.

(g) *White v. Garden*, 10 C. B. 927. *Sheppard v. Shoolbred*, Car. & M. 63. *Saltus v. Everett*, 20 Wend. 267. *Mowry v. Walsh*, 8 Cow. 243. *Root v. Trench*, 13 Wend. 572. *Andrew v. Dieterich*, 14 Wend. 31.

(h) *Higgins v. Burton*, 26 Law J., Exch. 342. *Robinson v. Douchy*, 3 Barb. (N. Y.) 20. But see *Fassett v. Smith*, 23 N. Y. 252.

got possession of the acid and pledged it with the defendants, it was held that the defendants could make no title to the acid through Anderson, who had obtained the transfer of the acid to himself without authority and by false pretences, and that mere possession of chattels, with no further indicia of title than a delivery-order, is not sufficient to entitle a *bonâ fide* pawnee of the person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action for a conversion of the property(*i*).

497 *Transfers of chattels in the hands of bailees*.—If the owner of a chattel or negotiable security places it in the hands of *A*, with directions to hand it over to *B* for *B*'s use, that does not have the effect of transferring the property to *B*. The direction remains countermandable by the remitter until it is executed either by the actual delivery of the chattel or money to the remittee, or by some binding engagement entered into between the agent and the remittee, which gives the latter a right of action against the former(*j*). "The transaction amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it"(*k*). But as soon as the person holding the chattel enters into a binding engagement with the third person to hold it for him, he cannot afterwards contest the title of the latter(*l*). If the defendant has led the plaintiff to believe that he would act as a warehouseman or bailee of the goods for the plaintiff, and after that parts with them to another, he will be guilty of a conversion(*m*).

498 *Title by delivery-order*.—The mere possession of a dock-warrant, delivery-order, or warehouse-keeper's or wharfinger's receipt for goods, or any other documentary evidence of title to chattels, is no stronger evidence of title and ownership than the actual possession of the goods themselves. And if by means of a delivery-order fraudulently obtained and presented to a warehouse-keeper, merchandise has been transferred in the warehouse-keeper's books of transfer into the name of the wrong-doer, the latter cannot thereby convey a valid title by sale

(*i*) *Kingsford v. Merry*, 1 H. & N. 503. See *Brower v. Peabody*, 13 N. Y. 121.

(*j*) *Brind v. Hampshire*, 1 M. & W. 373. *Williams v. Everett*, 14 East, 596.

(*k*) *Scott v. Porcher*, 3 Mer. 663.

(*l*) *Stonard v. Dunkin*, 2 Campb. 344.

(*m*) *Hawkes v. Dunn*, 1 Cr. & J. 527.

or by pledge(*n*). But this is otherwise in the case of a negotiable instrument, such as a bill of lading for delivery of certain goods to order or assigns, and therefore a person, who has obtained such a bill by fraud, can confer a valid title to the goods on a third person to whom he has indorsed the bill of lading for value, and who has no notice of the fraud(*o*.) As between several innocent indorsees of the same bill of lading, however (where the bill of lading has been drawn in triplicate, and two of them have been indorsed to one person and the remaining one to another), the title of the first indorsee in point of time will prevail(*p*).

499 *Title by purchase from the sheriff*.—The ordinary course in cases of seizure of goods by a sheriff under a *fi. fa.*, is for the sheriff to sell by auction or by bill of sale¹; but the law does not require the sale to be made in any particular manner. If the sheriff has the goods valued, and then delivers them by way of sale to the execution creditor for the amount of the valuation, this is a good sale of the property to him(*q*). In ordinary cases of sales by sheriffs there is no implied warranty of title on the part of the sheriff to the property he sells(*r*). In an interpleader suit between a claimant under a bill of sale from the sheriff and an execution creditor, proof of the bill of sale, with some evidence of a previous seizure of the chattels by the sheriff, is sufficient *prima facie* evidence of the title of the claimant(*s*).

500 *Title to bills, notes, and cheques*.—Bank-notes are treated as money or cash in the ordinary course of business by the common consent of mankind. If, therefore, a man finds a bank-note, and pays it away *bonâ fide* in the ordinary course of business, the owner has no remedy for the recovery of the lost property; but if he demands the note whilst it still remains in the hands of the finder, the latter will, as we have seen, be responsible for the non-delivery of it(*t*). In the case of the loss of a bill, note, or cheque, by theft or accident, if the instrument

(*n*) *Boyson v. Coles*, 6 M. & S. 14. *Kingsford v. Merry*, 1 H. & N. 503. *Godts v. Rose*, 25 Law J., C. P. 61. Addison on Contracts, ch. 6, 6th ed. See *Brower v. Peabody*, 13 N. Y. 121; *Commercial Bank of Rochester v. Colt*, 15 Barb. 506.

(*o*) *Pease v. Gloaher*, L. R., 1 P. C. C. 219. See "The Argentina," L. R., 1 Adm. & Ecc. 370; *Coventry v. Gladstone*, L. R., 4 Eq. Ca. 493; *Dracachi v. Anglo-Egyptian Navigation Co.*, L. R., 3 C. P. 190; *Rogers v. Comptoir d'Escompte de Paris*, L. R., 2 P. C. C. 393; 38 L. J., P. C. 30. *Dows v. Greene*, 24 N. Y. 638.

(*q*) *Meyerstein v. Barber*, L. R., 1 C. P. 38; 2 *ibid.* 661; 4 Eng. & Ir. App. 317. See Addison on Contracts, 6th ed., p. 314; *Shepherd v. Harrison*, L. R., 4 Q. B. 196; *Ibid.* 493; 5 Eng. & Ir. App. 116.

(*r*) *Hernaman v. Bowker*, 11 Exch. 760.

(*s*) *Morley v. Attenborough*, *ante*, p. 418.

(*t*) *Hornidge v. Cooper*, 27 Law J., Exch. 314.

(*f*) *Miller v. Race*, *Grant v. Vaughan*, *ante*, p. 404.

be assignable by mere delivery, the thief or finder may confer a title by transferring it to a person who takes it *bonâ fide*, and who gives value for it without notice of any infirmity of title at the time he receives it. But if the instrument is assignable only by indorsement, neither the thief nor the finder can make a valid indorsement(*u*). And whenever a person discounts, or receives into his possession by way of deposit, a bill, or note, or negotiable security, knowing that the person from whom he receives it is not the owner of it, he cannot lawfully detain it from the true owner(*x*).

When a bill, note, or cheque has been proved to have been stolen or lost, or to have been obtained by fraud, this affords a presumption that the thief or the finder, or the fraudulent possessor, of the security would dispose of it, and would place it in the hands of another person to sue upon it; and such proof on the part of the defendant casts upon the plaintiff the burthen of showing that he gave value for the note(*y*). Negligence on the part of a person taking a negotiable security, and giving value for it, does not fix him with the defective title of the person passing it to him (*ante*, p. 405). If, therefore, a cheque payable to bearer is lost, and is tendered a few days after the loss to a shopkeeper in payment of goods purchased, and the shopkeeper takes it without any inquiry, and without any knowledge of the name or address of the person tendering the cheque, he will, nevertheless, be entitled to recover the amount from the maker, unless the latter can prove that the shopkeeper knew that the cheque was a lost cheque at the time he took it(*z*).

501 *Title to the property of bankrupts.*—By the 32 & 33 Vict. c. 71(*a*) all the “property” of a person who has been adjudged bankrupt, except property held by him in trust, his tools, wearing apparel, and bedding, to the value of 20*l.*, vests, until the appointment of a trustee(*b*), in the registrar of the court, and on such appointment passes

(*u*) *Johnson v. Windle*, 3 Sc. 608; 3 B. N. C. 225. *Whistler v. Forster*, 32 Law J., C. P. 169. *Jones v. Nellis*, 41 Ill. 482. *Bayley on Bills*, 5th ed., p. 133. As to cheques payable to order, see 16 & 17 Vict. c. 59, s. 19.

(*x*) *Lovell v. Martin*, 4 Taunt. 799. *Burn v. Morris*, 2 Cr. & M. 579.

(*y*) *Bailey v. Bidwell*, *ante*, p. 405.

(*z*) *Ld. Kenyon, Lawson v. Weston*, 4 Esp. 57. *Raphael v. Bank of England*, 17 C. B. 161. “The cases of *Gill v. Cubitt*, 3 B. & C. 566, and *Down v. Halling*, 4 B. & C. 330, which were considered to have gone far to overrule the case of *Lawson v. Weston* are no longer law; and the opinion of *Ld. Kenyon* is set up and supported by all the lawyers.” *Ld. Brougham in Bank of Bengal v. Macleod*, 7 Moore, P. C. C. 35; *Bank of Bengal v. Fagan*, *ib.* 72. *Willes, J.*, 17 C. B. 175. *Watson v. Russell*, 3 B. & S. 38.

(*a*) Amended as to absconding debtors by 33 & 34 Vict. c. 76. All the principal statutes on the subject of bankruptcy are repealed by the 32 & 33 Vict. c. 83.

(*b*) Or trustees, see s. 83.

to and vests in the trustee (ss. 15, 17, and 83(c)); and where any conveyance or assignment of property is required to be registered, the certificate of the appointment of the trustee may be registered instead (s. 83). The term property includes money, goods, things in action(*d*), land(*e*), and every description of property whether real(*e*) or personal; also obligations, easements, and every description of estate, interest, or profit, present or future, vested or contingent, arising out of or incident to property as above defined (s. 4). These words would include an option to take a lease(*f*); but not, it seems, the chance of an appointment under a will(*g*); and the right of nomination to an ecclesiastical benefice is expressly excepted (s. 15). For the purpose of acquiring or retaining possession of the property of the bankrupt, the trustee is in the same position in all respects as a receiver appointed by the Court of Chancery (s. 20). In the case of stocks, shares, or other property transferable in the books of any company, the right to transfer such property may be exercised by the trustee in bankruptcy to the same extent as the bankrupt himself might have exercised it (s. 22).

502 *Leaseholds—Onerous property.*—Under the acts previous to the Act of 1869, it was held that the general assignment of a bankrupt's property did not vest leaseholds in the assignee until acceptance(*h*); although at common law such would be the effect of an assignment (*e.g.* for the benefit of creditors), under which the assignee had acted, and he would, therefore, be liable under such a deed for the rent(*i*); but by the 32 & 33 Vict. c. 71, s. 23, it is now provided, that when the property of a bankrupt, acquired by the trustee in bankruptcy, consists of lands of any tenure burdened with onerous covenants, of unmarketable shares, of unprofitable contracts, or other property unsaleable, or not readily saleable by reason of its binding the possessor to the performance of some onerous act, or to the payment of money, the trustee may disclaim such property(*k*), although he may have taken possession of it or endeavored to sell it, and upon such disclaimer the

(c) Nor would it be divested by an order to stay proceedings under s. 80. See *Macdonald v. Thompson*, L. R., 4 C. P. 747, decided under the 110th section of 24 & 25 Vict. c. 134, now repealed.

(d) See s. 22.

(e) As to copyhold property, see s. 22. As to estates in tail, see s. 25.

(f) See *Buckland v. Papillon*, L. R., 1 Eq. Ca. 477; 2 Ch. App. 67. And see s. 15, as to powers exerciseable by bankrupt.

(g) *Re Vizard*, L. R., 1 Eq. Ca. 667.

(h) *Copeland v. Stephens*, 1 B. & Ald. 593.

(i) *White v. Hunt*, L. R., 6 Exch. 32.

(k) See *Ex parte Lynvi Coal and Iron Co.*, L. R., 7 Ch. App. 28. *Re Wilson*, L. R., 13 Eq. Ca. 186.

lease shall be deemed to have been surrendered^(kk), the contract determined, or the shares forfeited, from the date of the order of adjudication; or, if real property, it will revert to the person entitled on the determination of the estate of the bankrupt therein. The persons interested in such property in reversion or remainder, however, are entitled to call upon the trustee to disclaim within a certain time, and he will not be entitled to disclaim afterwards (s. 24).

503 *Contracts or dealings with the bankrupt without notice.*—The title of the trustee to the property of the bankrupt has relation back to the act of bankruptcy, so that the property ceases to be his, and becomes the property of his trustee from the time of the commission of the act of bankruptcy (ss. 11 & 15)(l). But the harsh effect of this doctrine is modified by ss. 94 & 95(m), which enact, that all conveyances, transfers, delivery of goods, contracts, or dealings, by, with, or to, any bankrupt, made in good faith and for valuable consideration before the date of the order of adjudication, shall not be deemed invalid, provided the person so dealing with the bankrupt had not at the time thereof notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication. As against persons, therefore, having notice of the act of bankruptcy and not being, consequently, within the protection of this clause, the title of the trustees will have relation back to the time of the act of bankruptcy(n), unless, perhaps, the adjudication of bankruptcy is the act of the court, under s. 125, in consequence of a liquidation by arrangement having become impracticable, and without any creditor's petition having been presented, and possibly in cases where the creditor's petition is founded on the debtor's own declaration, duly filed, admitting his inability to pay his debts(o). Where a guarantee society, in pursuance of an agreement between them and the bankrupt, entered into his house and seized his goods, without any knowledge of his having committed an

(kk) But this does not apply to rent due between the date of the adjudication and the disclaimer by the trustee in bankruptcy; and it seems that as between the lessor and the lessee, the latter is still liable for the rent. *Smyth v. North*, L. R., 7 Exch. 242.

(l) The title of a trustee under a liquidation by arrangement (see s. 125) relates back in a similar manner: *Ex parte Duignan*, L. R., 11 Eq. Ca. 604; 6 Ch. App. 605.

As to the distinction between liquidation by arrangement, and a composition deed under s. 126, see *Ex parte Birmingham Gas Light and Coke Co.*, L. R., 11 Eq. Ca. 204; *Ex parte Sheriff of Middlesex*, L. R., 12 Eq. Ca. 207.

(m) These are substantially a re-enactment of s. 133 of 12 & 13 Vict. c. 106.

(n) See *Fawcett v. Fearn*, 6 Q. B. 28; *Exley v. Inglis*, L. R., 3 Exch. 247; 37 Law J., Exch. 145.

(o) Sect. 6. And see *Stevenson v. Newnham*, 13 C. B. 301; *Monk v. Sharp*, 2 H. & N. 548; 27 L. J., Exch. 29. But see *Jones v. Harber*, L. R., 6 Q. B. 80; *Ex parte Duignan*, L. R., 6 Ch. App. 605.

act of bankruptcy, it was held that this was a "transaction" protected by the 133d section of the repealed Act (12 & 13 Vict. c. 106), and that the assignees could not maintain an action against the guarantee company for the entry and seizure(*p*).

504 *Title to chattels purchased from a bankrupt after an act of bankruptcy.*—

If a man buys goods of a bankrupt, and pays over the price to the latter with knowledge of the act of bankruptcy, he will have no title to the goods as against the trustee; but if he had no notice of the act of bankruptcy at the time he paid the money, the transaction will be protected by the above sections. A trustee in bankruptcy does not, by sending in a bill of parcels or invoice of goods purchased, necessarily ratify a dealing between the bankrupt and a third person as a sale. It may amount only to a qualified offer on their part to adopt the transaction as a sale, provided the defendant will pay for the goods, so as to leave it open to them to maintain an action for the conversion of the property if the defendant will not pay the money demanded(*q*). But if the trustee unreservedly adopts the transaction as a valid contract of sale, he cannot afterwards treat a refusal to re-deliver the goods as a conversion(*r*).

505 *Transfer of property by bankrupts constituting an act of bankruptcy.*—

Fraudulent preference(s).—If there be a voluntary conveyance of property by a man who is indebted at the time, which conveyance would have the effect of delaying or defeating the payment of creditors, such conveyance is stamped with the character of fraud(*t*). Every conveyance for an antecedent debt is a voluntary conveyance, and when it is made to the prejudice of other creditors, it becomes a fraudulent conveyance and an act of bankruptcy(*u*), and avoidable by the trustee in bankruptcy(*v*). Again, if a man hands over property for payment of his creditors, except under pressure, he makes a voluntary preference, and that is an act of bankruptcy(*x*). And the handing over property, even under pressure, may be an act of bankruptcy, for the

(*p*) *Krehl v. Great Central Gas Co.*, L. R., 5 Exch. 289. The word "transaction" is not used in the late act; the words are "contract or dealing" only. As to the sufficiency of a seizure in such a case, see *Brewin v. Short*, *post*, p. 430.

(*q*) *Valpy v. Sanders*, 5 C. B. 893; 17 Law J., C. P. 249.

(*r*) *Edwards v. Hooper*, 11 M. & W. 363.

(*s*) See 33 & 34 Vict. c. 76.

(*t*) *Young v. Fletcher*, 34 Law J., Exch. 154. *Marks v. Feldman*, L. R., 4 Q. B. 481; 5 *ibid.* 275.

(*u*) *Jones v. Harber*, L. R., 6 Q. B. 77; *Ex parte Cohen*, L. R., 7 Ch. App. 20. See *Ex parte Hawker*, L. R., 7 Ch. App. 214; *Re Wood*, L. R., *id.* 302.

(*v*) *Heilbut v. Nevill*, L. R., 5 C. P. 478.

(*x*) *Lacon v. Liffen*, 32 Law J., Ch. 315. Addison on Contracts, 6th ed., p. 156. *Bills v. Smith*, 34 Law J., Q. B. 68.

6th section(y) provides, that if an execution for a debt of more than 50*l.* be levied by seizure and sale of the goods of a trader, he is to be deemed to have committed an act of bankruptcy. But a *bonâ fide* transfer of all a person's property to secure a past debt and a future advance is not an act of bankruptcy(z), although the advance is for the purpose of satisfying an existing debt(a), and there be power to seize all after-acquired property(b). Nor is a *bonâ fide* transfer of all the trader's property, under pressure, unless a fraudulent preference, voidable by the trustee, in cases where there is no relation back of his title(c). An assignment by a debtor of his property to a trustee for the benefit of his creditors, is an act of bankruptcy(d). And so is the filing of a petition for liquidation by arrangement under s. 125(e).

The 6th section of the Act enacts that any fraudulent conveyance, gift, delivery, or transfer (*i.e.*, a conveyance or transfer fraudulent in fact, *e.g.*, without consideration), by a debtor of his property or any part thereof, shall be an act of bankruptcy; and the 92nd section enacts that every conveyance or transfer of property or charge thereon, etc., except to a purchaser, payee, or incumbrancer in good faith and for valuable consideration(f), made by any person unable to pay his debts as they become due from his own money, in favor of any creditor or in trust for him, with a view of giving such a creditor a preference over the other creditors, shall be deemed fraudulent and void as against the trustee in bankruptcy, if the person making such conveyance, transfer, etc., become bankrupt within three months afterwards. It has been held, however, that this section has not altered the law with respect to fraudulent preferences, and that it is still necessary, in order to constitute a fraudulent preference, that the conveyance or transfer be made voluntarily and in contemplation of bankruptcy, and that, if made upon pressure, the intention of the bankrupt to prefer one creditor to another is not material(g); and further, that if the payment be made without any view of preferring one creditor to

(y) Which is a re-enactment of the 24 & 25 Vict. c. 134, s. 73. See *Woodhouse v. Murray*, L. R., 2 Q. B. 634; 4 *ibid.* 27.

(z) *Allen v. Bonnett*, L. R., 5 Ch. App. 577. See *Re Colemere*, L. R., 1 Ch. App. 128; *Ex parte Foxley*, L. R., 3 Ch. App. 515. But under certain circumstances it may be. *Ex parte Fisher*, L. R., 7 Ch. App. 636.

(a) *Lomax v. Buxton*, L. R., 6 C. P. 107.

(b) *Hutton v. Cruttwell*, 1 E. & B. 15.

(c) *Jones v. Harber*, L. R., 6 Q. B. 77.

(d) Sec. 6. And see *Ponsford v. Walton*, L. R., 3 C. P. 167; *Ex parte Squire*, L. R., 4 Ch. App. 47.

(e) *Ex parte Duignan*, L. R., 11 Eq. Ca. 604; 6 Ch. App. 605.

(f) *Ex parte Blackburn*, L. R., 12 Eq. Ca. 358.

(g) *Ex parte Craven*, L. R., 10 Eq. Ca. 648; L. R., 6 Ch. App. 70.

another, it is not a fraudulent preference, although made without pressure by a person unable to pay his debts as they became due(*h*).

506 *Executions levied on the property of bankrupts.*—The 6th section of the Act further provides, that any execution, for 50*l.* and upwards, levied by seizure and sale on the property of a trader, shall be an act of bankruptcy; and the 87th section provides that the sheriff or bailiff of the County Court shall in such cases retain the proceeds of the sale in their hands for a period of fourteen days, in trust to pay them over to the trustee in bankruptcy, if a petition for adjudication or liquidation by arrangement(*i*) be presented within that time; but if no petition be presented, then to the execution creditor(*ii*). Subject, however, to the above provisions, any execution against the bankrupt's land or goods, executed in good faith, by seizure in case of land, and by seizure and sale in case of goods, before the adjudication, and without notice of any previous act of bankruptcy, is valid (s. 94).

Where an execution has been levied, but between the time of the seizure and sale a trustee in bankruptcy or in liquidation has been appointed, the title of the latter will prevail by relation over that of the execution creditor, if the act of bankruptcy preceded the seizure, although the sale has been delayed by an injunction, under s. 13(*k*); a fortiori, therefore, if the seizure has been completed by sale, it will not be defeated by notice of an act of bankruptcy committed subsequently to the seizure(*l*). If the creditors of the debtor prefer to accept a composition under s. 126, the execution creditor will be entitled to the proceeds of the execution(*m*).

The notice, which the execution creditor must have, must be of an act of bankruptcy committed previous to the seizure(*n*), and it must convey specific information as to the acts constituting the act of bankruptcy. A notice, stating circumstances which may or may not amount to an act of bankruptcy, is insufficient(*o*).

(*h*) *Ex parte* Bolland, L. R., 7 Ch. App. 24.

(*i*) *Ex parte* Key, L. R., 10 Eq. Ca. 432.

(*ii*) "If the goods remain unsold in the hands of the sheriff at the time of the appointment of the trustee in bankruptcy he is entitled to them against the execution creditor. *Ex parte* Rayner, L. R., 7 Ch. App. 325."

(*k*) *Ex parte* Veness, L. R., 10 Eq. Ca. 419. *Slater v. Pinder*, L. R., 6 Exch. 223. 7 *id.* 95. *Ex parte* Bailey, L. R., 13 Eq. Ca. 314. *Ex parte* Duignan, L. R., 11 Eq. Ca. 604; 6 Ch. App. 605. *Ex parte* Roche, L. R., 6 Ch. App. 795.

(*l*) *Ex parte* Todhunter, L. R., 10 Eq. Ca. 425. "But the goods must have been seized before the act of bankruptcy, for the mere delivery of a writ of *fi. fa.* to the sheriff before the act of bankruptcy is not sufficient as against a trustee in bankruptcy appointed subsequently. *Ex parte* Williams, L. R., 7 Ch. App. 314."

(*m*) *Ex parte* Sheriff of Middlesex, L. R., 12 Eq. Ca. 207.

(*n*) *Ex parte* Todhunter, L. R., 10 Eq. Ca. 425.

(*o*) *Evans v. Hallam*, L. R., 6 Q. B. 713.

507 *Title of trustee in bankruptcy to property settled or transferred by bankrupt.*—By s. 91 of the Act(*p*), it is further provided that any settlement, conveyance, or transfer of property made by a trader, shall be void against the trustee, if the settlor becomes bankrupt within two years from the date of the settlement or transfer, and shall also be void if the settlor becomes bankrupt within ten years, unless at the date of the settlement the settlor was able to pay all his debts without the aid of the property comprised in it. But this section does not apply to settlements or transfers made before and in consideration of marriage, nor to a purchaser or incumbrancer in good faith and for valuable consideration, nor to settlements, etc., made on the settlor's wife or children, of property which has accrued to him in right of his wife after marriage. Any covenant or contract made by a trader in consideration of marriage for the future settlement of property in which he had not at the time of the marriage any interest vested or contingent, is also void against the trustee, if the property has not been transferred, or money, etc., paid before the bankruptcy; but this does not apply to property to which the bankrupt becomes entitled in right of his wife.

508 *Title to chattels of which a bankrupt was reputed owner at the time of his bankruptcy.*—By s. 15 of the Act(*q*) it is further enacted, that the property of the bankrupt, divisible amongst his creditors, shall comprise all goods and chattels being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner, of which goods and chattels the bankrupt is the reputed owner, or of which he has taken upon himself the sale, or disposition as owner(*r*); but no chose in action, other than debts due to the bankrupt in his trade or business, are to be deemed goods and chattels within the section. This section probably extends to chattels which were in the order and disposition of the bankrupt at the time of his committing any act of bankruptcy capable of supporting the adjudication, though such act be prior to the act on which the adjudication is founded(*s*). But it would not, semble, oust the jurisdiction of the courts of common law or Chancery to decide what goods were in the reputed ownership of the bankrupt or not(*t*).

(*p*) This section is in substitution of s. 126 of 12 & 13 Vict. c. 106.

(*q*) Which is substantially a re-enactment of 12 & 13 Vict. c. 106, s. 125.

(*r*) See *Hornsby v. Miller*, 23 L. J., Q. B., 99.

(*s*) See *Stansfield v. Cubitt*, 2 De G. & J. 222.

(*t*) See *Mather v. Lay*, 2 J. & H. 374; *Graham v. Furber*, 14 C. B. 157; 23 Law J., C. P. 10.

509 *Recovery of possession of the goods by the true owner before notice of the act of bankruptcy.*—If, before the adjudication and without notice of an act of bankruptcy, the true owner has actually taken the goods out of the possession, order and disposition of the bankrupt, his title will prevail over that of the trustee(u). If, before the adjudication, and after the act of bankruptcy, the owner has, *bonâ fide* and without notice of the act of bankruptcy, done anything which before an act of bankruptcy would have been sufficient to determine his permission and consent to the goods remaining in the possession, order and disposition of the bankrupt, so that a subsequent act of bankruptcy would not have subjected the goods to be dealt with under the clause respecting reputed ownership, his title will prevail, although he had not, before notice, succeeded in obtaining the actual possession of the goods. If, before the date of the adjudication, and before notice of an act of bankruptcy, he has *bonâ fide* demanded the goods, and, communicating with the bankrupt, has done that which shows that the goods did no longer, with his consent and permission, remain in the possession, order, and disposition of the bankrupt, his title will not be defeated by a prior secret act of bankruptcy. But a mere intention to demand the goods, and to get possession of them, is not a “dealing” within the meaning of the statute(x). And if his consent has not been withdrawn, and it appears that, at the time he got back his goods, he was cognizant of an act of bankruptcy having been committed by the bankrupt, the title of the trustee will prevail, and will relate back to the period of the commission of such act of bankruptcy(y).

510 *What things are comprehended under the words “goods and chattels.”*—These words extend only to chattels personal, and do not embrace chattels real, leases, or interests in land, or fixtures and things attached to the freehold; and choses in action, other than trade debts, are expressly excepted by the section(z). The object of the legislature was to prevent traders from gaining a delusive credit by a false appearance of substance, which may be caused by the possession of personal chattels, as the possession and ownership generally go together; which is not the case with regard to land and fixtures

(u) *Graham v. Furber*, 14 C. B. 134.

(x) *Brewin v. Short*, 5 Ell. & Bl. 237. *Young v. Hope*, 2 Exch. 109. *Pariente v. Pennell*, 2 Mood. & Rob. 578.

(y) *Fawcett v. Fearne*, 6 Q. B. 28. *Heslop v. Baker*, 8 Exch. 423; 20 Law J., Exch. 350.

(z) This was otherwise under the former statutes; see *Hornblower v. Proud*, 2 B. & Ald. 327. As to trade debts, see *Cooke v. Hemming*, L. R., 3 C. P. 334; *Leslie v. Guthrie*, 1 B. N. C. 697.

annexed to the realty(a). But moveable machinery in buildings, all kinds of personal property in possession, shares in newspapers(b), and in public companies whose shares are made personal estate(c), stock in the public funds, patents for inventions, and all personal property assignable by deed at common law, would come within the section.

- 511 *What possession is within the statute.*—The possession of the goods and chattels by the bankrupt must be a possession as reputed owner, with the consent of the real owner. A mere temporary custody, or the mere possession without reputation of ownership(d), or the possession with reputation of ownership, but against the will or without the knowledge of the true owner, will not vest the property in the trustee(e). “There has been no case, or ever will be, wherein a court of law or equity will do so severe a thing as to subject the property of one man to the debts of another without proof of the consent of the real owner to leave them in the power of the bankrupt (possession only not being sufficient), or a *lâches* in letting them remain there so as to get him a false credit”(f). Therefore the property of infants in the hands of traders, who deal with it as the reputed owners, would not pass to the trustee for the benefit of creditors, by reason of the incapacity of infants to give their consent and permission within the intent and meaning of the statute(g). But if the real owner be of full age, and capable of acting for himself, it should be made notorious “to the world in which the bankrupt moves,” that the latter holds the property adversely, and without the consent and permission of such owner(h), or the latter should have done all that can reasonably be expected of him to obtain possession of the property prior to the bankruptcy(i). If the goods have been placed in the possession of the bankrupt by a person who was himself only the bailee, the consent of the latter to the bankrupt’s possession is not the consent of the true owner(j).

(a) *Horn v. Baker*, 9 East, 215. *Barclay, ex parte*, 25 Law J., Bankr. 4 Lloyd, *ex parte*, 3 D. & C. 787. *Wilson, ex parte*, 4 ib. 143. *Coombs v. Beaumont*, 5 B. & Ad. 73. *Hubbard v. Bagshaw*, 4 Sim. 338. *Boydell v. M’Michael*, 1 C. M. & R. 177.

(b) See *Longman v. Tripp*, 2 B. & P. N. R. 67.

(c) *Ex parte* Union Bank of Manchester, L. R., 12 Eq. Ca. 354.

(d) *Trismall v. Lovegrove*, 6 L. T. R., N. S. 329; 10 W. R. 527.

(e) *Richardson, ex parte*, Buck, 488. *Lingham v. Biggs*, 1 B. & P. 88. *Oliver v. Bartlett*, 1 B. & B. 273.

(f) *Ld. Hardwicke, West v. Skip*, 1 Ves. sen. 243. *Parke, B., Belcher v. Bellamy*, 17 Law J., Exch. 222; 2 Exch. 310.

(g) *Ld. Eldon, Viner v. Cadell*, 3 Esp. 89.

(h) *Best, J., in Ex parte Enderby*, 2 B. & C. 398.

(i) *Smith v. Topping*, 5 B. & Ad. 674.

(j) *Fraser v. Swansea Navigation, etc.*, 1 Ad. & E. 354.

512 *Reputation of ownership*.—Where the bankrupt has once been the actual and visible owner of goods and chattels, and has made over all his right and interest in them to a third person, either absolutely or by way of mortgage, and remains in possession of the things so transferred, the continuance of possession, if not a badge of fraud, raises an irresistible presumption of the continuance of ownership(*k*); so that if the goods are not taken out of the possession of the mortgagor before the mortgagee had notice of an act of bankruptcy(*l*), they would pass to the trustee. This is the case where a trader mortgages his furniture, goods and chattels, and stock-in-trade, and the mortgaged property is let to him by the mortgagee to be used for hire, or is allowed to remain in his hands notwithstanding the mortgage, and continues in his possession at the time of the adjudication(*m*); where the tenant of a mill gives his landlord by deed a lien upon the fixtures and machinery of the mill(*n*); where the goods and chattels of a trader are taken in execution by a creditor, and the latter receives an assignment of them from the sheriff, and allows the goods to remain in the trader's dwelling-house, and to be used by him for hire, down to the time of the adjudication(*o*); where a person, who is forbidden to trade in his own name, ships, and ware-houses, and deals with goods in the name of the bankrupt, the latter not being a commission agent for sale, and the course of dealing not being according to the ordinary usage of trade(*p*); where a shareholder in a joint-stock company, or a railway company, deposits the certificates of the shares with the creditor as a security for the repayment of money advanced, undertaking to execute a transfer of the shares when called upon, and the shares continue standing in his name in the books of the company, notwithstanding the assignment or deposit of the certificates, and no notice of the assignment has been given to the company(*q*). But if the company does not permit trans-

(*k*) *Castle, ex parte*, 3 M. D. & De G. 124.

(*l*) *Young v. Hope*, 2 Exch. 105.

(*m*) *Kyall v. Rowles*, 1 Ves. sen. 360. *Kirkley v. Hodgson*, 1 B. & C. 598. *Freshney v. Carrick*, 1 H. & N. 661. *Hams, In re*, 10 Ir. Ch. R. 100. *Spackman v. Miller*, 12 C. B., N. S. 659; 31 Law J., C. P. 309.

(*n*) *Shuttleworth v. Hernaman*, 1 De G. & J. 322.

(*o*) *Lingham v. Biggs*, 1 B. & P. 82. *Bryson v. Wylie*, *ib.* 83, n. (a). *Lingard v. Messiter*, 1 B. & C. 312.

(*p*) *Gordon v. E. I. Co.*, 7 T. R. 228.

(*q*) *Nutting, ex parte*, 2 M. D. & De G. 302. *Vallance, ex parte*, 2 Deac. 354. *Lanc. Can. Co., ex parte*, 1 D. & C. 423. *Boulton, ex parte*, 20 Beav. 178. *Ex parte Union Bank of Manchester, L. R.*, 12 Eq. Ca. 354. The same rule has been held to apply, under the repealed statutes, to the deposit by way of mortgage of a policy of insurance, where no notice, or no sufficient notice, has been given to the company. *Green v. Ingham*, L. R., 2 C P. 535. *Edwards v.*

fers to be made by shareholders without the production of the certificates of the proprietorship of the shares, and these certificates are not in the possession or under the control of the bankrupt, there will be no reputation of ownership, from the circumstance of the shares continuing to stand in his name(r). And if the change of ownership has been made notorious to "the world in which the bankrupt moves," the presumption of ownership from the continuance of possession will be rebutted(s). If it is notorious that furniture in the possession of a bankrupt never was his property, but was hired by him with the house in which he resides, there will be no reputation of ownership from his possession of the furniture(t). Nor does the clause apply to the case where a person becomes a dormant or secret partner of a firm in partnership, and permits the partnership stock, furniture, and effects to be in the possession and under the control of the ostensible partners, who become bankrupt, for there must be a real as distinguished from an apparent owner(u). Goods and furniture belonging to a woman who has passed herself off in the world as the wife of a bankrupt have been held to be in his possession, as reputed owner(x). But not goods in the possession of a bankrupt and his wife belonging to the trustees of his wife's marriage settlement(y); nor the goods of the son of a bankrupt, who lives in the same house with the bankrupt, although the goods have been used and dealt with by the latter(z). Where a notorious custom exists in a trade for the buyer of chattels, e.g., live stock, to leave them in the possession of the seller till it is convenient for him to remove them, the presumption of ownership will not arise(a).

513 *Things sold by the bankrupt, and left in his possession—Raw materials of manufacture.*—If the bankrupt gets his living by buying and selling goods and chattels, and it is a known custom of trade for the vendor to keep possession after a sale of the things purchased, until the purchaser carts them away, or ships them off to their place of destina-

Martin, L. R., 1 Eq. Ca. 121. And see *Ex parte Caldwell*, L. R., 13 Eq. Ca. 188. As to what is sufficient notice, see *Ex parte Agra Bank, re Worcester*, L. R., 3 Ch. App. 555.

(r) *Morris v. Cannan*, 31 Law J., Ch. 425. *Harrison, ex parte*, 3 Deac. 196. *Masterman*, 2 Mont. & Ayr. 212. *Langmead*, 20 Beav. 25. *Littledale*, 6 De G., M. & G. 714; 24 Law J., Bankr. 9. *Boulton*, 1 De G. & J. 179. *Richardson, ex parte*, 3 Deac. 503. *Addison on Contracts*, 6th ed., 259.

(s) *Muller v. Moss*, 1 M. & S. 335.

(t) *Shaw, In re*, 8 Law. T. R., N. S. 336.

(u) *Reynolds v. Bowley*, L. R., 2 Q. B. 41; *S. C.* in error, p. 474.

(v) *Mace v. Cammel, Loft, 782; Cowp. 232.*

(y) *Simmons v. Edwards*, 16 M. & W. 838. See *Ashton v. Blackshaw*, L. R., 9 Eq. Ca. 510.

(z) *Davis v. Living*, 1 Holt, 275.

(a) *Priestley v. Platt*, L. R., 2 Exch. 101. See *post*, p. 436.

tion, possession under such circumstances will not raise a presumption of ownership. Thus it has been held that goods in the possession of a person at the time of his bankruptcy subject to a bill of sale, which entitles him to possession until the debt is demanded, and default made in payment, are not in his order and disposition^(b). Also, if, after the sale, the bankrupt removes the articles away from the rest of his stock-in-trade, and puts them away in his cellars, warehouses, or into some private place of deposit, and there sets them apart for the purchaser, and enters the sale in his books, they are no longer, after such appropriation has been made, in the possession, order, or disposition of the bankrupt within the meaning of the statute, "for they are not then in the possession of the bankrupt under such circumstances as to deceive the creditors by the appearance of their forming part of that stock to which they might give credit"^(c); but if the things are left upon the bankrupt's premises undistinguishable from his stock-in-trade, in order that they may be re-sold for the benefit of the buyer, they will be in the possession of the bankrupt as reputed owner, unless it be shown that the latter acts as a commission agent for the sale of goods, or it is a custom of trade for property to remain on the premises of the trader to be resold^(d). "It is the usage," observes Parke, B., "of clock makers to have clocks of other persons in their shops, both for repair and for sale, and a man has no right to infer, from finding a clock there, that it is the property of the clock-maker. No inference ought to be drawn either that it is or is not his, and, it being uncertain, there is no reputed ownership"^(e).

If a ship-builder, or manufacturer of steam-engines and machinery contracts for the building and sale of a specific vessel, or steam-engine, or mass of machinery, to be paid for by instalments as the work proceeds, and several instalments of the purchase-money are paid by the purchaser, so that the right of property in the chattel, so far as it has been completed, vests in the purchaser, and the builder or manufacturer becomes bankrupt, the unfinished chattel in his hands is not in his possession, order, or disposition, as the reputed owner, for it is the known custom of such trades for the manufacturer to be paid from time to time as the work progresses, and it is in general notorious that the builders and manufacturers of such articles are not themselves the

(b) *Ex parte Homan*, L. R., 12 Eq. Ca. 598. *Secus*, if the bill of sale be not registered, *Ashton v. Blackshaw*, L. R., 9 Eq. Ca. 510.

(c) *Marrable, Ex parte*, 1 Gl. & Jam. 402. *Dover*, 2 M. D. & De G. 259.

(d) *Thackthwaite v. Cock*, 3 Taunt, 487. *Shaw v. Harvey*, 1 Ad. & E. 920.

(e) *Hamilton v. Bell*, 10 Exch. 545; 24 Law. J., Exch. 46.

owners of them, and the trade could never be carried on if such payments by purchasers were not protected(*f*). And with regard to property not capable of manual occupation and delivery, such as a ship building on the stocks, a haystack in a meadow, timber in a timber-yard, or oil, wine, or corn in stores and warehouses, the rule is, that if the bankrupt has sold such property *bonâ fide*, and received the purchase-money, and made such a delivery as the subject-matter of the sale is capable of, and placed the property at the disposal of the purchaser prior to the act of bankruptcy, it is not in the bankrupt's possession, order, or disposition within the statute, and does not pass to the trustee(*g*), although it has not been removed from the bankrupt's premises, provided it has remained there after the sale no longer than was reasonably necessary to enable the purchaser to fetch it away(*h*). But the transfer of the right of property must be complete. If the thing sold is in the hands of a third person, or if it is on board a vessel at sea, the bill of lading, delivery-order, or whatever documents of title may be necessary to establish the transfer of the ownership, must have been delivered to the purchaser prior to the adjudication(*i*); and in the case of transfers and assignments of ships, the provisions of the Registry Acts must be complied with, and actual possession taken of the vessel on the first practicable opportunity.

514 *Goods and chattels which have never been the property of the bankrupt.*—

Where it is shown that the property in possession of the bankrupt at the time of the adjudication never belonged to him at all, and was confided to him only for a temporary and special purpose, slighter circumstances will rebut a presumption of ownership arising from possession than in those cases where the property originally belonged to him, and has been subsequently sold and mortgaged without any change of possession(*k*). If goods and chattels have been sent pursuant to order, for the inspection and approval of an intended purchaser, and the latter becomes bankrupt with the goods in his hands before any contract of sale has been made, the goods so sent are not in his possession as reputed owner(*l*). Whenever the possession, taken in connection with the custom and usage of trade, and the surrounding circumstances, “is consistent with the fact of a person being absolute

(*f*) *Clarke v. Spence*, 4 Ad. & E. 448. *Woods v. Russell*, 5 B. & Ald. 942. *Holderness v. Rankin*, 2 De G. F. & J. 258. *Watts, Ex parte*, 32 Law J., Bankr. 36.

(*g*) *Manton v. Moore*, 7 T. R. 71. *Brown v. Heatcote*, 1 Atk. 159.

(*h*) *Flyn v. Mathews*, 1 Atk. 185. *Parke, B., Belcher v. Bellamy*, 17 Law J., Exch. 222.

(*i*) *Belcher v. Capper*, 4 M. & Gr. 551. *Lemprière v. Pasley*, 2 T. R. 495.

(*k*) *Wiggins, Ex parte*, 2 D. & C. 270.

(*l*) *Gibson v. Bray*, 8 Taunt. 76; 1 Moore, 519. *Ashton, In re*, 1 Fonb. N. R. 258.

owner, and also of his not being absolute owner, the mere possession ought not to raise an inference in the mind of any cautious person acquainted with the usage, that the person in possession is the owner"(m). Therefore, when there exists a custom which is known, that property standing in the name of a man in the books of a public company may only be his nominally, while the real right to it may be in another person, the reputation of ownership does not attach to the mere nominal possession. This is the case with money in the funds and shares in railway companies standing in the name of a person as trustee(n). Where it is the known custom and usage at a watering-place for houses to be taken ready furnished as well as unfurnished, and for carriages and horses to be let by the job, day, week, or month, the mere possession of furniture by the tenant of a house, or of a carriage and horses by an inhabitant, will of itself raise no presumption of ownership in the possessor(o).

Whenever the custom to hire as well as to buy the plant, machinery, and implements used in the trade which the bankrupt carried on, is shown to be so general and notorious in the trade that those who had dealings with the bankrupt, "the world in which he moved, might reasonably be provoked to inquire, before giving the bankrupt credit, whether he was the owner of them or not," there is no presumption of ownership from the possession of them. This is the case in the coal-mining trade, where it is the notorious custom of the owners of collieries to demise, not only the colliery, but also the steam-engines, plant, and machinery necessary to get out the coal; in the coal-light-erage trade, where it is the custom for the owners of barges and lighters used to discharge coal to let such lighters out to hire, and to suffer the names of the hirers to be painted upon them; also in the brewing trade, where it is the notorious custom of brewers to hire their vats, barrels, coppers, and brewing utensils; and in the hosiery and lace trade, where it is the notorious custom for stocking-frames and masses of machinery to be let out to hire to the working hosiers, weavers, and mechanics. But the custom must be shown to be general and notorious in the trade, otherwise the presumption of ownership arising from the possession and use of such things will not be rebutted(p).

515 *Possession by manufacturers, workmen, and depositaries.*—Possession

(m) Abbott, C.J., in *Storer v. Hunter*, 3 B. & C. 376; Parke, B., 24 Law J., Exch. 46.

(n) Watkins, *Ex parte*, 4 D. & C. 87. Stewart, *Ex parte*, 34 Law J., Ch. 6.

(o) Burton v. Hughes, 9 Moore, 334.

(p) *Storer v. Hunter*, 3 B. & C. 368. *Watson v. Peache*, 1 Sc. 142. *Horn v. Baker*, 9 East, 239. *Hornsby v. Miller*, 1 Ell. & Bl. 192; 28 Law J., Q. B. 99.

by manufacturers and workmen of goods and chattels, and of raw materials furnished to them by their employers to be manufactured, worked up, or repaired, in the way of their trade, raises no presumption of ownership within the statute. This has been held to be the case with the timber of the carpenter, delivered to him to be converted into wagons; the cloth of the tailor, sent to him for the purpose of being made into garments; the gold of the goldsmith, sent to him to be worked up in the course of his trade; carriages sent to the coach-maker to be repaired, and machinery and chattels manufactured and made to order, and left on the manufacturer's premises after they have been paid for by the employer or purchaser, that they may be altered or repaired, or in order that the purchaser may send for them and convey them away(*q*.) Possession by depositaries in the ordinary course of trade, where it is the custom for persons to let out vaults, stores, warehouses, and rooms for the purpose of receiving, storing, and taking care of pictures, furniture, or merchandise, for hire and reward, is not a possession by such depositaries as reputed owners of the goods intrusted to them for safe keeping. Goods and chattels held by the bankrupt at the time of his bankruptcy as a security for the repayment of money advanced by him to the owners thereof, are not in the reputed ownership of the bankrupt, but the trustee is entitled to all the right of the bankrupt over them. Goods deposited in the hands of a bankrupt for a specific purpose, or to be applied in a particular way in the ordinary course of trade, and held by him no longer than is reasonably necessary to carry into effect the trust reposed in him, are not in his reputed ownership; nor a sum of money in a bag, purse, or box, deposited in the hands of a bailee for a special purpose, and set apart by the latter, and kept distinct from his own monies and effects; but if the money is taken out of the bag or box and used by the bailee, and mixed with his own monies, it will form part of his general estate, and the amount will be a debt due from him to the bailor, which must be proved under the bankruptcy(*r*).

516 *Possession, sale, and disposition of chattels by factors and commission agents for sale in the ordinary course of their trade and business is not a possession, sale, etc., by them as reputed owners, although they sell*

(*q*) *Collins v. Forbes*, 3 T. R. 323. *Carruthers v. Payne*, 2 M. & P. 429. *Bartram v. Payne*, 3 C. & P. 177. *Wilkins v. Bromhead*, 7 Sc. N. R. 921.

(*r*) *Parke v. Eliason*, 1 East, 551. *Thompson v. Giles*, 2 B. & C. 431. *Sadler v. Belcher*, 2 M. & Rob. 489. *Zinck v. Walker*, 2 W. Bl. 1154. *Jombart v. Woollett*, 2 Myl. & Cr. 339. *Tooks v. Hollingworth*, 5 T. R. 227. *Taylor v. Plumer*, 3 M. & S. 575.

their own goods as well as the goods of other persons, and all are confounded and mixed together, so that it is impossible to tell which goods belong to them and which belong to their customers. Persons selling goods on commission must have the goods of other people in their possession whilst carrying on their calling, and their possession is known not to be necessarily their own possession as owners. If it is the custom of shopkeepers in certain trades to receive the goods of third persons, and expose them for sale in their shops for a certain hire or commission paid by the owners of such goods, the things so received for sale, and the contracts made concerning them, are not, in case of their bankruptcy, in their possession as reputed owners. Booksellers and publishers, for example, who publish and sell books on commission for the authors and owners thereof, have not the reputed ownership of the books they sell, although the books are mixed with their own books, and are not to be distinguished from their general stock-in-trade(s); nor coach-makers, who receive and exhibit in their shops and warehouses coaches for sale(t); nor watch and clock-makers, who receive watches to be repaired and sold for their customers(u). But if it is not the custom for persons carrying on the trade exercised by the bankrupt to sell goods on commission, or if the whole stock-in-trade of a retail dealer is furnished to him by a wholesale house, and he trades therewith apparently on his own account, such stock-in-trade and goods will be in his possession, order, or disposition as reputed owner(x).

The fact of the bankrupt's having been intrusted with the goods as a commission agent for sale, may be proved by oral evidence, although the agreement for the deposit and sale of the goods has been put into writing(y). If the goods have been sold by the factor, and not paid for at the time of his bankruptcy, the owner or principal should give notice to the purchaser of the position in which he stands, and require the price to be paid to himself; and if, after such notice has been received, the purchaser pays over the money to the bankrupt factor, or his trustee in bankruptcy, the payment will be no answer to an action by the principal for the money. If, after the bankruptcy, the trustee receives the money, it may be recovered from him by the principal(z). If the factor has sold the goods, and received money by way

(s) *Whitfield v. Brand*, 16 M. & W. 282.

(t) *Carruthers v. Payne*, 2 M. & P. 441.

(u) *Hamilton v. Bell*, 10 Exch. 545.

(x) *Livesay v. Hood*, 2 Campb. 83. *Shaw v. Harvey*, 1 Ad. & E. 920.

(y) *Whitfield v. Brand*, *supra*.

(z) *Pauli, Ex parte*, 3 Deac. 169. *Murray, Ex parte*, Cooke's B. L. 379.

of payment which is ear-marked, and can be identified, or which he has put into a bag, box, or parcel, set apart for his principal or employer, the money thus set apart is not in his possession, order, or disposition as reputed owner; but if it has been mixed with the general monies of the bankrupt, it will form part of the bankrupt's estate, to be administered by the trustee, and the principal must then come in as a creditor upon the estate for the amount as a debt due to him from the bankrupt at the time of his bankruptcy(a).

517 *Non-consent of the true owner.*—We have already seen that if the owner has demanded back his goods prior to the act of bankruptcy, they are not in the possession of the bankrupt with his consent after the demand has been made. Goods obtained by fraud before the act of bankruptcy, and remaining in the bankrupt's possession at the time he becomes bankrupt, are not in the possession, order, and disposition of the latter with the consent of the owner. If, therefore, the bankrupt has obtained possession of goods through the medium of a fraudulent and pretended purchase, never intending to pay for them, and then becomes bankrupt, with the goods in his possession, they may be reclaimed by the vendor, as there is no true and apparent owner, in such a case, within the meaning of the statute, and no consent and permission by the former, the transaction being a cheat, and fraudulent altogether on the part of the buyer(b).

518 *Possession by a bankrupt cestui que trust.*—Possession by the bankrupt of furniture belonging to the trustees of his wife's ante-nuptial marriage settlement, is not a possession, by him, with the consent of the true owner, within the meaning of the statute(c); nor possession by the bankrupt's wife of cows and stock-in-trade, held by trustees under a *bond fide* settlement for her separate use, unless the bankrupt has himself traded with the trust property, and got it into his own hands(d).

519 *Possession by bankrupt trustees(e).*—It was mentioned, *ante*, p. 344, that goods and chattels of which the bankrupt is possessed as trustee, do not pass to the trustee in bankruptcy as his own goods; nor is his possession of them a possession with the consent and permission of the true owner within the meaning of the statute. This is the case with

(a) *Dumas, Ex parte*, 2 Ves. sen. 585; 1 Atk. 232. *Scott v. Surman*, Willes, 400. *Tooke v. Hollingworth*, 5 T. R. 227. *Godfrey v. Furzo*, 3 P. Wms. 185. *Whitecomb v. Jacob*, 1 Salk. 160. *Smith v. Hudson*, 34 Law J., Q. B. 145.

(b) *Load v. Green*, 15 M. & W. 216.

(c) *Simmons v. Edwards*, 16 M. & W. 838.

(d) *Jarman v. Woolloton*, 3 T. R. 618. *Haselinton v. Gill*, ib. 620, u. (a). *Martin, Ex parte*, 19 Ves. 493.

(e) See s. 117 as to the appointment of a new trustee in place of a bankrupt trustee. *Yate Lee on Bankruptcy*, pp. 445-447.

respect to possession by trustees of government stock and shares in the public funds, and joint-stock companies, etc., whether the trust does or does not appear upon the bank books, or the books or register of the company(*f*). However, where the trust has not been created by a third person, but by the cestui que trust, or person beneficially interested himself, who has clothed the bankrupt trustee with the apparent ownership of shares in a public company, by buying them in the name of the latter, and procuring him to be registered as a shareholder, and permitting him to have possession of the scrip certificates, and to attend the meetings of the company, and vote as owner, there may be an apparent ownership with the consent of the true owner, within the mischief of the statute, for a delusive credit may be occasioned by a secret trust of that description(*g*). So property of testators and intestates, held by executors and administrators, in the ordinary course of their administration, is held by them as trustees, and does not, therefore, pass to the trustee for the benefit of creditors in case of their bankruptcy(*h*). But if they are allowed to continue in possession of the trust property for several years, and to trade with it, to all appearance, on their own account, by the persons who are entitled to dispute their possession, and call them to account, the property will be deemed to have been in the possession of such executors, etc., as reputed owners, with the consent of the true owners, within the statute(*i*).

A seizure by a sheriff, under an execution against a bankrupt, of the goods and chattels of a third person in the possession, order, and disposition of the bankrupt, with the consent of the true owner, does not in any way withdraw the goods from the possession, order, or disposition of the bankrupt, so as to interfere with the title of the trustee(*k*).

520 *Goods in the apparent possession of the bankrupt within the Bills of Sale Act.*—By the 17 and 18 Vict. c. 36 (the Bills of Sale Act, 1854), s. 1, it is enacted that all bills of sale not duly filed, etc., according to the Act, shall be void as against assignees of bankrupts, sheriff's officers, etc., so far as regards the property in, or right to the possession of, the chattels comprised in the bill of sale, which, at the time of the bankruptcy shall be in the possession, or apparent possession of the bank-

(*f*) Rogers, *Ex parte*, 25 Law J., Bankr. 41. Witham, *Ex parte*, 1 M. D. & De G. 624. Pinnett v. Wright, 2 Hare, 120. *Ex parte* Stewart, 34 Law J., Ch. 6.

(*g*) Burbridge, *Ex parte*, 1 Deac. 142. Ord, *Ex parte*, ib. 170.

(*h*) Ld. Mansfield, Howard v. Jemmett, 3 Burr. 1369. Ludlow v. Browning, 11 Mod. 139.

(*i*) Fox v. Fisher, 3 B. & Ald. 136. Thomas, *Ex parte*, 3 M. D. & De G. 40.

(*k*) Barrow v. Bell, 5 Ell. & Bl. 540; 25 Law J., Q. B. 3.

rupt^(l); and by s. 7, it is provided that personal chattels shall be deemed to be in the "apparent possession" of the person making the bill of sale, so long as they shall remain in any house, mill, warehouse, etc., land, or other premises occupied by him, or shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by, or given to, some other person. Where the holder of an unregistered bill of sale of furniture took formal possession of the goods, by sending in a man to take possession, who remained in the house, but did not remove the furniture, or interfere with its use by the bankrupt, and subsequently put up placards announcing an auction of the furniture, but nothing appeared in the placards to show that it was not a sale made by the bankrupt himself, it was held that the goods remained in the apparent ownership of the bankrupt, within the above Act, and passed to the trustee in bankruptcy^(m). The mere fact of the goods remaining in the house, however, is not of itself fatal to a bill of sale, if they have ceased at the date of the bankruptcy to be in the actual or apparent possession of the bankrupt⁽ⁿ⁾.

521 *Title to trust property*.—A trustee can never assert a title of his own to trust property. He may destroy that property, and render himself responsible in consequence; if it be stock, he may sell the stock, and invest the proceeds in other property. If he destroy the trust fund by paying away the money, the trust is at an end; but if he invests it in other property, and that can be traced, he is still in possession of the trust property, and to that he can never assert a right. If a person having trust property and property of his own chooses to mix the two together, the whole becomes trust property, subject to this, that whatever he can distinguish as his own he can take out; whatever he cannot distinguish remains for the benefit of the trust until that trust is satisfied. Property has been frequently identified through a long course of dealings and transactions as being the original assets, which may be followed and clothed with the original trust^(o).

522 *Right of property in things taken and converted after recovery of judgment in an action for the conversion of them*.—The recovery of judgment by a plaintiff in an action for the wrongful taking and converting his goods and chattels has the effect of transferring the property of the

(l) See *Ex parte Cohen*, L. R., 7 Ch. App. 20.

(m) *Ex parte Lewis*, L. R., 6 Ch. App. 626. *Ex parte Hooman, re Vining*, L. R., 10 Eq. Ca. 63, acc.

(n) *Gough v. Everard*, 2 H. & C. 1. See *ante*, p. 410, n. (f).

(o) *Frith v. Cartland*, 34 Law J., Ch. 301.

goods converted from the plaintiff to the defendant if the judgment has been satisfied. The plaintiff, by recovering damages for the wrong, loses his right of property in the chattel that has been converted, and this transfer of the right of property dates back, by relation, to the time of the conversion. The damages recovered by the plaintiff against the defendant are regarded as the price of the goods, "so that the defendant hath now the same property therein as the original plaintiff had, and this against all the world"(*p*). Having once recovered judgment and satisfaction in respect of the goods, the plaintiff cannot recover again the same thing against somebody else. His further remedy is altogether gone, and his claim satisfied. By damages recovered is meant damages paid(*q*).

SECTION III.

REMEDIES FOR THE WRONGFUL CONVERSION OF CHATTELS.

If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, the person thus deprived of his goods may bring an action for the trespass, or, waiving the trespass, he may sue for the conversion of the property, or, waiving the tort altogether, he may sue for money had and received(*r*).

523 *Recaption of goods wrongfully seized or stolen.*—If *A* has actual possession of a chattel, and *B* takes it from him against his will, *A* may use as much force as is necessary to defend his right and enable him to retake the chattel; and if a chattel has been seized and carried away by a person who has no color of title to it, and the owner comes and demands it, and the trespasser refuses to give it up, the owner may use force sufficient to enable him to retake his property(*s*). A person, therefore, who has been robbed is entitled to retake the stolen

(*p*) Per Cur. *Adams v. Broughton*, Andr. 19; 6 M. & Gr. 640, u. Byles J., *Edmonson v. Nuttall*, 34 Law J., C. P. 102. *Thurst v. West*, 31 N. Y. 210. *Osterhout v. Roberts*, 8 Cow. 43. *Foremen v. Neilson*, 2 Rich. Eq. 287. *Barb v. Fish*, 8 Blackf. 481. *Morris v. Berkley*, 2 Rep. Con. Ct. 228. *Hepburn v. Sewell*, 5 Har. & J. 211.

(*q*) *Sanders v. Egerton*, 2 Brevard, 45. *Miller v. Manice*, 6 Hill, 114. *Brinsmead v. Harrison*, L. R., 6 C. P. 584, overruling the dictum of Jervis, C.J., in *Buckland v. Johnson*, 15 C. B. 163.

(*r*) *Rodgers v. Maw*, 15 M. & W. 448. *Neat v. Harding*, 6 Exch. 349.

(*s*) *Blades v. Higgins*, 10 C. B., N. S. 713; 30 Law J., C. P. 347; 34 ib. 286. *Rex v. Mitton*, 3 C. & P. 31.

property wherever he can find it, provided the person in possession of it has not acquired a title to it by purchase in market overt, without notice of the robbery. He is not justified in committing an assault, or a breach of the peace in order to possess himself of the property, unless he finds it in the hands of the thief or the felonious receiver; but he must watch his opportunity for recovering possession, and if he is unable peaceably to retake it, he must pursue his remedy by writ of restitution, or by action. If there has been no alteration of the right of property in the thing stolen, by sale in market overt, he may at once demand it from the person in possession of it; and if the latter refuses to deliver it up to him on demand, he may bring his action; but he cannot, as we have seen, sue the thief himself, or the felonious receiver, until he has done his duty to society by prosecuting the felon (*ante*, p. 41).

The remedy, by way of action, for the recovery of the stolen property, or for damages for its detention or conversion, is confined, as we have seen, to those persons who had it in their possession at the time of the conviction of the thief or afterwards (*ante*, p. 416).

524 *Of the plaintiffs in actions of trespass and conversion.*—The person in whom the general property in a personal chattel is vested may maintain an action of trespass for the taking or injuring of the chattel by a stranger(*t*), although he has never had possession in fact, for the general property draws to it the right of possession(*u*). A person entitled to the temporary possession of chattels for a particular purpose may also maintain an action for a trespass, or for the conversion of such chattels against any person who takes possession of them, without having any color of right so to do(*x*). He may be entitled to sue the

(*t*) *Beaty v. Gibbons*, 16 East, 116. *Smith v. James*, 7 Cow. 328. *Hughes v. Giles*, 1 Haw. 26. *Thorp v. Burling*, 11 Johns. 285.

(*u*) Bro. Abr. TRESPASS, pl. 303, 346; Latch, 214. One having the right and title to a promissory note which has never been actually delivered to him, may maintain an action for its conversion. *Wininger v. Banning*, 7 Minn. 274. The assignee of stock already converted may maintain an action for its conversion. *Genet v. Howland*, 45 Barb. (N. Y.) 569. But see *Overton v. Williston*, 31 Penn. St. 155; *Clark v. Glidden*, 39 Me. 448. An administrator may maintain trover for goods which have never been in his possession. *Kerby v. Quinn*, 1 Rice, 264. *Hill v. Brennan*, 1 Rice, 285. See *Parrott v. Dubignore*, Charl. 261; *Kirby v. Clark*, 1 Root, 389; *Towle v. Lovet*, 6 Mass. 394. So where goods situated at A, are given at B, and converted by a stranger before the donee can take possession, the latter may maintain an action for the conversion. *Collis v. Bowen*, 8 Blackf. 262. A vested legal interest is sufficient to support the action. *Pope v. Tucker*, 23 Geo. 484. *Thompson v. Ford*, 7 Ired. 418.

(*x*) *Burton v. Hughes*, 9 Moore, 339. *Sutton v. Buck*, 2 Taunt. 307. The possession of goods under a bill of lading for the purpose of securing advances thereon, is sufficient to maintain the action as against one showing no better title. *Adams v. O'Conner*, 100 Mass. 515. *Burke v. Savage*, 13 Allen, 408. See *Fitzhugh v. Wiman*, 9 N. Y. 559. An agistor of cattle may maintain trover for their conversion. *Betts v. Monser*, Wright, 744. An officer by attaching goods acquires such a special property in them as will authorize him to maintain trover for

owner, if he has a right as against the latter to the temporary possession of the chattel, and the owner refuses to deliver it up on demand(*y*). An auctioneer has a special property as bailee in goods and chattels which are put into his possession for the purpose of sale, whether such goods and chattels be in his own rooms, or in the house of another person; but this is not the case with regard to fixtures. An employment to sell fixtures only authorizes him to sell the right of detaching and removing the fixtures; he has no possession of them as chattels, unless it was intended that he should have possession of them after they were detached. Where, therefore, fixtures sold by an auctioneer were to be detached and removed by the purchaser, it was held that the auctioneer could not maintain an action for their wrongful removal(*z*).

If a timber-tree growing on land demised to a tenant is cut down, the property in the tree is in the lessor, and he may maintain an action against any person who carries it away(*a*); but the lessee has sufficient possession and special property in him to enable him to maintain an action for the conversion of the timber. Property in the hands of very young children is in the constructive possession of the father and master of the house; but watches and books given by a parent to a school-boy or apprentice, and taken away from home, are the property of the boy; and if they are taken away, detained, or converted by a wrong-doer, the boy, and not the parent, is the proper person to sue for the injury(*b*).

If the owner of chattels has, by contract, parted with the possession of them for a certain time, and has only a reversionary interest, he cannot sue a wrong-doer for trespassing upon or converting the property(*c*), unless the bailee, or person clothed with the right of possession, has, by some wrongful act of his own, determined the bailment, or the

their conversion. *Lathrop v. Blake*, 3 Foster (N. H.), 38. *Brownell v. Manchester*, 1 Pick. 232. *Caldwell v. Eaton*, 5 Mass. 399. *Blackley v. Sheldon*, 7 Johns. 32. And the owner of property attached but not removed from his possession, may maintain trover against a third person converting the property pending the attachment. *Mussey v. Perkins*, 36 Vt. 690.

Possession, even if wrongfully obtained, is a sufficient title as against a mere stranger. *Carter v. Bennett*, 4 Florida, 283. But see *Tuley v. Tucker*, 6 Me. 583; *Coffin v. Anderson*, 4 Blackf. 395.

(*y*) *Roberts v. Wyatt*, 2 Taunt. 268. Thus, the pledgee of a promissory note, who has delivered it up to the pledgor under an agreement for a return of the same or another note, may maintain an action against such pledgor for a conversion of the note on his refusal to return the note or another. *Way v. Davidson*, 12 Gray (Mass.), 465. So a bailee for hire may maintain trover against the bailor for a conversion. *Bowen v. Coker*, 2 Rich. 13.

(*z*) *Davis v. Danks*, 3 Exch. 435.

(*a*) *Berry v. Heard*, Cro. Car. 242.

(*b*) *Hunter v. Westbrook*, 2 C. & P. 578.

(*c*) *Gordon v. Harper*, 7 T. R. 13. *Bradley v. Copley*, 1 C. B. 698.

privity of the bailment has been destroyed by the act of a wrong-doer in taking the goods out of the possession of the bailee, and selling them, or converting them to his own use(*d*). But although the bailor cannot sue for a trespass or for a wrongful conversion of the property, yet he may maintain an action on the case against a wrong-doer, who by negligence or misconduct has caused the goods to be destroyed or permanently injured(*e*).

Every hirer has the use, not the dominion, of chattels demised to him, and therefore, when he alters or changes the nature of the property, or does anything to destroy its identity, his right of using it is at an end, the bailment is determined, and an action is maintainable for the wrongful conversion of the property(*f*). “If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth the cattle, I may well,” observes Littleton, “have an action of trespass against him, notwithstanding the lending.” “And the reason,” saith Coke, “is that when the bailee, having but a bare use of them, taketh upon him as owner, to kill them, he loseth the benefit of the use of them”(*g*). If the hirer of chattels sends them to an auctioneer to be sold, this is a conversion of the goods to his own use, which at once determines the bailment, and the owner has an immediate right of possession, and may at once sue for the recovery of the goods, or for damages for the loss of them(*h*).

If the goods of the plaintiff have been let to hire to a tenant, and have been distrained for rent whilst in the possession of the latter, and impounded, the plaintiff, nevertheless, retains his right of property in the goods, whilst they continue in the custody of the law, and in case of pound breach against those who take and convert the goods(*i*).

Where the owner of a furnished house puts a person into the possession of the house to manage a business for him, at a certain agreed rate of remuneration, and gives him the use of the furniture, the occupier is the mere servant of the owner, his possession of the furniture is the possession of the master, and the latter is entitled to take it

(*d*) See *post*, ch. 9; *Scott v. Newington*, 1 M. & Rob. 252. See *Lovejoy v. Jones*, 10 Foster (N. H.), 164; *Harvey v. Epes*, 12 Grat. (Va.) 153.

(*e*) *Mears v. Lond. & South-West. Rail. Co.*, 11 C. B., N. S. 850; 31 Law J., C. P. 221. *Tancred v. Allgood*, 4. H. & N. 438; 28 Law J., Exch. 362. *Hall v. Pickard*, 3 Campb. 186.

(*f*) *Bryant v. Wardell*, 2 Exch. 482. *Holroyd, J.*, in *Farrant v. Thompson*, 5 B. & Ald. 829. *Fenn v. Bittleston*, 7 Exch. 159.

(*g*) Co. Litt. 57a-57b.

(*h*) *Loeschman v. Machin*, 2 Stark. 312. A refusal to return borrowed property to the house of the owner, although a breach of duty, does not amount to a conversion, if the borrower make no claim to the property and no objection to the owner taking it. *Farrar v. Rollins*, 37 Vt. 295.

(*i*) *Turner v. Ford*, 15 M. & W. 215.

away at any time(*k*). A mere gratuitous bailment of a chattel to another (*post*, ch. 9.) does not remove the chattel out of the possession of the bailor, and does not prevent the latter from suing a third person who takes and converts the chattel, with or without the authority of the bailee. If goods are bailed by *A* to *B*, to be kept by the latter, and *B* bails them to *C*, who uses and wastes the goods, *C* is liable to an action at the suit of *A* for the recovery of compensation for the damage sustained(*l*). If the owner of a chattel gives a gratuitous permission to another to take the chattel and use it, he may, nevertheless, maintain an action against a stranger who takes, damages, or converts the chattel, whilst it is being used by the person to whom it has been lent(*m*).

525 *Joinder of joint-owners as plaintiffs—Joint-tenants and tenants in common of chattels.*—When several persons are joint-owners of a chattel, they must all be joined as plaintiffs in an action for the conversion of it (see *ante*, pp. 84, 244, 356)(*mm*). Where some engravings had been mortgaged to the plaintiff, and the plaintiff and the mortgagor, after execution of the mortgage, placed the engravings in the hands of the defendant in their joint names, to be sold by him by a public lottery or raffle, which failed for want of subscribers, and the mortgagor being greatly in debt, absconded, and the plaintiff then demanded the engravings, but the defendant refused to deliver them to him alone, without an indemnity, it was held by Jervis, C.J., that the refusal was right, and that the plaintiff had no ground of action in respect thereof against the defendant(*n*). But it has been held, that if one tenant in common of a personal indivisible chattel bring an action for the conversion of it against a stranger, if the stranger doth not plead the tenancy in common in abatement, he can have no benefit of it in evidence on the general issue(*o*), and the plaintiff will be entitled to recover damages in proportion to the extent* and value of his interest, and the damage he has sustained(*p*).

526 *Parties to be made defendants.*—Every person who aids and assists in the act of conversion is responsible for the entire damage that has been sustained, although he acted only as the friend of another wrong-

(*k*) *Bertie v. Beaumont*, 16 East, 36. *Mayhew v. Suttle*, *White v. Bailey*, *ante*, pp. 335, 336.

(*l*) 12 Ed. 4, fol. 13, pl. 9; fol. 9, pl. 5.

(*m*) *Lotan v. Cross*, 2 Campb. 465. *Nicolls v. Bastard*, 2 C. M. & R. 659. *Turner v. Ford*, 15 M. & W. 212. *Manders v. Williams*, 4 Exch. 343.

(*mm*) *Haskell v. Jones*, 11 Shep. 222.

(*n*) *Burke v. Bryant*, C.B. Sittings after Trinity Term, 1852. And see *post*, ch. 9, s. 2.

(*o*) *King, C.J.*, *Barnardiston v. Chapman*, cited 6 T. R. 770.

(*p*) *Dockwray v. Dickenson*, Skin. 640. *Addison v. Overend*, 6 T. R. 770.

doer, the real principal in the transaction, or is merely a servant obeying his master's orders, and had no idea of committing any wrongful act himself. It is no answer that he acted under authority from another, who had himself no authority in the matter(*q*). Every master and employer is, of course, responsible for a conversion by his servant acting in obedience to his master's orders, or in the execution of his duty to his employer. Thus, if a ship-owner gives orders or directions to his ship-master to detain goods shipped on board, the ship-owner will be responsible for everything done by the ship-master whilst acting in obedience to his orders(*r*). And if a pawnbroker's servant, in the execution of his master's business, refuses to deliver up a pawn to the pawnor, on tender of the money due on it, the refusal of the servant is the refusal of the master, and the latter is responsible in damages for a conversion(*s*). However, no petition of right can be maintained against the Crown for the act of the captain of a man-of-war in seizing a vessel wrongly supposed to be engaged in the slave trade(*t*). The remedy for the ship-owner is in the Court of Admiralty(*u*), with an appeal to the Privy Council(*v*). If a man has intermeddled with the goods of a deceased person for the purpose of preserving and administering his estate, and has thus made himself executor *de son tort*, he may be sued for a trespass and conversion by the rightful administrator, when he has obtained letters of administration; but if no injury has been sustained by the estate, nominal damages only would be recoverable(*x*).

In order to recover against several persons for a joint-conversion it must be proved that all concurred in some joint act of conversion(*xx*). If the facts exclude a joint conversion by all the defendants, but show separate acts of conversion, in which some have participated and others not, some of the defendants may be found guilty and others may be acquitted, for several may be joined as defend-

(*q*) *Parker v. Godin*, 2 Str. 813. *Stephens v. Elwall*, 4 M. & S. 261. *Gage v. Whittier*, 17 N. H. 312. *Fiedler v. Maxwell*, 2 Blatch. Ct. Ct. 552. Thus the instructions of the Secretary of the Treasury is no defence in an action of trover brought by an importer of goods against a collector of customs who unlawfully detains them. *Id.*

(*r*) *Schuster v. McKellar*, 7 Ell. & Bl. 704; 26 Law J., Q. B. 288.

(*s*) *Jones v. Hart*, 2 Salk. 441. See *Chambers v. Lewis*, 28 N. Y. 454.

(*t*) As to the seizure of a ship contrary to the provisions of the Foreign Enlistment Act, 1870, see the provisions of that Act, 33 & 34 Vict. c. 90; see s. 28.

(*u*) *Tobin v. The Queen*, 33 Law J., C. P. 199.

(*v*) *Casanova v. The Queen*, L. R., 1 P. C. Ca. 269.

(*x*) *Elworthy v. Sandford*, 34 Law J., Exch. 42.

(*xx*) *White v. Demary*, 2 N. H. 546. But to constitute a joint conversion the acts of the several wrong-doers need not be cotemporaneous, if their acts and purposes all tend to the same result. *Cram v. Thissell*, 35 Me. 86.

ants in an action for conversion, and one only may be found guilty(y). Where a ship-captain, *bonâ fide* intending to execute the duties of his employment, made a mistake in disposing of the cargo, which amounted to a conversion of it, it was held that there was a joint-conversion by the master and owner(z). If a married woman is guilty of a conversion of chattels, she and her husband may be joined as defendants(a). Where some sheriff's officers, being authorized to seize the goods of A, by mistake took the goods of the plaintiff and lodged them in the defendant's stable, and when the plaintiff came and demanded the goods, the defendant's wife, in the defendant's absence, refused to give them up, saying "I am told I shall be borne harmless," it was held that both the husband and wife were responsible for a conversion(b).

527 *Of the staying of proceedings on the delivery of the chattels to the plaintiff.*—In actions for the conversion of goods and chattels, the defendant may, in certain cases, where no special damage is alleged, or, if alleged, where it is merely colorable, obtain an order for a stay of proceedings on the terms of the delivery of the goods to the plaintiff, and the payment of nominal damages and costs(c). In an action for the conversion of a packet of letters, the defendant was allowed to stay proceedings as to one of the letters, upon delivering it up to the plaintiff and paying costs(d). But where there is any uncertainty, either as to the quantity, or quality, or value, of the things which have been converted, or when damages have been sustained over and above the value of the goods, the court, or a judge will not interfere to stay the proceedings upon the delivery of the goods to the plaintiff(e).

528 *Declarations for a trespass, or for the conversion of chattels.*—Whenever the goods and chattels of one man have been wrongfully taken and carried away by another, the wrong-doer may be sued either for a trespass or for a conversion of the chattels(ee). If the chattels have come lawfully into the possession of the defendant, and there was no trespass in the taking of them, but the defendant fails to deliver them

(y) *Nicoll v. Glennie*, 1 M. & S. 589. *Ante*, pp. 246, 359. *Powers v. Sawyer*, 46 Me. 160. And see *Pattee v. Gilmore*, 18 N. H. 460; *Lockwood v. Bull*, 1 Cow. 322.

(z) *Ewbank v. Nutting*, 7 C. B. 808.

(a) *Keyworth v. Hill*, 3 B. & Ald. 688. See *Knowing v. Manly*, 49 N. Y. 192.

(b) *Catterall v. Kenyon*, 3 Q. B. 310.

(c) *Chitty's Arch. Pr.* 1367, 11th ed.

(d) *Earl v. Holderness*, 4 Bing. 462.

(e) *Tucker v. Wright*, 11 Moore, 503. *Whitten v. Fuller*, 2 W. Bl. 901. *Olivant v. Berino*, 1 Wils. 23. *Gibson v. Humphrey*, 1 Cr. & M. 544. *Lucas v. Lond. Dock Co.*, 4 B. & Ad. 378. See *Rank v. Rank*, 5 Barr, 211; *Hibbard v. Stewart*, 1 Hilt. (N. Y. C. P.) 207.

(ee) *Prescott v. Wright*, 6 Mass. 20. *Peirce v. Benjamin*, 14 Pick. 356. *Thorpe v. Burling*, 11 Johns. 285.

within a reasonable time after they have been demanded by a plaintiff entitled to the possession of them, the declaration should be for a conversion of them. A declaration for a trespass upon personal property alleges, either that the defendant seized and took certain goods and chattels of the plaintiff, and damaged and destroyed them, or deprived the plaintiff of the use of them, or that he shot at and lamed the plaintiff's dog, and greatly injured it, or that the defendant drove his horse and cart against the horse and carriage of the plaintiff, and greatly damaged them, and deprived the plaintiff of the use of them, and obliged him to hire another horse and carriage, etc., as the case may be, claiming damages in each case. A declaration for the wrongful conversion of the plaintiff's chattels by the defendant simply alleges "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods" describing them(*f*).

Where a tenant, during his tenancy, whilst removing a dung-heap, dug into and carried away a quantity of virgin-soil beneath the dung-heap, it was held that the soil, so soon as it had been severed from the freehold, vested in the landlord as a chattel, so as to enable him to declare against his tenant for a trespass *de bonis asportatis*, or for a conversion of chattels(*g*).

529 *What may be given in evidence under the plea of not guilty.*—In actions for a trespass, or for converting the plaintiff's goods, the plea of not guilty operates as a denial of the defendant's having committed the wrong alleged by taking or converting the goods mentioned, but not of the plaintiff's property therein, and no other defence than such denial is admissible under that plea(*h*). Wherever, therefore, the defendant allows that he meddled with goods which were the property, and in the possession, of the plaintiff, he is presumed to be a trespasser, and if he has any matter of justification, or any authority, general or particular, express or implied, from the plaintiff, this must be specially pleaded. Therefore, where an action was brought against the defendant for unmooring the plaintiff's barge, it was held that the defendant could not, under the plea of not guilty, give in evidence facts and circumstances showing that he was justified in so doing; such as that the barge was in the greatest danger of being carried

(*f*) 15 & 16 Vict. c. 76, Sched. B. 28. *Holmes v. Hodson*, 8 Moore, 379. See *Decker v. Mathews*, 12 N. Y. 313.

(*g*) *Higgon v. Mortimer*, 6 C. & P. 616; *ante*, pp. 282, 356, 384.

(*h*) Reg. Gen. Hil. Term. 16 Vict., 1 Ell. & Bl. App. lxxxii. See *Pemberton v. Smith*, 3 Head (Tenn.) 18.

away by floating ice, and that the defendant, being employed generally by the plaintiff to look after his barges, removed the barge from a place of danger to a place of safety(*i*).

The plea of not guilty in actions for the conversion of chattels puts in issue the wrongful character of the act, so that if the defendant detained them in the exercise of a legal right consistent with the fact of the right of property being in the plaintiff, the true character of the detainer and the existence of the right may be given in evidence under the plea of not guilty. The demand and refusal of the goods are not in themselves an actual conversion, but only evidence of it(*j*). Any fact, therefore, explanatory of the demand and refusal is receivable in evidence under the plea of not guilty, because it goes directly to show that there was no conversion at all: such as the fact that the defendant has a lien upon the chattel in his hands, or that he and the plaintiff were joint-owners of the chattel, and that what the defendant did was in the exercise of his legal rights as joint-owner with the plaintiff(*k*), or that the defendant had some qualified right in it, and has only dealt with the article in the manner in which he was entitled to deal with it in the exercise of his legal right(*l*). But a defence to the effect that the chattels had been given by the defendant to the plaintiff, subject to a condition not performed, whereupon they again became the property of the defendant, whereupon the latter retook them, and claimed to keep them as his own property, is not admissible under the plea of not guilty(*m*).

530 *Pleas denying the plaintiff's right of property in, or his right to the possession of, the chattel.*—If the defendant intends to dispute the plaintiff's title to, or his right to the possession of, the chattel taken or converted, he must plead a plea, alleging that the goods and chattels taken or converted were not, at the time of the alleged conversion, the property of the plaintiff, or that the plaintiff was not then entitled to the possession of them(*mm*). Under this plea the defendant is at liberty to set up any circumstances, showing that the plaintiff has no

(*i*) *Milman v. Dolwell*, 2 Campb. 378.

(*j*) *Munger v. Hess*, 28 Barb. 76. *Salt Springs National Bank v. Wheeler*, 48 N. Y. 492. *Robinson v. Hartridge*, 13 Florida, 501. *Yale v. Saunders*, 16 Vt. 243. *Morris v. Thomson*, 1 Richardson, 65. *Lockwood v. Bull*, 1 Cow. 322. *Buck v. Ashley*, 37 Vt. 475. *Ellis v. Wire*, 33 Ind. 127.

(*k*) *Higgins v. Thomas*, 8 Q. B. 908.

(*l*) *Young v. Cooper*, 6 Exch. 259; 20 Law J., Exch. 136. *Parke, B.*, in *Kynaston v. Crouch*, 14 M. & W. 272. *Wilkinson v. Whalley*, 5 M. & Gr. 590. *Verrall v. Robinson*, 2 C. M. & R. 495. *Drew v. Spaulding*, 45 N. H. 472.

(*m*) *Jones v. Davies*, 6 Exch. 663; *ante*, pp. 88, 180.

(*mm*) But see *Coffin v. Anderson*, 4 Blackf. 395.

property in, or right of possession of, the goods, in respect of which he is entitled to maintain the action against the defendant. A plea, denying that the goods are the goods of the plaintiff, puts in issue the plaintiff's property in, as well as his right to the possession of, the goods(*n*). If the defendant has, by contract, acquired a right to take and carry away the chattel, the contract may be given in evidence under a plea denying that the chattel was at the time of the seizure the chattel of the plaintiff(*o*). Under this plea it is competent to the defendant to show that the plaintiff had parted with the property before the cause of action arose, or that the defendant had a lien upon the goods, as a right of lien on the part of the defendant is inconsistent with a right of possession on the part of the plaintiff(*p*), or that the title to the goods had become vested in a trustee or trustees under a bankruptcy(*q*), or that the plaintiff's title has been defeated by matter subsequent to the bailment(*r*). In an action against trustees of a bankrupt for the conversion of chattels, the defence that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt, with the consent of the true owner, and that the title to the goods vested in the trustees, is admissible under a plea of not possessed(*s*).

A plea of the previous recovery of judgment by the plaintiff in an action for the conversion of the property brought against some third person, under whom the defendant claims, is, as we have seen, an answer to the action(*t*).

531 *Pleas of justification*.—If the defendant intends to justify the taking of the goods on the grounds distinct from any question of title or right of property or possession, he must set forth his ground of justification in a special plea; such as, that the goods and chattels mentioned in the declaration were wrongfully upon the defendant's land, encumbering the same, and doing damage there to the defendant, whereupon the defendant took the goods and carried them to the plaintiff's land, and deposited them there, doing no damage to them that could be reasonably avoided(*u*): or if the plaintiff complains of

(*n*) *Harrison v. Dixon*, 12 M. & W. 142.

(*o*) *Richards v. Symons*, 8 Q. B. 90.

(*p*) *Dorrington v. Carter*, 1 Exch. 566. *Lane v. Tewson*, 12 Ad. & E. 116, n. *Barton v. Brown*, 5 M. & W. 298. *Owen v. Knight*, 4 B. N. C. 54.

(*q*) *Leake v. Loveday*, 5 Sc. N. R. 921; 4 M. & Gr. 972. *Howarth v. Tollemache*, ib. 329.

(*r*) *Martin, B., Thorne v. Tilbury*, 3 H. & N. 539; 27 Law J., Exch. 407; *post*, ch. 21.

(*s*) *Heslop v. Baker*, 8 Exch. 411; 22 Law J., Exch. 333. *Isaac v. Belcher*, 5 M. & W. 139.

(*t*) *Ante*, pp. 441, 442. The defence of a valid release to a co-trespasser may also be pleaded in bar. *Montgomery v. Irwin*, 24 Ark. 540. As to the plea of former recovery, see *Miller v. Manice*, 6 Hill, 114.

(*u*) *Cole v. Maundy*, *Rea v. Sheward*, 2 M. & W. 426.

the shooting of his dog by the defendant, the latter may justify the trespass or conversion of the animal, on the ground that the dog was trespassing on the defendant's land in pursuit of and worrying the plaintiff's sheep, or hunting and chasing the defendant's deer, and that the defendant had no means of protecting his sheep or deer from injury but by shooting the dog, and that he therefore shot it(x).

532 *Evidence at the trial—Proof by the plaintiff.*—To enable a plaintiff to maintain an action and recover damages for a seizure or conversion of chattels, he must show that the seizure was wrongful, and that he has been damnified by it(y). He must, therefore, give some general evidence of his right to the chattel, and of the wrong done to him by the defendant in taking it away; for if there is no proof of his having ever been in possession of the chattel, or of his having any right to the possession of it, there is no proof of any wrong having been done to him, nor any evidence of any cause of action, nor anything to support the material averments of the plaintiff's declaration(z). Where the plaintiff proved that the defendant seized some chairs and tables in a house which was not the plaintiff's house, and carried them away, and the only plea on the record was a plea of not guilty, it was held that the plaintiff must, nevertheless, give some general evidence of his right to the possession of the chairs and tables to constitute a cause of action, and establish the tort or wrong charged in the declaration(a). If in a declaration for a trespass in entering a house and seizing goods there is no allegation that the goods belonged to the plaintiff, nor any admission to that effect on the record, there is no disclosure of any cause of action(b). Possession of chattels, however, is *prima facie* proof of ownership, and mere proof of possession will entitle a plaintiff to recover in an action of trespass or trover against a wrong-doer(c).

533 *Proof of constructive possession of chattels.*—If a man cuts down wood

(x) *Barrington v. Turner*, 3 Lev. 28.

(y) *Tancred v. Allgood*, 4 H. & N. 433; 28 Law J., Exch. 362.

(z) *Channon v. Patch*, 5 B. & C. 897. To support an action of trover, the plaintiff must prove property, and the right of possession in himself, and a conversion by the defendant of the thing to his own use. *Salt Springs National Bank v. Wheeler*, 48 N. Y. 492. *Picquet v. M'Kay*, 2 Blackf. 465. See *Stephenson v. Little*, 10 Mich. 433; *Vanderburgh v. Bassett*, 4 Maine, 242.

If the defendant has a color of title, the plaintiff must show title as well as possession. *Fightmaster v. Beasley*, 7 J. J. Marsh. 410.

To sustain the action it must also be shown that the article sued for is of some value. *Miller v. Reigue*, 2 Hill (S. C.), 592. See *Sterling v. Garrites*, 18 Md. 463.

(a) *Forman v. Dawes*, Car. & M. 129.

(b) *Pritchard v. Long*, 9 M. & W. 666.

(c) *Webb v. Fox*, 7 T. R. 397. See *post*, p. 455; *Jones v. Sinclair*, 2 N. H. 319; *Derby v. Gallup*, 5 Minn. 119; *Duncan v. Spear*, 11 Wend. 54; *Vining v. Baker*, 53 Me. 544; *Burk v. Savage*, 13 Allen (Mass.), 408; *Burt v. Dutcher*, 34 N. Y. 493.

or rushes, and stores them on the ground ready to be carried away, the things so severed from the realty are in the actual possession of the person who has cut them down, and proof that the act of severance has been committed by the plaintiff is sufficient *primâ facie* evidence of title to enable the plaintiff to maintain an action against another person for seizing them and carrying them away, and the *primâ facie* title cannot be disputed under the plea of not guilty(*d*). Proof that the plaintiff dug out ore, or sand and gravel, and piled it in heaps on the ground, is *primâ facie* proof that he is entitled to the heaps(*e*). Proof that the plaintiff is the owner of a vessel taking in cargo is *primâ facie* evidence that the plaintiff is the owner of the cargo(*f*). If the plaintiff shows that he has a right to the possession of chattels, this will enable him to maintain an action for damages without proof that he has ever had actual possession of them, or that he is the owner of them; for a factor to whom goods have been consigned by the owner for sale, and who has never received them, may maintain an action for the conversion of them(*g*). There may be a constructive possession of chattels in respect of the right of property being actually vested in the plaintiff. Such is the case in an action of trespass by the lord for an estray or wreck taken by a stranger before seizure by the lord, where the right is in the lord, and a constructive possession in respect of the thing being within the manor of which he is lord. So the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession(*h*). If trees growing on land demised to a tenant are cut down by the latter, or fixtures attached to a dwelling-house are severed by the tenant, the landlord has an immediate right of possession of the trees and fixtures so severed from the inheritance; they are his goods and chattels, and if they are taken away from the demised premises he may maintain an action for the conversion of them(*i*).

However, where there was an absolute assignment of goods by deed, with a covenant to pay a certain debt on demand, and a proviso for redemption on payment of the debt, and a further proviso that

(*d*) Rackham v. Jessup, 3 Wils. 332.

(*e*) Northam v. Bowden, 11 Exch. 76; 24 Law J. Exch. 238. Rowe v. Brenton, 8 B. & C. 737.

(*f*) Brancker v. Molyneux, 3 M. & Gr. 84.

(*g*) Eyre, C.J., Fowler v. Down, 1 B. & P. 47.

(*h*) Smith v. Miles, 1 T. R. 480.

(*i*) Farrant v. Thompson, 5 B. & Ald. 828. A mortgagor may maintain trover against the mortgagee or his assignee for sale of timber cut on the mortgaged premises after payment of the mortgage. Hutchins v. King, 1 Wall. (U. S.) 53. And the wrongful cutting of timber without carrying it away is a conversion. Sanderson v. Haverstick, 8 Barr, 294.

the assignor should continue in possession until default, and before any default made the goods were taken in execution and sold by the sheriff, it was held that the assignee had not such a right of immediate possession as would entitle him to maintain an action against the sheriff for a conversion of the goods(k).

534 *Proof of title of trustees of bankrupts, executors, and nominal parties.*—

In all actions by and against trustees of bankrupts, or executors, or administrators, or persons authorized by statute to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued is not in issue unless it is specially denied(l). The Bankrupt Act, 32 & 33 Vict. c. 71, s. 10, makes the *London Gazette* conclusive evidence of the debtor having been duly adjudged a bankrupt, and of the date of the adjudication, in criminal as well as civil proceedings(m).

535 *Proof of conversion.*—It is necessary for the plaintiff in an action for the conversion of chattels to prove either that the defendant unlawfully meddled with the plaintiff's goods, and removed them from some place where they had been deposited by the plaintiff, and that the goods had since then been lost to the plaintiff, or that the chattels came to the hands of the defendant wrongfully, or by a tortious taking, or that the defendant has unlawfully exercised dominion over them, to the prejudice of the plaintiff, or that there has been a wrongful destruction of the chattels (ante, p. 396). If the property came lawfully into the possession of the defendant, or under his dominion and control, there must then, as we have seen, be proof of a demand and refusal of the property by a party entitled to make the demand, and have possession of the chattels (ante, pp. 398, 399).

The refusal must, as we have seen, be an absolute refusal, and not a qualified conditional refusal, amounting only to an objection to deliver the goods, until the plaintiff's title to them has been ascertained (ante, p. 400). If the plaintiff complains of the conversion of a bank-note or negotiable security, he must show that the defendant got the note under circumstances which give him no title to hold the

(k) *Bradley v. Copley*, 1 C. B. 685.

(l) Reg. Gen. Hil. Term, 1853, 1 Ell. & Bl. App. lxxix.

(m) See *R. v. Levi*, 34 Law J., M. C. 174. "But the *Gazette* is not evidence whether the bankrupt was a trader or not at the time of adjudication; and the trustee, therefore, in a case of disputed title to goods between him and the execution creditor is not concluded by the *Gazette* from showing that the bankrupt was in fact a trader at the date of adjudication, although the adjudication was made against him as a non-trader. *Revell v. Blake*, L. R., 7 C. P. 301." And see as to proof of proceedings in bankruptcy by production of records sealed with the seal of the court, s. 107.

note as against the plaintiff (*ante*, pp. 403, 404). Any admission on the part of the defendant that the plaintiff's property had come into his hands, or under his control, and had then been wrongfully dealt with by him, will be evidence of a conversion. Thus, where a defendant, in answer to a demand made upon him by the plaintiff for the delivery of a bill of exchange, said that he could not give it up, because it had been burnt, it was held that this was evidence of a conversion by him of the bill(*n*).

536 *Evidence for the defence*.—The defendant cannot, as we have seen, set up any right or title to the subject-matter of the action in answer to a *prima facie* case on the part of the plaintiff, unless the right of possession or right of property has been put in issue by the pleadings (*ante*, p. 450); but he may, as we have seen, under the plea of not guilty, show that he has a lien on the goods, and detains them in the exercise of such right of lien, or that he is joint-owner of the goods with the plaintiff, or has some limited or temporary right or interest in them, and has therefore a right to keep them (*ante*, pp. 408, 449). When goods have been taken from the actual possession of the plaintiff, and the defendant fails in establishing any title in himself to the property, so as to justify the seizure, he will not be allowed to set up a *jus tertii*, and deny the plaintiff's title to the goods; for, as against a wrong-doer, possession is title, and the presumption of law is that the possession and ownership of chattels go together, and that presumption cannot be rebutted by evidence that the right of property was in a third person, offered as a defence by one who admits that he had no title and was a wrong-doer when he took or converted the goods(*o*). A wrong-doer, therefore, in actual possession of goods, the

(*n*) *M'Kewen v. Cotching*, 27 Law J., C. P. 41. A conversion consists of the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in defiance of the plaintiff's right, or in withholding it under a claim of title. *Salt Springs National Bank v. Wheeler*, 48 N. Y. 492; 1 Greenl. Ev. s. 542.

The accidental loss or destruction of an article by one lawfully in its possession has never been held to be a conversion. *Salt Springs National Bank v. Wheeler*, 48 N. Y. 492. *Cairns v. Bleeker*, 12 Johns. 300. *Jerves v. Jolliffe*, 6 Johns. 9.

The refusal of a bailee to give up property upon demand which has been stolen from him, and which is not within his control, is not a conversion nor evidence of a conversion. *Buck v. Ashley*, 37 Vt. 475. See *Robinson v. Hartridge*, 13 Florida, 501.

So of the accidental loss of goods by a carrier. *Dwight v. Benton*, 1 Pick. 50.

But where the direct wrongful act of the defendant has deprived the plaintiff of the possession of his property, it is immaterial whether the defendant has kept, destroyed or delivered it to a third person. *Davis v. Taylor*, 41 Ill. 405.

(*o*) *Heath v. Milward*, 2 Sc. 160; 2 B. N. C. 100. *Carter v. Johnson*, 2 M. & Rob. 265. *Ashmore v. Hardy*, 7 C. & P. 505. *Bourne v. Fosbrooke*, 34 Law J., C. P. 164. *Weymouth v. Chicago*, etc., R. R. Co., 27 Wis. 550. *Harker v. Dement*, 9 Gill, 7. *Duncan v. Spear*, 11 Wend. 54. *Hoyt v. Van Alstyne*, 15 Barb. 568. *Gerber v. Monie*, 56 Barb. 652.

But see *Rotan v. Fletcher*, 15 Johns. 207; *Schermerhorn v. Van Volkenburgh*, 11 Johns. 529; *Kennedy v. Strong*, 14 Johns. 128; *Glenn v. Garrison*, 2 Harr. 1; *Smoot v. Cook*, 3 W. Va. 172.

property of another, can recover their value in an action against another wrong-doer who takes the goods from him(*p*).

537 *When the defendant is estopped from disputing the title of the plaintiff.*

—If the defendant has by deed admitted the title of the plaintiff to the chattels in respect of which the action is brought, he will be estopped from disputing it at the trial(*q*). If he has accredited the title of some third person to the goods, and so induced the plaintiff to buy from the latter, he will be estopped from setting up any title in himself(*r*). If the owner of goods parts with the possession of them, and knowingly suffers his bailee to deal with the goods as owner, and culpably and negligently stands by and allows a third person to acquire an interest in the goods on the faith and understanding of a fact which he can contradict, and does not contradict, he will be afterwards estopped from disputing the fact in an action against the person whom he has himself assisted in deceiving. Thus, if *A*, the owner of goods, stands by and permits *B* to sell them to *C*, without giving any notice to *C*, of his being the real owner of the goods, he will be estopped from disputing *C*'s title under the sale(*s*).

Where the plaintiff, in order to protect his personal effects from his creditors, delivered the actual possession of them to the defendant, and, in order that the latter might appear to be the true owner, made a priced invoice of the articles, and gave a receipt to the defendant for the amount as on a sale, it was nevertheless held that the plaintiff, as between himself and the defendant, was not estopped from showing the real character of the transaction, so as to entitle him to recover back the goods from the defendant. Here no deed of transfer had been executed, and the jury found that there was no sale and no intention of transferring the right of property in the things to the defendant. “And,” observes Martin, B., “it is perfectly true that if an act be done, the party cannot avail himself of his own fraud to undo it; but here the act is not done, as the jury expressly find there was no sale at all to the defendant,” and no transfer whatever of the property in these goods to him(*t*).

538 *Evidence under pleas of justification.*—If the defendant has placed a plea of justification on the record, all the material averments of the

(*p*) *Jeffries v. Gt. West. Rail. Co.*, 5 Ell. & Bl. 806; 25 Law J., Q. B. 107.

(*q*) *Wiles v. Woodward*, 5 Exch. 557. See *Kennedy v. Strong*, 14 Johns. 123; and see *Barwick v. Wood*, 3 Jones' Law (N. C.), 306.

(*r*) *Waller v. Drakeford*, 1 Ell. & Bl. 753.

(*s*) *Gregg v. Wells*, 10 Ad. & E. 98.

(*t*) *Bowes v. Foster*, 2 H. & N. 779; 27 Law J., Exch. 262.

plea should be proved. If the defendant justifies the shooting of a dog, on the ground that the animal was hunting and chasing deer in a park, or conies in a rabbit-warren, sheep in a fold, or fowls in a poultry-yard, he must prove that the dog was in hot pursuit at the time he shot it(*u*). But if a man allows his sheep or his fowls to escape from his own land, and trespass upon his neighbor's property, and they are there attacked and worried by his neighbor's dog, he cannot justify the shooting of the dog in defence of his strayed sheep or fowls.

Dogs trespassing in pursuit of animals *feræ naturæ* cannot lawfully be destroyed. "A dog," observes Lord Ellenborough, "does not incur the penalty of death for running after a hare in another man's ground. And if there be any precedent of that sort which outrages all reason and common sense, it is of no authority to govern other cases. A gamekeeper has no right to kill a dog for following game"(*x*), although the owner of the dog has received notice that trespassing dogs will be shot(*y*). But a dog chasing and pursuing game in a preserve might, it is apprehended, be shot, if the game could not otherwise be saved from destruction(*z*).

539 *Of the assessment of damages.*—Whenever the chattels of one man have been wrongfully seized by another, who has assumed a virtual dominion over them, substantial damages are recoverable, although no pecuniary damage can be proved to have been sustained. Where, therefore, the defendant wrongfully seized the plaintiff's horse and cart, and placed a man to keep possession of them, who allowed the plaintiff the free use of the cart, which was driven to market every day, it was held that the plaintiff was nevertheless entitled to recover substantial damages in respect of the infringement of his proprietary rights(*a*).

In actions for the conversion of chattels, the full value of the chattels at the time of the conversion is the measure of the damages, where no special damage has been sustained, and the goods have not been tendered and received back after action(*b*). By the recovery of the

(*u*) *Barrington v. Turner*, 3 Lev. 28. *Protheroe v. Mathews*, 5 C. & P. 586. *Wadhurst v. Damme*, Cro. Jac. 45. *Wells v. Head*, 4 C. & P. 568. *Janson v. Brown*, 1 Campb. 41.

(*x*) *Vere v. Ld. Cawdor*, 11 East, 569.

(*y*) *Corner v. Champneys*, cited 2 Marsh. 584.

(*z*) *Read v. Edwards*, *ante*, p. 30.

(*a*) *Bayliss v. Fisher*, 7 Bing. 153.

(*b*) *Wood v. Morewood*, 3 Q. B. 440, n. *Finch v. Blount*, 7 C. & P. 478. *Alsager v. Close*, 10 M. & W. 584. *Ewbank v. Nutting*, 7 C. B. 809. *Edmondson v. Nuttall*, 17 C. B., N. S. 230; 34 Law J., C. P. 102. The rule as to the measure of damages in actions of trover cannot be said to be uniformly settled in this country, nor would the adoption of the rule stated in the

judgment the ownership of the converted property is transferred, as we have seen, from the plaintiff to the defendant, and the plaintiff holds the damages as the price of the goods he has lost (*ante*, p. 360); he is therefore entitled to their full marketable value where he does not consent to receive them back. If the chattel is of such a nature that the loss of it may readily be supplied by the purchase of a similar chattel in the market, the damage will be the marketable value of the chattel at the time of the conversion. If the value of it is doubtful, every presumption is made against the wrong-doer. Where a boy having found a jewel set in a socket took it to a jeweller's to know what it was worth, and the jeweller took the jewel out of the socket to examine it, and then refused to deliver it up, and the boy brought an action for the conversion of the jewel, "several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth, and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they did" (c).

text tend in any considerable degree to harmonize the conflicting decisions, and furnish a uniform measure of damages. It is undoubtedly the general rule that the measure of the plaintiff's damages in an action of trover is the value of the property at the time of the conversion and interest thereon from the time of the conversion up to the rendition of the verdict. *Ryburn v. Pryor*, 14 Ark. 505. *Clark v. Whitaker*, 19 Conn. 319. *Burney v. Pledger*, 3 Rich. 191. *Kennedy v. Whitwell*, 4 Pick. 463. *Watt v. Potter*, 2 Mason, 77. *Lillord v. Whitaker*, 3 Bibb, 92. *Weld v. Oliver*, 21 Pick. 559. *Greenfield Bank v. Leavitt*, 17 Pick. 1. *Johnson v. Sumner*, 1 Met. 172. *Sanders v. Vance*, 7 Monr. 209. *Baldwin v. Munro*, Anthon, 156. *Ellis v. Woie*, 33 Ind. 127. *Carlyon v. Lannan*, 4 Nev. 156. *Hamer v. Hatheway*, 33 Cal. 117. *Crumb v. Oaks*, 38 Vt. 566. *Ripley v. Davis*, 15 Mich. 75. *Brown v. Haynes*, 52 Me. 578. *Robinson v. Barrows*, 48 Me. 186. *Derby v. Gallup*, 5 Min. 119. *Commercial Bank v. Jones*, 18 Texas, 811. *Hurd v. Hubbell*, 26 Conn. 389. *Cook v. Loomis*, 26 Conn. 433. *Polk v. Allen*, 19 Mo. 467. *Funk v. Dillon*, 21 Mo. 294. *Robinson v. Hartridge*, 13 Florida, 501.

But the time of conversion is not always fixed by the same circumstances. Thus, a tortious taking is sufficient proof of a conversion, but it has been held in many cases that the plaintiff may elect to consider the property as still his own and treat a sale of it by the wrong-doer, or a refusal to deliver it on demand, as the conversion. So, it has been held, that the law will, upon the principle of natural justice, that a wrong-doer ought not to be allowed to make a profit by his own wilful tort, treat the conversion of property of fluctuating value as occurring at such time between the taking and the trial as the property bears the highest price in the market. *Ellis v. Woie*, 33 Ind. 127. *Burt v. Dutcher*, 34 N. Y. 493. *Romaine v. Van Allen*, 26 N. Y. 309. *Markham v. Jandon*, 41 N. Y. 235. *Scott v. Rogers*, 31 N. Y. 673.

But this rule, although supported by numerous well considered decisions, has recently been repudiated as a universal rule in New York and other States, and its propriety and soundness questioned when applied to cases not special and exceptional. *Matthews v. Coe*, 49 N. Y. 57. *Baker v. Drake*, 53 N. Y. 211. In the latter case it was held that the rule of damages in civil actions does not depend upon the form of the action; and whether it be in contract or in tort, the proper measure of damages, except where punitive damages are allowable, is a just indemnity to the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted.

(c) *Armory v. Delamire*, 1 Str. 504.

Where goods of the plaintiff had been deposited in the hands of the defendant for manufacturing purposes, and, the plaintiff being indebted to the defendant, the latter sued him in the county court and recovered judgment for the debt, but before he could lawfully issue execution the plaintiff demanded his goods, which the defendant refused to deliver, and subsequently the defendant caused the goods in his hands to be seized and sold under the execution, and the plaintiff brought his action for the conversion of the goods, it was held that he was entitled to recover their full value, for there is nothing unlawful in a man withdrawing his goods for the purpose of avoiding an execution; and, as by the result of the action in the superior court, the property becomes the defendant's who has thus seized his own goods in execution, his claim against the plaintiff *pro tanto* is not satisfied, and he must resort to the county court to issue fresh execution(*d*).

If an action is brought for the shooting of a dog, the character and propensities of the animal for mischief may be considered in mitigation of damages(*e*).

If a jury arrive at the conclusion that a defendant has come dishonestly by a part of property which has been stolen, they are warranted in finding that he got possession of the whole. Thus, where a diamond necklace worth 500*l*. had been stolen, and a portion of the diamonds shortly after the robbery, came into the defendant's possession, and the latter gave contradictory and unsatisfactory accounts as to the mode in which he became possessed of them, and the owner sued and recovered a verdict for the full value of the necklace, it was held that the jury were justified in finding that the whole necklace came into the defendant's hands(*f*).

The plaintiff is entitled, under a declaration properly framed, to recover all that at the commencement of the suit he has lost through the wrongful seizure of his goods, and it has even been held that the defendant cannot, in mitigation of damages, show that after action brought he paid to plaintiff the value of the goods(*g*). The jury are not limited in assessing the damages to the price or value of the article on the day of the conversion, but may give the value at any subsequent time at their discretion, as the plaintiff might have had a good

(*d*) *Edmondson v. Nuttall*, *supra*.

(*e*) *Wells v. Head*, 4 C. & P. 568.

(*f*) *Mortimer v. Cradock*, 12 Law J., C. P. 166.

(*g*) *Rundle v. Little*, 6 Q. B. 178. But see *post*, p. 362.

opportunity of selling the goods if they had not been detained(*h*). If the defendant, acting *bonâ fide* under the belief that he had acquired the lawful ownership of the chattel, has proceeded to lay out money upon it, and improve it, and increase its value, the plaintiff will not in all cases be entitled to swell the damages by estimating them according to the improved value of the article. "It may be," observes Maule, J., "that the wrong-doer, who acquires no property in the thing he converts, acquires no lien for what he expends upon it, and the owner may bring an action for the detention or conversion of it; but it does not follow that the owner is to recover the full value of the thing in its improved state. The proper measure of damage is the amount of pecuniary loss the plaintiff has sustained by the conversion of the chattel, that is, what it was really worth, at the time of the conversion"(*i*). If at the time of the seizure the plaintiff was under an obligation to have the goods sold, then, if they have been fairly sold, the price realized at the sale may be the fair measure of damages, if there has been nothing harsh or oppressive in the defendant's conduct, or that of his agents(*j*); but if at the time of the seizure the plaintiff was under no obligation to part with his goods, but was in a position to retain the dominion and use of them, he is at the very least entitled to be placed in the condition he was in at the time his goods were taken away from him, and to be compensated with such an amount of money as will enable him to replace the goods(*k*). "It is, however," observes Alderson, B., "entirely a question for the jury, what damages they will allow. Juries have not much compassion for trespassers, and they are not bound to weigh in golden scales how much injury a party has sustained by a trespass"(*l*).

If the act of conversion amounts to pound breach, the person guilty of the wrong will be liable in damages to the landlord, and also to the owner of the property for damages for the conversion. "It might be difficult in such a case to ascertain the damages, but they would not exceed in the whole the value of the chattels distrained"(*m*).

(*h*) *Greening v. Wilkinson*, 1 C. & P. 626. *Romaine v. Van Allen*, 26 N. Y. 309. *Markham v. Jandon*, 41 N. Y. 235. *Burt v. Dutcher*, 31 N. Y. 493. *Scheley v. Lyon*, 6 Geo. 530. *Barnett v. Thompson*, 37 Ga. 335. *Douglass v. Kraft*, 9 Cal. 562.

(*i*) *Reid v. Fairbanks*, 13 C. B. 729; 22 Law J., C. P. 206. But see *Ellis v. Woie*, 33 Ind. 127; *Silsbury v. McCoon*, 3 N. Y. 331; *Brown v. Sax*, 7 Cow. 95; *Betts v. Lee*, 5 Johns. 348; *Baker v. Wheeler*, 8 Wend. 505; *Rice v. Hollenbeck*, 19 Barb. 664.

(*j*) *Whitmore v. Black*, 13 M. & W. 509; 14 Law J., Exch. 19. See *Campbell v. Woodworth*, 20 N. Y. 499.

(*k*) *Glasspool v. Young*, 9 B. & C. 696; 4 M. & R. 533.

(*l*) *Lockley v. Pye*, 8 M. & W. 135.

(*m*) *Turner v. Ford*, 15 M. & W. 215.

540 *Assessment of damages, where the plaintiff has only a limited or doubtful interest in the goods.*—Where the plaintiff is not the actual owner, but is only a bailee or hirer of goods which have been wrongfully taken out of his possession, he is entitled as against a stranger to recover the entire value of the goods; but if the action is brought by the hirer or bailee against the owner of the goods, the damages will be limited to the value of the plaintiff's interest in them(*n*). A defendant who has wrongfully deprived the plaintiff of the possession of goods cannot avail himself of the title of a third party in reduction of damages, but he may show that he was himself the owner of the goods at the time of the conversion, subject to some temporary or conditional right of possession on the part of the plaintiff, with a view of limiting the damages to the value of the plaintiff's limited interest(*o*). If a man brings an action for the conversion of a ship, and upon the evidence it appears that he has but the sixteenth part of it, this will go in reduction of damages, as he has no right to recover the value of the shares of the other part-owners(*p*). If it appears that the plaintiff has merely been clothed with the possession and ostensible ownership of the chattels, for the purpose of perpetrating a fraud or defeating a distress, or if he has made a transfer of the chattels, which he has treated at one period as valid and *bond fide*, and at another as merely colorable, so as to leave it doubtful what is his real and *bond fide* interest in the property, the jury may, if they please, give him merely nominal damages(*q*).

In cases between pawnor and pawnee, where the pawnee has by an illegal dealing with the pledge determined the bailment, and the pawnor has in consequence brought an action for the conversion of the goods, the interest of the pawnee ought to be taken into account, and if the pawnor did not intend to redeem the pledge, only nominal damages are recoverable(*r*).

Damages for the conversion of bills and notes are calculated, in general, according to the amount of principal and interest due upon the bills

(*n*) *Heydon & Smith's case*, 13 Co. 68. *Waters v. Monarch*, 5 Ell. & Bl. 890; 25 Law J., Q. B. 102. *Ullman v. Barnard*, 7 Gray (Mass.), 554. See *Chadwick v. Lamb*, 29 Barb. (N. Y.) 518; *Fowler v. Gilman*, 13 Met. 267; *Bigelow v. Young*, 30 Ga. 121; *Russell v. Kearney*, 27 Ga. 96.

(*o*) *Brierley v. Kendall*, 17 Q. B. 943.

(*p*) *Dockwray v. Dickson*, Skin. 640.

(*q*) *Cameron v. Wynch*, 2 C. & K. 264. *Pringle v. Taylor*, 2 Taunt. 150.

(*r*) *Johnson v. Stear*, 15 C. B., N. S. 330; 33 Law J., C. P. 130 (diss. Williams, J.). See *Hays v. Riddle*, 1 Sandf. Sup. Ct. (N. Y.) 248; *Baltimore, etc., R. R. Co. v. Blocher*, 27 Md. 277.

or notes at the time of the demand and refusal to deliver them up(s). But if a document, purporting to be a bill or note, has been lost or accidentally destroyed, and the defendant is unable to deliver it up, and can prove that it was not a genuine security, and was of no value at all at the time of the conversion, nominal damages only may be recoverable, if the plaintiff is entitled to recover damages at all(t). If the security has been mutilated and rendered valueless by the wrongful act of the defendant, the plaintiff will be entitled to recover what it would have been fairly worth to him had it continued a perfect and complete instrument(u).

541 *Of the damages recoverable, where the plaintiff has offered to return the goods, or the defendant has received them back after the commencement of the action.*—If in the course of the cause the goods have been returned, the plaintiff is still entitled to proceed for further damages and his costs(x). When the goods have been returned and received unconditionally by the plaintiff, after the commencement of the action, and no special damage is alleged in the declaration, and the damage complained of is not necessarily incidental to the wrongful taking of the property, nominal damages only are recoverable. When substantial damages have been recovered, notwithstanding the return of the goods after the commencement of the action, there has been either an injury to the property converted, or the damage has been the actual and necessary consequence of the conversion; as in the case of the detention or conversion of a riding-horse, where the horse may have been deteriorated by ill-usage, or where the plaintiff could not get back his horse without paying certain charges for his keep(y), the payment being a necessary consequence of the conversion. But the plaintiff, although he has taken upon himself to accept the goods without imposing any condition upon the defendant, has a right to go on with the action, and proceed to trial for the purpose of recovering his costs(z). It is no ground for mitigation of damages that very shortly after the conversion the defendant was entitled to issue execution against the plain-

(s) *Mercer v. Jones*, 3 Campb. 477. *Ingalls v. Lord*, 1 Cow. 240. *Keaggy v. Hite*, 12 Ill. 99. *Booth v. Powers*, 56 N. Y. 22. *Neff v. Clute*, 12 Barb. 466. *Callanan v. Brown*, 31 Iowa, 333. The presumption that the note converted was worth its face may, however, be rebutted by showing the insolvency of the maker. *Id.* See *Fry v. Baxter*, 10 Mo. 302.

(t) *Mathew v. Sherwell*, 2 Taunt. 438. *Wills v. Wells*, 8 ib. 267; 2 Moore, 251.

(u) *M'Leod v. M'Ghie*, 2 Sc. N. R. 604.

(x) *Laugher v. Brett*, 5 B. & Ald. 765; 1 D. & R. 417. *Hibbard v. Stewart*, 1 Hilt. (N. Y. C. P.) 207. *Sparks v. Purdy*, 11 Mo. 219. *Rank v. Rank*, 5 Barr. 211. See *Curtis v. Ward*, 20 Conn. 204; *Smith v. Downing*, 6 Ind. 374; *Doolittle v. McCullough*, 7 Ohio (N. S.), 299.

(y) *Syeds v. Hay*, 3 Burr. 1364.

(z) *Moon v. Raphael*, 2 B. N. C. 314.

tiff, and did subsequently issue execution and seize and sell thereunder the very goods (which had all along been in his possession) of which the conversion was complained of(a).

Damages, in the nature of interest, over and above the value of the goods.

—By the 3 & 4 Wm. 4, c. 42, s. 29, it is enacted, that in all actions of trover or trespass *de bonis asportatis*, the jury, on the trial of any issue, or any inquisition of damages, may, if they think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure thereof.

542 *Special damages*, far exceeding the value of the goods, are recoverable if specified and claimed in the declaration, and shown to be the natural and necessary consequence of the wrongful act. Thus, where the plaintiff complained, not only that the defendant took his goods, but that he did so under a false and unfounded claim of right, and that the plaintiff was thereby much annoyed and prejudiced in his business, and believed to be insolvent, and that by means of the premises certain lodgers were induced to believe that the plaintiff was in embarrassed circumstances, and that the defendant was entitled to seize the goods for a debt, and left the house, it was held that the jury might give vindictive damages for the injury, over and above the value of the goods seized(b).

Where a carpenter's tools have been detained or converted, and the carpenter, by reason thereof, has lost a valuable job, or been unable to earn his customary wages, damages far beyond the value of the tools may be recovered(c). So if, by reason of the unlawful detention of goods, the owner of them has been prevented from fulfilling a contract, or reaping the benefit of a bargain he has made, he is entitled to compensation for the special damage he has sustained, although performance of the contract or bargain could not have been enforced by compulsion of law(d). If, in an action for the conversion of a horse, the plaintiff claims damages in respect of his being obliged to hire other horses for his use, in consequence of his being deprived of his own horse, he will be entitled to recover the amount expended by him for horse-hire, in addition to the value of his own horse at the time of the conversion(e). A person who has wrongfully taken goods, and handed them over to a third person, is, under certain circumstances,

(a) *Edmonson v. Nuttall*, ante, pp. 457, 459.

(b) *Brewer v. Drew*, 11 M. & W. 629; *post*, ch. 22.

(c) *Bodley v. Reynolds*, 8 Q. B. 779.

(d) *Waters v. Towers*, 8 Exch. 401; 22 Law J., Exch. 186. *Wood v. Bell*, 25 ib., Q. B. 153.

As to the necessity for giving notice of such damage, see *France v. Gaudet*, L. R., 6 Q. B. 199.

(e) *Davis v. Oswell*, 7 C. & P. 804.

bound to pay what it has cost the owner of the goods to get them out of the possession of the person into whose hands they have been wrongfully delivered(*f*).

543 *Damages in actions for seizures under the Customs' Acts.*—By 8 & 9 Vict. c. 87, s. 116, it is enacted, that if any action shall be commenced and brought to trial against any person on account of the seizure of any vessel, boat, goods, etc., as forfeited under any Act relating to the customs, wherein a verdict shall be given against the defendant, if the court or judge before whom the suit shall have been tried shall have certified on the record that there was a probable cause for such seizure, then the plaintiff, besides the thing seized, or the value thereof, shall not be entitled to above twopence damages, nor to any costs of suit(*g*).

(*f*) *Keene v. Dilk*, 4 Exch. 388. *Pritchett v. Boevey*, 1 Cr. & M. 778.

(*g*) And see further as to damages, *post*, ch. 22.

CHAPTER VIII.

OF TRESPASSES AND INJURIES FROM NEGLIGENCE—NEGLIGENT MANAGEMENT OF CHATTELS.

SECTION I.—*Of trespasses and injuries from acts of negligence.*—Negligence and inevitable accident—Negligence of carriers of passengers—When the very occurrence of a railway accident is *prima facie* proof of negligence—Accidents at level crossings—Negligent driving—Secret defects in carriages, race-stands, etc.—Liability of the master for the negligence of his servant—Identification of the passenger with the driver—Negligence of foot-passengers in public thoroughfares—Negligent navigation of vessels—Collisions between foreign ships—Non-observance of statutory or Admiralty regulations—Limitation of liability—Duty of shipowner as to goods damaged—Damage to owners of cargoes—Negligence of masters and employers causing injury to their servants—Injuries to servants from the negligence of their fellow-servants—Volunteers in dangerous employments—Contributory negligence on the part of the plaintiff—Negligence on the part of skilled workmen and professional men—Negligence of attorneys, barristers, surveyors, bank managers, directors of companies.

SECTION II.—*Of actions for negligence.*—Actions for compensating the families of persons killed by negligence—Proceedings in the Court of Admiralty—Parties to be made plaintiffs and defendants—Master and servant—Contractor and sub-contractor—Pleadings, defences, and evidence—Damages recoverable—Where the plaintiff is insured—Where the action is brought by personal representatives.

SECTION I.

OF TRESPASSES AND INJURIES FROM NEGLIGENCE—NEGLIGENT MANAGEMENT OF CHATTELS.

544 *Negligence and inevitable accident.*—No person may, as we have seen, be excused of a trespass except it be adjudged to have been committed entirely without fault, or to have been an inevitable accident, or to

have been^{entire} occasioned by the negligence of the plaintiff himself. "Looking into all the cases from the year-book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be," observes Grose, J., "that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable"(a). Where to an action of trespass the defendant pleaded that he was a soldier of the trained bands, and was skirmishing with muskets charged with powder for exercise *in re militari*, and that in discharging his musket he accidentally and unintentionally injured the plaintiff, it was held that the plea, being a mere excuse, and no justification, afforded no answer to the action(b). And where the defendant was uncocking his gun, and the plaintiff was stopping to see it, and the gun went off and wounded the plaintiff, it was held that the plaintiff might maintain an action for the injury(c). So, where the defendant intrusted a loaded gun to be carried by an inexperienced servant girl, and the girl pointed the gun in sport at the plaintiff, and drew the trigger, and shot him in the eye, and blinded him, it was held that the defendant was responsible in damages for the consequences of his carelessness(d). And where the defendant gave the plaintiff a carboy, or large bottle of nitric acid, to carry, without informing him of the dangerous nature of the acid, and the carboy burst, and the acid inflicted dangerous wounds upon the plaintiff, and burnt and destroyed his clothes, and disabled him, it was held that the defendant was responsible in damages for the injury(e). But if the injury has resulted from circumstances over which the defendant had no control, he is not then answerable(f). This has been held to be the case where the defendant's horse, being frightened by the sudden noise of a butcher's cart which was driven furiously along the street, became ungovernable, and plunged the shaft of a gig into the breast of the plaintiff's horse(f); also where a horse naturally vicious, but not known to be so by the defendant who was riding it, became restive and unmanageable, and ran upon the foot pavement and knocked down and killed the plaintiff's husband(g); and where a horse, ridden by the defendant, was

(a) *Leame v. Bray*, 3 East, 599, *ante*, p. 2.

(b) *Weaver v. Ward*, Hob. 134. *Dickenson v. Watson*, 2 Jones, 205. *Castle v. Duryee*, 2 Keyes (N. Y.), 169.

(c) *Underwood v. Hewson*, 1 Str. 596.

(d) *Dixon v. Bell*, 5 M. & S. 193.

(e) *Farrant v. Barnes*, 11 C. B., N. S. 553; 31 Law J., C. P. 137.

(ee) *Vincent v. Stinehour*, 7 Vt. 62.

(f) *Wakeman v. Robinson*, 1 Bing. 213. 8 Moore, 63.

(g) *Hammack v. White*, 11 C. B., N. S. 588; 31 Law J., C. P. 129.

frightened by a clap of thunder, and ran over the plaintiff, who was incautiously standing with others in the carriage-road(*h*).

If a horse, not known to be of a vicious disposition by the rider, suddenly kicks out without provocation and injures a bystander, the rider will not be responsible for the injury; but it is otherwise if the injury is caused by an incautious and dangerous use of the spur(*i*).

By the civil law, all the losses and damages which result from the act of another, whether through imprudence, rashness, ignorance, or other faults, are to be made good by him whose imprudence, or other fault, caused the mischief; for it is a wrong that he hath done, although he had no intention to do harm. Thus he who plays imprudently at a game in a place where there may be danger to others passing by, is answerable for the harm he does(*k*). A waggoner, or a mule-driver, who hath not strength or skill enough to hold in a mettlesome horse, or an unruly mule, will be answerable for the damage caused thereby; for he ought not to have undertaken what he had not skill or strength enough to perform. If, by overloading a horse or other beast, or by not avoiding a dangerous path, or by some other neglect, he causes damage to another, he will be answerable; and he who sustains the damage may have his action against the driver, or against the person who employed him(*l*).

545 *Negligence of carriers of passengers for hire.*—Every carrier of passengers for hire, whether he be or be not a common carrier (*post*, ch. 10), is bound to exercise the greatest care and forethought for securing the safety of his passengers, and is answerable for the smallest negligence on his own part, or on the part of his servants and agents(*m*), but not for unforeseen accidents and misfortunes, which care and vigilance could not have provided against or prevented. He “does not warrant the absolute safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safety(*mm*).” “When everything has

(*h*) *Gibbons v. Pepper*, 1 Ld. Raym. 38.

(*i*) *North v. Smith*, 10 C. B., N. S. 575.

(*k*) *Domat*, liv. 2, tit. 8, s. 4.

(*l*) *Ib.* liv. 2, tit. 8, s. 2, § 5.

(*m*) *Jackson v. Tollett*, 2 Stark. 38. *Dudley v. Smith*, 1 Campb. 169. *Maverick v. Eighth Avenue R. R. Co.*, 36 N. Y. 378. *Brown v. New York Central R. R. Co.*, 34 N. Y. 404. *Bowen v. N. Y. Central R. R. Co.*, 18 N. Y. 408. *Caldwell v. New Jersey Steamboat Company*, 47 N. Y. 282. *Illinois Central R. R. Co. v. Phillips*, 55 Ill. 194. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304. *Johnson v. Winona, etc., R. R. Co.*, 11 Minn. 296. *McLean v. Burtant*, 11 Minn. 277. *Wheaton v. North Beach, etc., R. R. Co.*, 36 Cal. 590. *Edwards v. Lord*, 49 Me. 279. *Fairchild v. California Stage Co.*, 13 Cal. 599.

(*mm*) *McPadden v. New York Central R. R. Co.*, 44 N. Y. 478. *Laing v. Colden*, 8 Barr. 482. *Railroad Co. v. Aspell*, 23 Penn. (11 Har.) 149. *Sullivan v. Philadelphia & Reading R. R. Co.*,

been done that human prudence can suggest, an accident may happen. The lights may in a dark night be obscured by fog; the horses frightened; or the coachman may be deceived by a sudden alteration in the position of objects near the road by which he had been used to be directed in former journeys; and if, having exerted proper skill and care, he from accident gets off the road, the proprietors are not answerable for what happens from his doing so." But the breaking down or overturning of a coach is *primâ facie* proof of negligence on the part of the driver, and he must rebut this presumption, if it be unfounded, by showing that "the damage arose from what the law considers a mere accident"(n). When the carriage is by railway, the railway company is bound to keep the railway itself in good traveling order, and fit for use, and to provide roadworthy engines and carriages, skilful drivers and engineers, and all things necessary for the safe conveyance of such passengers; and by the 31 & 32 Vict. c. 119, s. 22, to provide in certain cases for means of communication between the passengers and the guard. But the company is not bound, at its peril, to provide a roadworthy carriage, and will not be responsible to a passenger, if the defect in the carriage is such that it could neither be guarded against in the process of construction, nor discovered by subsequent examination(o).

6 Casey, 234. Kenney v. Neil, 1 McLean, 540. Meier v. Pennsylvania R. R. Co., 64 Penn. St. 225. Fairchild v. California Stage Co., 13 Cal. 599.

(n) Crofts v. Waterhouse, 11 Moore, 137; 3 Bing. 321. Sharp v. Grey, 2 M. & Sc. 620; 9 Bing. 460. Harris v. Costar, 1 C. & P. 637. Boyce v. California Stage Co., 25 Cal. 460. Christie v. Griggs, 2 Campb. 79. Stokes v. Saltonstall, 13 Pet. (U. S.) 181. Laing v. Colder, 8 Barr. 482. Farish v. Reigle, 11 Gratt. (Va.) 697. Sullivan v. Philadelphia & Reading R. R. Co., 6 Casey, 234. McKinney v. Neil, 1 McLean, 540. Redf. on Railw., s. 1760; Shearm. on Neg., s. 280. Meier v. Pennsylvania R. R. Co., 64 Penn. St. 225. Frink v. Cœe, 4 Greene (Iowa), 555. Fairfield v. California Stage Co., 13 Cal. 599.

(o) Readhead v. Midland Rail. Co., L. R., 2 Q. B. 412; S. C. (Exch. Ch.) ib. 4 Q. B. 379. Meier v. Pennsylvania R. R. Co., 64 Penn. St. 225. McPadden v. New York Central R. R. Co., 44 N. Y. 478. Curtis v. Rochester & Syracuse R. R. Co., 18 ib. 536.

In Alden v. New York Central R. R. Co. (26 N. Y. 102), it was held that a carrier is bound, absolutely and irrespective of negligence, to provide roadworthy vehicles; and that a railroad corporation is liable for injuries to a passenger, caused by a crack in the iron axle of a car, although the defect could not have been discovered by any practicable mode of examination. The doctrine of this case is not in accord with the American cases generally, nor with the modern English decisions, and the authority of the case is questioned, if not wholly denied in the court in which it was decided. McPadden v. New York Central R. R. Co., 44 N. Y. 478.

It has been held that a railroad corporation is responsible in damages to a passenger injured by the breaking of one of the axles of a car in consequence of a latent defect which could not be discovered by the most vigilant external examination, although the car was purchased by the company from extensive and skilful car makers, and the axle was procured from a manufacturer of skill and reputation, if the defect was one which could have been discovered in the process of manufacturing the axle or car by the application of any test known to men skilled in such business. Hegeman v. Western R. R. Co., 13 N. Y. 9.

But in another case it was held that a railway were not liable for injuries to a passenger resulting from the breaking of an axle where the road bed and the car running upon it were

If the driver of a railway-engine drives at a dangerous speed, or from negligence or unskilfulness causes the train to be thrown off the rails, or to come into collision with another train, the railway company

constructed of the best known materials and in the best known manner, combining all those appliances which men skilled in the art of car building employ, and where the car and its running gear were duly and carefully inspected from time to time, and the accident was due to some cause against which precaution and foresight would be unavailable. *Meier v. Penn sylvania R. R. Co.*, 64 Penn. St. 225.

In another case it was held that carriers of passengers are liable for slight neglect; and that the law imposes upon them the duty of carrying their passengers safely, so far as is reasonably practicable, and that they would be liable for injury by the breaking of an axle by reason of frost, if by extraordinary care and attention the danger might have been avoided. *Frink v. Potter*, 17 Ill. 406.

In Pennsylvania it is held that railroad corporations are bound to exercise the strictest vigilance, and must carry their passengers safely if human care and foresight can do it, and that they are liable for any defect in the road, the cars or the engines, or any other species of negligence whatever of which they or their agents may be guilty. *Railroad Co. v. Aspell*, 23 Penn. 147. *New Jersey R. R. Co. v. Kennard*, 21 ib. 203.

In Massachusetts it is held that carriers of passengers are bound to use the utmost care and diligence to prevent an injury which human foresight can guard against, and that they are responsible for defects which might have been discovered upon the most careful and thorough examination. *Ingalls v. Bills*, 9 Met. 1. *McElroy and wife v. Nashua & Lowell R. R. Co.*, 4 Cush. 400.

In Maine the carrier of passengers is held for such care as is used by very cautious persons. *Edwards v. Lord*, 49 Me. 279.

In Connecticut the carrier is held for the highest degree of care of a reasonable man. *Hall v. Connecticut River Steamboat Co.*, 13 Conn. 320. *Derwent v. Loomer*, 21 ib. 253. *Fuller v. Naugatuck R. R.*, 21 ib. 557, 576.

In Illinois it has been held that carriers of passengers are bound to use the utmost prudence and caution, and the utmost degree of care, vigilance and skill, and are liable for the slightest negligence known to the law short of insurance; and that the diligence of cautious persons is not enough. *Galena & Chicago R. R. Co. v. Tarwood*, 15 Ill. 468. *Galena & Chicago R. R. Co. v. Fay*, 16 ib. 468. *Frink v. Potter*, 17 ib. 406. *Illinois Central R. R. Co. v. Phillips*, 55 ib. 194.

In New Hampshire it is held that carriers of passengers by railroad are bound to exercise the highest degree of care and diligence in the conduct of their business, and are responsible for the slightest negligence. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304. *Cornwall v. Sullivan R. R. Co.*, 28 ib. 159. *Clark v. Barrington*, 41 ib. 51.

But it has been held in both New Hampshire and Illinois, that while the rule requires of the carrier the highest degree of practicable care and diligence consistent with the mode of transportation adopted, it does not require the utmost degree of care which the human mind is capable of inventing, as such a rule would involve such an expenditure of money and the employment of so great a number of persons as would prevent all persons of ordinary prudence from engaging in that kind of business. *Fuller v. Talbot*, 23 Ill. 357. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304.

In New York it is held that the rule as to the liability of carriers of passengers by stage-coach is not applicable to carriers of passengers by rail; and that the carrier in the latter case is bound to conduct his business with all the care which human prudence and skill can suggest. *Hegeman v. Western R. R. Co.*, 16 Barb. 353. *S. C.* 13 N. Y. 9. And in *The Philadelphia & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 486, the court held that when carriers undertake to convey persons by the powerful, but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence; and whether the consideration be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents; and that any negligence in such cases well deserves the epithet of gross. And see *Steamboat New World v. King*, 16 How. (U. S.) 474.

But while railroad companies are bound to exercise the utmost care and vigilance for the safety of their passengers, they are not held to an absolute warranty that the passengers shall not be injured rendering them liable in any event in the absence of negligence. *McPadden v. New York Central R. R. Co.*, 44 N. Y. And see note *mm, ante*.

is responsible for all damages and injuries that may have been sustained by the passengers(*p*). But if a railway-train runs off the line in consequence of the wilful and malicious act of a stranger, who has placed a stone on the railway, then, as there is no negligence on the part of the railway company, they are not responsible for the consequences(*q*). A railway company will be responsible for an injury sustained by a child between the ages of three and twelve, travelling with its mother, although no separate fare was paid for the child, at all events in the absence of fraud on the part of the mother(*r*). If the train overshoot, or stop short of, the platform, and a passenger is injured while jumping from the carriage to the ground, the company is not responsible unless the passenger first requested that the train might be backed into the station(*s*); or was invited by the company's

(*p*) *Collett v. Lond. & N. W. Rail. Co.*, 16 Q. B. 984. *Skinner v. Lond. Br., etc., Rail. Co.*, 5 Exch. 787.

(*q*) *Latch v. Rumner Rail. Co.*, 27 Law J., Exch. 155.

(*r*) *Austin v. Gt. West. Rwy. Co.*, L. R., 2 Q. B. 442. The liability of carriers for injuries to passengers does not depend in all cases upon the existence of a contract for carriage between the carrier and the passenger. It has been held that a railroad corporation is liable for injuries to a person riding upon their cars upon an invitation from a servant of the corporation as a passenger without hire, where the injury arose from the negligence of the servant in the course of his employment and the party injured was without fault. *Wilton v. Middlesex R. Co.*, 107 Mass. 108.

A person riding upon a railroad on a free pass, with an agreement that in consideration of its receipt he assumes all risks of accident, and that the company shall not be liable under any circumstances for injuries to his person while using the pass, cannot recover against the company for injuries received through negligence of their servants while being so carried. *Kinney v. Central R. R. Co. of New Jersey*, 34 N. J. 513.

But the rule is otherwise when the party injured is riding under a "drover's pass" containing similar stipulations. *Cleveland, Painesville & Ashtabula R. R. Co. v. Curran*, 19 Ohio St. 1. *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315. *Lockwood v. Railroad*, 17 Wall. 357. But see *Bissell v. New York Central R. R. Co.*, 25 N. Y. 442; *Gallin v. London & Northwestern R. R. Co.*, 32 L. T. R. (N. S.) 550.

In the absence of an agreement to the contrary, a railroad corporation voluntarily undertaking to convey a passenger upon its road, whether with or without compensation, is liable for injuries to such passenger arising from the culpable negligence or want of skill of the agents of the company. *Nolten v. Western R. R. Co.*, 15 N. Y. 444.

(*s*) *Siner v. Gt. West. Rwy.*, L. R., 3 Exch. 150. 4 ib. 117; 33 Law J., Exch. 67. See *Robson v. Northeastern R. R. Co.*, 32 L. T. (N. S.) 551; *Ackle v. Southeastern R. R. Co.*, 27 L. T. (N. S.) 320; L. R., 7 C. P. 324; *Lewis v. London, etc., R. R. Co.*, 29 L. T. (N. S.) 397; L. R., Q. B. 66; *Weller v. London, etc., R. R. Co.*, 29 L. T. (N. S.) 688; L. R., 9 C. P. 132, 134. It is the duty of railway companies to provide platforms at their stations on which passengers may alight, and to deliver their passengers on such platforms. *Memphis & Charleston R. R. Co. v. Whitfield*, 44 Miss. 466. *Shearm. & Redf. on Negl. ss. 275-277.*

The conductor is bound, upon the request of any passenger, to move the train backward or forward, so as to enable the passenger to step upon the platform. *Ib.*

Railway companies are bound to stop their trains at places convenient for passengers to alight. *Delamatyr v. Railroad Co.*, 24 Wis. 518. And if a train is stopped at a place where passengers cannot alight without difficulty, it is the duty of the company's servants to assist the passengers in alighting. *Memphis & Charleston R. R. Co. v. Whitfield*, 44 Miss. 466. *Shearm. & Redf. on Negl. s. 278.* And see *Warren v. F. R. R. Co.*, 8 Allen, 227; *Gee v. Railway Co.*, L. R., 8 Q. B. 161.

Stopping a train at an unusual place, renders the company presumptively wrong to that extent, and throws the burden of explaining the neglect upon them. *Memphis & Charleston*

servants to alight there(*t*). But the stopping of the train at a place, which a passenger would naturally suppose to be the platform, is a sufficient invitation for this purpose(*u*). The mere calling out by a porter of the name of a station, however, is not such an invitation, unless the train stops at a fit place for getting out. It will not, for instance, justify a passenger in getting out while the carriage in which he is riding is in a tunnel(*v*). Where a passenger, in getting

R. R. Co. v. Whitfield, 44 Miss. 466. Sedgw. on Dam. 565. Curtiss v. Rochester & Syracuse R. R. Co., 20 Barb. 285. And where a railway train passes the platform, and the passengers are required to alight without assistance at an unusual place and without a safe spot to alight upon, the company are *prima facie* guilty of negligence. *Ib*.

Railway companies are also required to afford a reasonable time for passengers, whether young or old, to leave the cars in safety; and if the time tables do not allow sufficient time for this purpose, and an injury is thereby occasioned, the company will be liable. T. W. & W. R. K. Co. v. Baddely, 54 Ill. 19. A sick or aged person, a delicate woman, a lame man or a child, is entitled to more attention and care from a railroad company than one in good health and under no disability, and are entitled to more time in which to get on or off the cars. Sheridan v. Brooklyn City & Newtown R. R. Co., 36 N. Y. 39. See O'Mara v. Hudson River R. R. Co., 38 N. Y. 445.

But a person who is sick and infirm and unable to take care of himself should provide himself with proper assistance while travelling, and should give timely notice to the conductor that he will require longer delay at the station than usual for the purpose of alighting. New Orleans, etc., R. R. Co. v. Statham, 42 Miss. 607.

If a train stops at a station and remains a reasonable time for passengers to alight, the company will not, in the absence of proof of mismanagement of the train or careless conduct on the part of the employees, be held liable for injuries to passengers who did not avail themselves of the opportunity to alight, and were injured in leaving the cars after the train was in motion. Illinois Central R. R. Co. v. Slatton, 54 Ill. 133. Lucas v. New Bedford & Taunton R. R. Co., 64 Gray. But where a passenger, by the wrongful act of the company, is put to an election between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station, where he desires to stop, the company will be held liable for the consequences of the choice provided it is not exercised wantonly or unreasonably. Filer v. New York Central R. R. Co., 49 N. Y. 47. See Lambeth v. North Carolina R. R. Co., 66 N. C. 494. But see Jeffersonville R. R. Co. v. Hendricks, 26 Ind. 228; Jeffersonville R. R. Co. v. Swift, *id.* 459.

(*t*) Foy v. Lond., Bright, & South Coast Rwy., 18 C. B., N. S. 225.

(*u*) Cockle v. Lond. & South-East. Rwy., L. R., 5 C. P. 457 (L. R., 7 C. P. 321).

(*v*) Bridges v. North London Rwy., L. R., 6 Q. B. 377. Where a train passed beyond the platform and stopped, leaving one of the cars over a culvert, and on the calling of the name of a station by the conductor, a passenger attempted to alight and was injured by reason of darkness and inability to see where the train was standing, the company were held liable. Col. & Ind. Central R. R. Co. v. Farrell, 31 Ind. 408. Wherever passengers are accustomed to be received upon a train, whether at the station house, at the water tank or elsewhere, the company is bound at its peril to keep the ordinary space in which passengers go to and from the train, in a safe condition for transit; and passengers have a right to assume, that the ground adjacent to the cars within the limits in which persons necessarily and naturally go to and from them, admits of their getting in and out in safety, even in a dark night. Hulbert v. New York Central R. R. Co., 40 N. Y. 145. But if a railway train is stopped at night, merely for the purpose of allowing a train which is expected from the opposite direction, to pass by, and no notice is given by the servants of the company to passengers that they may leave the cars, a passenger who, nevertheless, leaves the cars and is injured by walking into an open cattle guard, cannot recover therefor in an action against the company. Frost v. Grand Trunk R. R. Co., 10 Allen, 387.

As a general rule, where a railway company have provided a depot and convenience for getting on and off its trains, passengers have no right to get on or off at other places, and to attempt to do so would be such negligence as would prevent a recovery for injuries received thereby. But where the company has been in the habit of receiving and discharging passen-

into a railway carriage, puts his hand on the open door to assist him in getting in, and the guard, without any previous notice(w), shut the door, and so crushed the passenger's finger, the railway company were held responsible(x).

546 *When the very occurrence of a railway accident is prima facie proof of negligence.*—When both the railway itself, and the carriages in which the passengers are conveyed, are under the exclusive control of the company carrying the passengers, the very fact of a train's running off the line has been held to be *prima facie* proof of negligence on the part of such company, or its officers, and throws upon them the burden of explaining how it happened, and of showing that it occurred without any fault or neglect of duty on their part(y). And it is not sufficient to show that other companies had running powers over their line, without showing affirmatively that it was through the negligence of such other companies that the accident occurred(z). But if the accident is *prima facie* caused by negligence of some third person, for whom the defendants are not responsible, e.g., a contractor engaged in placing iron girders over the defendant's line for some third person, it must be shown that the accident resulted from, or might not have occurred, but for the defendant's omitting to take some precaution usually adopted in such cases(a). If it appears that the train went off the rails when travelling at a moderate speed, and that the wheels of the carriages and engine were properly constructed, and the railway itself was properly made and in good order, and that the departure of the engine and carriages from the rails might have been occasioned by the malicious trespass of a stranger (ante, p. 383), there will be nothing to establish even a *prima facie* case of negligence against the company(b). But if the railway bridges or viaducts have not been properly con-

gers at other places, it is not negligence for passengers to get on or off at these places while the train is standing still, and there is no apparent danger in so doing. *Keating v. New York Central & Hudson River R. R. Co.*, 49 N. Y. 673. And see *Hulbert v. New York Central R. R. Co.*, 40 N. Y. 145.

(w) See *Richardson v. Metropolitan Rwy., L. R.*, 3 C. P. 374, n.

(x) *Fordham v. Brighton Rwy. Co., L. R.*, 3 C. P. 368; 4 *ibid.* 619; 38 L. J., C. P. 324.

(y) *Carpue v. Lond. & Br. Rail. Co.*, 5 Q. B. 751. *Latch v. Rumner Rail. Co., supra.* *Dawson v. Manch., etc., Rail. Co.*, 5 Law T. R., N. S. 682. See *Scott v. Lond. Dock Co.*, 34 Law J., Exch. 17; *ib.* 220; *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 534; *Meier v. Pennsylvania R. R. Co.*, 64 Penn. St. 225; *Sullivan v. Philadelphia & Reading R. R. Co.*, 6 Casey, 234; *Laing v. Colder*, 8 Barr. 482; *Shearm. & Redf. on Negl.*, § 280; *Redf. on Railw.*, § 1760. As to interrogatories in cases of collision, see *Beckervaise v. Gt. West. Rwy., L. R.*, 6 C. P. 36.

(z) *Ayles v. South-East. Rwy., L. R.*, 3 Exch. 146. See *Webster v. Hudson River R. R. Co.*, 38 N. Y. 260; *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Colegrove v. New York & New Haven & New York & Harlem R. R. Co.*, 20 N. Y. 492.

(a) *Daniel v. Metropolitan Rwy., L. R.*, 3 C. P. 216; 3 *ibid.* 591; 5 Engl. & Ir. App. 45.

(b) *Bird v. Gt. Northern Rail. Co.*, 28 Law J., Exch. 3. *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 534-536.

structed, or have not been carefully maintained and repaired, so as to enable them to resist the violence of storms and floods which may be expected occasionally to occur, and injuries are thereby caused to passengers(c), the railway company will be responsible in damages, although they may have employed competent engineers and workmen, and have used the best materials in the work(d).

547 *Accidents at level crossings*.—When a railway crosses a turnpike-road on a level adjoining to a station, the trains must slacken their speed before arriving at the turnpike-road, and cannot, unless there is some special provision to the contrary in the particular Act under which the company is incorporated, cross the same at any greater rate of speed than four miles an hour(e). And even where the crossing is not near a station, but there are circumstances making that particular crossing exceptionally dangerous, the mere occurrence of an accident to a foot passenger crossing the line, is evidence to go to the jury of negligence(f). *Primâ facie*, however, a foot-passenger crossing a railway on the level, is bound to look to his own safety(g); and there is no general duty on railway companies to place watchmen at public footways, or accommodation roads, crossing the railway on a level, to warn persons using the footway or road(h). Where, therefore, the view of the line from one of the gates was obstructed by a pier, but from the level of the line there was a clear view of 300 yards each way, and a person, crossing the line immediately after a train had passed, was killed by a train coming the other way, it was held that there was no evidence of negligence against the railway company(i). Where, however, the plaintiff took the precaution of looking up and down the line,

(c) *Gt. West., etc., of Canada v. Fawcett*, 1 Moore's P. C., N. S. 101.

(d) *Grote v. Chester & Holyhead Rail. Co.*, 2 Exch. 255. See *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304.

(e) 8 & 9 Vict. c. 20, s. 48.

(f) *Bilbee v. Lond. & Brighton Rwy.*, 34 Law J., C. P. 182.

(g) *Skelton v. L. & N. W. Rwy.*, L. R., 2 C. P. 631. A traveller approaching a railroad track is bound to use his eyes and ears so far as there is an opportunity; and when by the use of those organs, danger may be avoided, the omission is such negligence as will bar a recovery for injuries received upon the track, notwithstanding the negligence of those in charge of the train in omitting to sound the whistle or ring the bell. *Gorton v. Erie R. R. Co.*, 45 N. Y. 660. *Ernst v. Hudson R. R. Co.*, 39 N. Y. 61. *Havens v. Erie R. R. Co.*, 41 N. Y. 296. *Wilcox v. Rome, Watertown & Ogdensburgh R. R. Co.*, 39 N. Y. 358. *Grippen v. New York Central R. R. Co.*, 40 N. Y. 34. *Gonzales v. New York & Harlem R. R. Co.*, 38 N. Y. 440. *Mitchell v. N. Y. Central & Hudson R. R. Co.*, 5 N. Y. Sup. Ct. 122. *Davis v. New York Central & Hudson R. R. Co.*, 47 N. Y. 400. *Stevens v. Oswego & Syracuse R. R. Co.*, 18 N. Y. 422. *Telfer v. Northern R. R. Co.*, 1 Vroom (N. J.), 188. *Butterfield v. Western R. R. Co.*, 10 Allen (Mass.), 532.

(h) *Cliff v. Midland Rwy.*, L. R., 5 Q. B. 258. *Beisiegel v. New York Central R. R. Co.*, 40 N. Y. 9. *Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61.

(i) *Stubley v. L. & N. W. Rwy.*, L. R., 1 Exch. 13.

but owing to the fogginess of the morning could not see an engine coming, and the engine man never whistled, it was held that there was evidence of negligence(*j*). If there is a public carriage way over the railway, alongside of the footway, and the servant in charge of the carriage gates has left them open, this is so far equivalent to a representation by the railway company that all is safe, as to amount to evidence of negligence in case the foot-passenger is injured in crossing the line(*k*). Where one of the public carriage gates at a level crossing is also the only exit out of a private yard across the railway, and the driver of a cart coming out of the private yard asks the railway gatekeeper if he may cross, and is answered in the affirmative, the company will be responsible if the cart is run into by a train(*l*).

548 *Injuries from secret defects in carriages or race-stands.*—A coach with a defective axle-tree is not roadworthy, and a coach-proprietor who sends out a coach with such a defect is responsible for the consequences to a passenger, whether he does or does not know of the defect at the time the coach starts(*m*), provided the defect could have been discovered on due examination, or could have been guarded against

(*j*) *James v. Gt. West. Rwy., L. R., 2 C. P. 634, n.; 36 Law J., C. P. 255, n.* Where a traveller on a public highway approaches a railroad track, and can neither see nor hear any indication of a moving train, he is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous; and he has a right to presume, that in handling their cars, the railroad company will act with appropriate care, and that the usual signals of approach will be seasonably given, and that the managers of the train will be attentive and vigilant. *Kennayde v. Pacific R. R. Co. 45 Mo. 255.* *Tabor v. Missouri Valley R. R. Co., 46 Mo. 353.* See also *Langhoff v. Milwaukee, etc., R. R. Co., 19 Wis. 489.* And where a railroad company has by its own act obstructed the view of travellers upon the public highway, so that the approach of a train to a crossing cannot be seen until the traveller is upon the track, the company will be deemed guilty of negligence if the traveller is injured at the crossing after having taken due precautions to ascertain the approach of a train. An omission to stop his team before going upon the crossing is not contributory negligence in such cases. *Mackay v. New York Central R. R. Co., 35 N. Y. 75; Ingersol v. N. Y. Cent. & Hudson R. R. Co., 6 N. Y. Sup. Ct. 416.* And where the railroad is carried across the highway in such a manner as to prevent a traveller upon the highway from seeing or hearing an approaching train until too late to avoid a collision, the company will be liable for such collisions in the absence of negligence on the part of the party injured, notwithstanding the company gave the statutory warnings. *Richardson v. New York Central R. R. Co., 45 N. Y. 846.*

For a railroad company to make a running switch over a crossing in a populous part of a village is *per se* an act of criminal negligence, and proof of injury sustained at such crossing by the act of making such switch will warrant a recovery against the company without other proof of negligence. *Brown v. New York Central R. R. Co., 32 N. Y. 597.* As to the effect of contributory negligence in such case, see *Illinois, etc., R. R. Co. v. Baches, 55 Ill. 379.*

(*k*) *Stapley v. L. B., & South Coast Rwy., L. R., 1 Exch. 21.* *Wanless v. North-East. Rwy., L. R., 6 Q. B. 481.*

* (*l*) *Lunt v. L. & N. W. Rwy., L. R., 1 Q. B. 277.*

(*m*) *Sharp v. Grey, 9 Bing. 459; 2 M. & Sc. 623.* *Gaselee, J.,* observing that there was a material distinction between that case and the case of *Christie v. Griggs, 2 Campb. 79.* See *Grote v. Chester & Holyhead Rail. Co., 2 Exch. 255.*

in the manufacture(*n*). A coach which is overloaded is not roadworthy, and if it upsets, in consequence of its being top-heavy, the coachman and coach-proprietor will be responsible in damages(*o*).

The same principle applies to persons who cause stands or buildings to be erected to enable the public to view sights, such as horse-races; and the person who causes such a building to be erected, and receives the money for admission, will be responsible for the negligence of the contractor, although he was a competent person to be employed for such a purpose, and although the defect in the building or stand was not one capable of being ascertained by inspection; for the law in such a case implies a warranty that due care has been used in the construction of the stand not only by the defendant, but by those whom he employed to erect it, and that it was reasonably fit for the purpose for which it was erected(*p*).

549 *Collisions in public thoroughfares—Negligent driving.*—A person driving a carriage is not bound to keep on the regular side of the road; but if he does not, he must use more care, and keep a better look out, to avoid collision, than would be necessary if he were on the proper part of the road(*q*). A foot-passenger is not bound to keep on the foot-pavement;

(*n*) *Readhead v. Midland Rwy.*, *ante*, p. 468. *Hadley v. Cross*, 34 Vt. 586. *Ingalls v. Bills*, 9 Metc. 1. See *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304.

(*o*) *Israel v. Clarke*, 4 Esp. 259. *Aston v. Heaven*, 2 Esp. 535.

(*p*) *Francis v. Cockrell*, L. R., 5 Q. B. 184; *ibid.* 501.

(*q*) *Pluckwell v. Wilson*, 5 C. & P. 375. See *Kelsey v. Barney*, 12 N. Y. 425, 429; *Burnham v. Butler*, 31 N. Y. 480. In New York, as in many other States, it is provided by statute that when persons travelling in carriages shall meet on a road or highway, they shall seasonably turn their carriages to the right of the centre of the road so as to permit such-carriages to pass without interference or interruption. 1 R. S. 695, s.1.

Under this statute travellers in carriages are required to keep to the right of the centre of the worked part of the road, although the whole of the smooth or travelled part may be upon one side of that centre. *Earing v. Lansing*, 7 Wend. 185. But in the winter, when the road is covered with snow, the centre of the highway within the meaning of the statute is the centre of the beaten or travelled track. *Smith v. Dygert*, 12 Barb. 613. *Jaquith v. Richardson*, 8 Metc. 213. The law of the road does not apply to persons on horseback—*Dudley v. Bolles*, 24 Wend. 465. Nor to the meeting of railway cars and ordinary vehicles where the track of the railway is laid along a street or highway. *Hegan v. Eighth Avenue R. R. Co.*, 15 N. Y. 380.

The fact that a carriage was unnecessarily on the left of the middle of the travelled part of a road will not prevent a recovery for injuries from a collision with another carriage turning in from a cross road and negligently driven. *Smith v. Gardner* 11 Gray (Mass.), 418. See *Lovejoy v. Dorlon*, 10 Cush. (Mass.) 495. Nor will the statute requiring the traveller to keep to the right justify him in stubbornly keeping on that side and thus causing a collision which a slight change on his part might have avoided. *O'Maley v. Dorn*, 7 Wis. 236. When a light vehicle can safely pass to the left of a heavily-loaded team it is the duty of the driver of the former to give way to the latter. *Grier v. Sampson*, 27 Penn. St. 183. *Beach v. Parmenter*, 23 Penn. St. 196. See *Washburn v. Tracy*, 2 Chip. 136.

Vehicles not moving or passing, are not required to occupy any particular part of the road. *Johnson v. Small*, 5 B. Monroe, 25. And where two vehicles are going the same way, the driver of the one in advance may take the middle or either side of the road at his pleasure,

he has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it(*r*). "It is the duty of persons who are driving over a crossing for foot-passengers to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon a crossing, so as not recklessly to get among the carriages"(*s*). If a person driving his own carriage takes another person into it as a passenger, such person cannot be subjected to an action in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; nor, in case of an accident happening, has he any right of action against the proprietor, except in case of gross negligence(*t*); but if two persons were jointly concerned in the carriage, as if both had hired it together, both will be answerable for any accident arising from the misconduct of either in the driving of the carriage whilst it was so under their joint care(*u*). It is not enough to give warning to a person to get out of the way of a carriage to exonerate parties from responsibility for carelessness(*v*).

550 Liability of the master for the negligence of his servant.—Whatever a servant does in order to give effect to his master's will may be treated, as we have seen, as the act of the master(*w*). But if my servant without my knowledge, wrongfully takes my carriage, or my horse, for his own purposes, and drives against another person's carriage, I shall not be responsible for the injury; for when the servant takes the master's carriage or horse, and uses it under such circumstances, he gains a special property for the time being in the chattel, and makes it for the time, and for the particular wrongful purpose, his own(*x*). Where the defendant's coachman was driving the defend-

and is under no obligation to turn to either side to allow the other to pass him, provided there is room enough. *Bolton v. Colder*, 1 Watts, 360.

Where no statute prescribes how persons shall drive when they meet at the junction of two streets, the rule of the common law applies, and each is required to use such due and reasonable care to prevent accident as the circumstances and the place demand. *Garrigan v. Berry*, 12 Allen (Mass.), 84.

(*r*) *Boss v. Litton*, ib. 407. *Baxter v. Second Avenue R. R. Co.*, 30 How. (N. Y.) 219. *Combs v. Purrington*, 42 Me. 332.

(*s*) *Pollock, C.B.*, *Williams v. Richards*, 3 C. & K. 82. *Erle, C.J.*, *Cotton v. Wood*, 8 C. B., N. S. 571. *Barker v. Savage*, 45 N. Y. 191. *Brooks v. Schwerin*, 54 N. Y. 343. *Belton v. Baxter*, id. 245.

(*t*) *Moffatt v. Bateman*, L. R., 3 P. C. Ca. 115.

(*u*) *Davey v. Chamberlain*, 4 Esp. 229.

(*v*) *Woolley v. Scovell*, 3 M. & Ry. 105.

(*w*) *Ante*, p. 30. *Alderson, B.*, *Hutchinson v. York & Newcastle Rwy.*, 5 Exch. 350.

(*x*) *M'Manus v. Crickett*, 1 East, 106; 2 Roll. Abr. 553; *ante*, p. 30. *Sleath v. Wilson*, 9 C. & P. 607; qualified by *Seymour v. Greenwood*, *ante*, p. 33. See *Weed v. Panama R. R. Co.*, 17 N. Y. 362, 365.

ant's carriage through a narrow street which was blocked up by a luggage-van, containing goods of the plaintiff, which were being unladen, and taken into the plaintiff's house, and behind the van stood the plaintiff's gig, and the defendant's coachman (there not being room for the carriage to pass) got off his box and laid hold of the van-horse's head and moved the van, and caused a large packing-case to tumble on the shafts of the gig, and break them, it was held that the defendant was not liable for the injury, the servant at the time not being in the execution of his master's orders or doing his master's work^(y).

But whenever the master has intrusted the servant with the control of his carriage or horses, it is no answer that the servant disobeyed his master's orders, and did what he had no business to do, or went where he had no business to go. If the servant, driving his master's carriage, on his master's business, disobeys the express instructions of the latter, and wilfully or maliciously does what he has been ordered not to do, or makes a *détour* to call on a friend, or to gratify some purpose of his own, and carelessly drives against another vehicle, the master will nevertheless be answerable for the injury; but if the servant was going on a frolic of his own, without being at all on his master's business, then the master will not be liable^(z).

If an omnibus conductor uses unnecessary violence in expelling a drunken passenger from an omnibus, the proprietor of the omnibus

(y) *Lamb v. Palk*, 9 C. & P. 631.

(z) *Limpus v. Lond. Gen. Omnibus Co.*, *ante*, p. 33. *Joel v. Morrison*, 6 C. & P. 503. *Mitchell v. Crassweller*, 13 C. B. 237. *Storey v. Ashton*, L. R., 4 Q. B. 476; 38 L. J., Q. B. 223. *Bard v. Yohn*, 26 Penn. St. 482. The test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it was done in the prosecution of the business that the servant was employed by the master to do. Thus, if the owner of a building employs a servant to remove the roof from his house, and directs him to throw the materials upon his lot, where no one would be endangered, and the servant, disregarding this direction, should carelessly throw them into the street, causing an injury to a passenger, the master would be responsible therefor, although done in violation of his instructions, because it was done in the business of the master. But, should the servant, for some purpose of his own, intentionally throw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to effect some purpose of his own. *Cosgrove v. Ogden*, 49 N. Y. 255. So, if a farmer should direct a servant to take his wagon and horses and take a load of wheat to mill, and on the way to the mill the servant should wilfully drive the team and wagon over a man and break his leg, the farmer would not be liable. *Wright v. Wilson*, 19 Wend. 343.

And the rule may be stated generally that while the master is responsible, civilly, for the fraud, negligence, or other wrongful act of his servant, committed in the transaction of his business, he is not responsible for the wilful injury committed by the servant while so engaged, unless he so act by the express or implied authority of his employer. *Mali v. Lord*, 39 N. Y. 381. *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479. Story on Agency, ss. 456-462. *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 468.

will, as we have seen, be responsible in damages for the misconduct of his servant(a).

551 *Liabilities of owners of carriages let to hire who select and send their own coachmen.*—If carriages and horses are let out to hire by the day, week, month, or job, and the driver is selected and appointed by the owner of the carriage, the latter is responsible for all injuries resulting from the neglect and careless driving of the vehicle, although the carriage may be in the possession and under the control of the hirer(b). But if the latter drives himself, or appoints the coachman and furnishes the horses, the owner of the carriage cannot of course be made responsible for the negligence or want of skill of the coachman(c). Two old ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses and a driver by the day, or drive. They gave the driver a gratuity for each day's drive, provided him with a livery-hat and coat, which were kept in their house, and after he had driven them constantly for three years, and was taking off his livery in their hall, the horses started off with their carriage, and inflicted an injury upon the plaintiff. It was held that the defendants were not responsible, as the coachman was not their servant, but the servant of the job-master(d). But if any directions are given by the hirer of the horses to the driver or postillion to break through a line of carriages, or to do any unusual, improper, or aggressive act, or if he interferes so as to take the actual management of the horses into his own hands, he is responsible for any damage done by the driver whilst carrying out the directions given(e). "It is undoubtedly true," observes Parke, B., "that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of"(f).

(a) *Seymour v. Greenwood*, ante, p. 33. A cab driver employed on the usual terms of paying so much a day for his cab, and keeping the rest himself, is, as between the cab proprietor and the public, the servant of the proprietor, and such proprietor is, therefore, liable for his negligence. *Powles v. Hider*, 6 E. & B. 207; 25 L. J., Q. B. 331. But as between the cab driver and cab master, the relation is that of bailor and bailee, and as the cab master undertakes to supply a horse reasonably fit to drive, he will be responsible to the driver for supplying an unruly horse which runs away and upsets and injures the driver. *Fowler v. Lock*, L. R., 7 C. P. 272.

(b) *Laugher v. Pointer*, B. & C. 572; 8 D. & R. 556. *Smith v. Lawrence*, 2 M. & Ry. 2. *Sam-mell v. Wright*, 5 Esp. 262. *Dean v. Branthwaite*, ib. 36.

(c) *Croft v. Alison*, 4 B. & Ald. 590. *Hall v. Pickard*, 3 Campb. 187.

(d) *Quarman v. Burnett*, 6 M. & W. 507. *Laugher v. Pointer*, 5 B. & C. 547.

(e) *M'Laughlin v. Pryor*, 4 Sc. N. R. 665.

(f) *Quarman v. Burnett*, 6 M. & W. 499.

The servant himself, by whose negligence or want of skill the accident has occurred, cannot defend himself against the claim of a third person by setting up that he was acting under the orders of his master, and that the act complained of was his master's act, and that the master alone is responsible(*g*).

552 *Liabilities of borrowers of carriages for the negligence of their drivers.*—

A person who has borrowed a horse and chaise for his own use and enjoyment, and who rides about in it, driven by a friend, whom he allows to drive, is responsible for the negligence of the driver, on a declaration charging that he was possessed of, and driving, the horse and chaise, and that the injury was occasioned by his negligent driving(*h*).

553 *Identification of the passenger with his driver.*—When a collision between two carriages has been caused by negligent driving on both sides, neither party can recover damages from the other (*post*, p. 400); and it has been held that every passenger who has selected the particular conveyance by which he travels is so far identified with the driver or director of its movements, that if any injury is sustained by him from collision with a rival vehicle, through the joint negligence of his own driver and that of the driver of the rival conveyance, precluding the former from maintaining an action against the latter, the passenger is himself equally precluded, and his only remedy is against his own driver, or the employer of the latter(*i*). But "it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver, or his employer. Why both the wrong-doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it has received"(*k*). Where the drivers of two rival omnibuses were competing for passengers, the one endeavoring to get before the other, and both driving at great speed, and in trying to avoid a cart which got in their way, the wheel of the defendant's omnibus came in contact with the projecting step of the omnibus on

(*g*) Alderson, B., in *Hutchinson v. York & Newcastle R'way.*, 5 Exch. 350.

(*h*) *Wheatley v. Patrick*, 2 M. & W. 650.

(*i*) *Thorogood v. Bryan*, 8 C. B. 131. *Brown v. New York Central R. R. Co.*, 31 Barb. (N. Y.) 385. *Mooney v. Hudson River R. R. Co.*, 5 Rob. (N. Y.) 548. But see *Metcalf v. Baker*, 11 Abb. N. S. (N. Y.) 431; *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341.

(*k*) Note to *Ashby v. White*, 1 Smith's L. C., 6th ed. 227. See *Brown v. New York Central R. R. Co.*, 32 N. Y. 597; *Colegrove v. New York & New Haven and New York & Harlem R. R. Companies*, 20 N. Y. 492.

which the plaintiff was riding, and caused it to swing against a lamp-post, and the plaintiff was thrown off and injured, it was held that he was not disentitled to recover damages from the proprietor of the rival omnibus, by reason, of misconduct on the part of his own driver(l).

554 *Negligence of servants in breaking-in and training horses.*—In an action in the case brought against a master and his servant, the plaintiff set forth that the defendants brought a coach with two ungovernable horses into Lincoln's Inn Fields, where people were always going to and fro upon their business, and there "*improvidé et absque debitâ consideratione ineptitudinis loci*," drove them to make them tractable and fit for a coach, and that the horses, being unmanageable, ran upon and injured the plaintiff; and it was urged that the master, being absent, the action was not maintainable against him, that no knowledge of the horses being unruly, nor any negligence was alleged, but judgment was given for the plaintiff(m).

555 *Collisions in public thoroughfares.*—The degree of care to be exercised by foot-passengers in a public thoroughfare to prevent collisions with others, depends in a great degree upon the injury that will be likely to result to others from their want of care. Thus a man who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the things he carries. Such a person would be bound to keep a better look-out than the man who merely carried an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands.

556 *Collisions between vessels—Compulsory pilotage.*—If a shipowner unnecessarily delays mooring his vessel until night comes on, and darkness prevents him from distinguishing objects, he will be responsible in damages if he comes into collision with any other vessel, which collision could have been avoided if it had been daylight(n). In every case of collision it is the duty of each master to give to the other the name of his vessel, her port of registry, or the place to which she belongs, and the port from which and to which she is bound(o).

Section 388 of the Merchant Shipping Act, 17 & 18 Vict. c. 104, protects the owners or masters of a ship from liability for loss or dam-

(l) *Rigby v. Hewitt*, 5 Exch. 240. *Greenland v. Chaplin*, ib. 247. And see the remarks of Dr. Lushington, *The Milan*, 31 Law J., Adm. 112.

(m) *Michael v. Alestree*, 2 Lev. 173.

(n) *The Egyptian*, 1 Moore, P. C. C., N. S. 373.

(o) 34 & 35 Vict. c. 110, s. 9. "A shipowner is not liable for a collision arising from an inevitable accident, i.e., an accident which could not have been prevented by the exercise of ordinary care, caution and maritime skill. *The Marpesia*, L. R., 4 P. C. 212."

age occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of a pilot is made compulsory by law(*p*). If, therefore, a ship, compulsorily in charge of a pilot, is being towed by a steam tug, and by the negligence of the steam-tug is towed across and brought into collision with another vessel, the owner of the former vessel is not responsible, if by giving proper orders the pilot could have avoided the collision(*q*), unless there was negligence on his part in the selection of the tug in the first instance, by which the collision was wholly or in part occasioned(*r*). And this section protects the owners or masters from responsibility for injuries done within the limits of the Thames Conservancy Act, 1857(*s*). It will not, however, absolve the owner from responsibility for the neglect of the master to keep a good look out, if such neglect conduces to the collision. It is the duty of the pilot to attend to the navigation, and of the master to keep a good look out(*t*). If a pilot has been taken on board in pursuance of an Act of Parliament, rendering such employment compulsory, and is in fact in charge of the ship at the time of the accident, and the accident occurs through his negligence, the shipowner is absolved from liability under the above section, even though, by reason of an exception in the Act, such employment ceased to be compulsory shortly before the accident occurred(*u*). But when the employment of the pilot has fairly ceased, the responsibility of the shipowner recommences(*v*). And if the employment of the pilot is not compulsory, the shipowner, of course, remains liable for his negligence(*w*).

(*p*) *The Schwalbe*, 14 Moore, P. C. C. 241. *The Annapolis*, 1 Lush 295. *The Peerless*, 30 Law J., Adm. 89. See *Hossack v. Gray*, 34 Law J., M. C. 209, as to when an English or Scotch pilot is necessary. *The Tyne Improvement Commissioners v. General Steam Navigation Co.*, L. R., 2 Q. B. 65, as to the port of Newcastle. *The Hannah*, L. R., 1 Adm. & Eccl. 283, as to ships (not British) coming up the North Channel, and as to who is a passenger within s. 354 of the Merchant Shipping Act. (See on the latter point, *The Lion*, L. R., 2 Adm. & Eccl. 102; 2 P. C. Ca. 525.) *The Maria*, L. R., 1 Adm. & Eccl. 358, as to the port of Hull. *Rodrigues v. Meluish*, 10 Exch. 110, as to the port of Liverpool. *General Steam Navigation Co. v. British & Colonial Steam Navigation Co.*, L. R., 3 Exch. 330; 38 Law J., Exch. 97, as to the limits of the port of London. The fact that the master of a vessel is required by a State law to take a pilot, does not exonerate the vessel from liability for a collision caused wholly through the negligence of such pilot. *The China*, 7 Wall. (U. S.) 53; *Camp v. the Marcellus*, 1 Clifford, C. C. 481; *The Alabama* and the *Gamecock* 1 Benedict, D. C. 476.

(*q*) *The Energy*, L. R., 3 Adm. & Eccl. 48.

(*r*) *Marshall v. Moran*, L. R., 3 P. C. Ca. 205.

(*s*) *Thames Conservators v. Hall*, L. R., 3 C. P. 415. See the Thames Conservancy Act, 1864, 27 & 28 Vict. c. 113, and the Thames Navigation Act, 29 & 30 Vict. c. 89.

(*t*) *The Iona*, L. R., 1 P. C. Ca. 426. *The Velasquez*, *ibid.* 494. *The Minna*, L. R., 2 Adm. & Eccl. 97. *The Calabar*, L. R., 2 P. C. Ca. 238.

(*u*) *General Steam Navigation Co. v. British & Colonial Steam Navigation Co.*, L. R., 3 Exch. 330; 38 L. J., Exch. 97.

(*v*) *The Woburn Abbey*, 38 Law J., Adm. & Eccl. 28.

(*w*) *The Lion*, 38 L. J., Adm. 51; L. R., 2 Adm. & Eccl. 102; 2 P. C. C. 525.

The above Act and the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63, s. 54), regulate the extent of the liability of shipowners and owners of shares in sea-going ships where, without any actual fault or privity on their parts, any loss of life or personal injury is caused to any person being carried in such ship; also, where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; also, where any loss of life or personal injury is, by reason of the improper navigation of such sea-going ship, caused to any person carried in any other ship or boat, or is caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat(x). The cargo laden on board ship is not liable, like the ship itself, to make good the damage(y); but freight earned may be(z).

In case of loss of life, or personal injury, the Board of Trade may cause juries to be summoned to assess compensation (ss. 507, 508), of a very limited character. Provision is made (s. 510) for the application of these damages to the parties entitled to them, and if they are dissatisfied with the amount they may, on procuring the amount thereof to be refunded, bring an action for the recovery of damages under various discouraging limitations and restrictions. Nothing, however, in the Act is to lessen or take away any liability to which any master or seaman, being also owner, or part owner, of the ship to which he belongs, is subject in his capacity of master or seaman (s. 516).

Proceedings *in rem* in the Admiralty Court are no bar to proceedings elsewhere *in personam*; such proceedings being for the purpose of enforcing a marine lien. If, therefore, the person injured has sustained damage beyond what the lien realizes, he may recover it by suing the person guilty of the negligence at common law(a). The Admiralty Courts Act, 1861 (24 Vict. c. 10), enacts by s. 7, that the Court of Admiralty "shall have jurisdiction over *any* claim for *damage* done by any ship," and it has been held by the Privy Council that the effect of Lord Campbell's Act, 9 & 10 Vict. c. 93, in conjunction with the above provision, is to give a new right to the representatives of a person killed in a collision between two vessels, enforceable against

(x) As to the method to be adopted in ascertaining the liability of the defendants for the several sorts of damage, see *Nixon v. Roberts*, 1 Johns. & Hem. 742-748; 30 Law J., Ch. 844; *Giaholt v. Barker*, L. R., 2 Eq. Ca. 598; S. C. 1 Ch. App. 223. See as to interest upon the damage from the date of the collision, *The Northumbria*, L. R., 3 Adm. & Eccl. 8.

(y) *The Victor*, 1 Lush. 72.

(z) *The Orpheus*, L. R., 3 Adm. & Eccl. 308.

(a) *Nelson v. Couch*, 33 Law J., C. P. 46. As to proceedings against the ship, see *Ohrloff v. Briscall*, L. R., 1 P. C. Ca. 231.

the ship which was in fault *in the Court of Admiralty*, as well as against the persons guilty of negligence in a court of common law^(b). But the Court of Queen's Bench has recently dissented from these decisions, and has prohibited the prosecution of such an action in the Court of Admiralty^(c).

557 *Collisions with foreign ships*.—The regulations for preventing collisions contained in 25 & 26 Vict. c. 63, are expressly extended (ss. 57–64) to foreign ships navigating within British jurisdiction, and may be extended to the high seas by consent of foreign countries in the manner therein mentioned^(d). If a foreign shipowner sues a British shipowner in the Court of Admiralty here for a collision occurring in foreign waters, and the defendant pleads that by the foreign law pilotage was compulsory in the place where the collision occurred, and that the damage was caused by the pilot's negligence, the plaintiff cannot reply, that by the foreign law the defendant continued liable for the damage; for, in a case of tort, the municipal law of a foreign country cannot be invoked against the admitted principles and practice of our own^(e).

558 *Non-observance of statutory or Admiralty regulations*.—Under the Merchant Shipping Acts, 17 & 18 Vict. c. 104, ss. 295–299, and 25 & 26 Vict. c. 63, s. 25, *et seq.*, and Sched. Table C, regulations are to be made by the Admiralty for the exhibition by steamboats and sailing-vessels of lights at night in such places and under such circumstances as the Admiralty think fit, and certain rules are required to be observed by vessels passing each other^(f); and it is enacted, that if a collision between vessels appears to have been occasioned by, or would not have happened but for, the non-observance of the Admiralty or statutory rules, the vessel by which any rule has been infringed shall (s. 29) be deemed to be in fault^(g), unless it appears to the court that the circumstances made a departure from the regulations necessary—*i.e.*, in order to avoid immediate danger—and that the course adopted by the parties so departing from the regulations was reasonably calcu-

(b) *The Guldfaxe*, 2 Adm. & Eccl. 325; 38 L. J., Adm. 12. *The Beta*, L. R., 2 P. C. C. 447; 38 L. J., Adm. 50. *The Explorer*, L. R., 3 Adm. & Eccl. 289, where the person killed was a foreigner. *The George and Richard*, L. R., 3 Adm. & Eccl. 466, where the claim was by an infant *en ventre sa mere*.

(c) *Smith v. Brown*, L. R., 6 Q. B. 729, per Cockburn, C.J., and Hannen, J., *dub.* Blackburn, J.

(d) See *The Amalia*, Br. & L. 151.

(e) *The Halley*, L. R., 2 Adm. & Eccl. 3; 2 P. C. Ca. 193. See *The Mali Ivo*, L. R., 2 Adm. & Eccl. 356.

(f) *General Steam Navigation Co. v. Hedley*, L. R., 3 P. C. Ca. 44.

(g) *Dowell v. Gen. St. Nav. Co.*, 5 Ell. & Bl. 195; 26 Law J., Q. B. 59. *The James*, 1 Swabey, 60. *Grill v. Iron Screw Collier Co.*, L. R., 1 C. P. 600; 3 *ibid.* 476. *The Esk*, L. R., 2 Adm. & Eccl. 350. *The Fenham*, L. R., 3 P. C. Ca. 212.

lated to avoid a collision(*h*); and in case of damage to person or property from non-observance of any rule, the same shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of the vessel, unless it appears to the court that the circumstances made a departure from the regulations necessary(*i*).

The old rule of the Admiralty Court, therefore, that if the owner of one ship brings an action against the owner of another ship for damage by collision, and both vessels be to blame, the damage shall be divided, has, to a certain extent, been superseded by the provisions of this statute(*j*). But the owner on board a ship that has violated the provisions of this statute, and so contributed to the collision, is not prohibited by the Merchant Shipping Act from recovering compensation, in accordance with the old rule of the Admiralty to the extent of a moiety of his loss(*k*).

Notwithstanding this statute, and the Admiralty regulations founded thereon, persons, in navigating their vessels, are still bound to keep a good look-out, just as they were before these regulations were made; and if it could clearly be made out that a vessel, having no light, had been run down by another vessel, from sheer carelessness and negligence in not keeping a good look-out, the owners of the former vessel would have a right to compensation from the latter(*l*). Every vessel, whether close-hauled or at anchor, is bound to show a light(*m*), and, if, in consequence of a vessel, which is lying across the channel leading into the harbor, not exhibiting a light, another vessel, to avoid a collision with her, runs aground or against a sea-wall and receives damage, the former vessel will be liable(*n*). And the master, when the ship is at anchor, is bound to keep a sufficient crew on board, to protect her against ordinary perils(*o*). Although the damage resulting from a collision may be greatly increased by some neglect or default on the part of the plaintiff, yet if the plaintiff's neglect has not caused or contributed to the collision, he is not thereby precluded from recovering damages(*p*); but if the fault of the plaintiff himself is the proxi-

(*h*) See *The Agra and Elizabeth Jenkins*, L. R., 1 P. C. 501.

(*i*) See *The Concordia and The Spring*, L. R., 1 Adm. Ca. 93, 99.

(*j*) *Lawson v. Carr*, 10 Moore, P. C. C. 162.

(*k*) *The Milan*, 31 Law J., Adm. 105.

(*l*) *Morrison v. Gen. Steam Nav. Co.*, 8 Exch. 738. See *Inman v. Reck*, L. R., 2 Pr. Co. Ca. 25.

(*m*) *The Eclipse*, 31 Law J., Adm. 201. See *The Esk*, L. R., 2 Adm. & Eccl. 350. *The John Fenwick*, L. R., 3 Adm. & Eccl. 500; *Lenox v. Winisimmet Co.*, Sprague, 160.

(*n*) *The Industrie*, L. R., 3 Adm. & Eccl. 303.

(*o*) *The Excelsior*, L. R., 2 Adm. & Eccl. 268.

(*p*) *Greenland v. Chaplin*, 5 Exch. 247. *Hoffman v. Union Ferry Co. of Brooklyn*, 47 N. Y. 176. *Haley v. Earle*, 30 N. Y. 208.

mate cause of the collision, he cannot recover in a court of common law(*q*): if it is only remotely connected with the accident, then the question is, whether the defendant, by ordinary care, might have avoided the accident, and if he might, the plaintiff is entitled to recover(*r*). In all cases of collision between ships, it is the duty of the persons in charge of each ship to render all practicable assistance, and, in case of failure so to do, with no reasonable excuse shown, the neglect will be *primâ facie* evidence of negligence on the part of the person in charge so making default(*s*). The person in charge under this section is the mate or master, as the case may be(*t*), and the mere fact of there being a pilot compulsorily in charge of the ship, is not sufficient to exempt the owners from responsibility(*u*).

A Queen's officer, stationed on board ship to do his duty there, together with others equally appointed; and stationed there by the same authority to do their several duties, is not responsible in damages for injuries occasioned by the negligence of his subordinate officers in carrying into effect the orders given by him in discharge of his public duty. Therefore, the captain of a sloop-of-war is not answerable for damage done by her in running down another vessel during the watch of the lieutenant who was upon the deck, and had the actual direction and management of the steering and navigating the sloop at the time(*v*).

The mere fact of a ship being chartered and employed by the Government as an armed vessel, and having a commander of the navy on board, under whose orders the vessel is navigated, will not exempt the shipowners from responsibility for injuries occasioned by the negligence of a master and crew shipped on board and paid by them(*w*). Nor will the fact that a vessel has been chartered by third persons exempt the shipowners from liability for the negligence of the master in the stowage of goods shipped on board, unless the charter-party amounts to a demise of the ship(*x*). But no action is maintainable against the owners of a transport in the employ of Government for damage done in the careful and proper execution of the orders of a

(*q*) Nor can he claim salvage. *The Capella*, L. R., 1 Adm. & Eccl. 356.

(*r*) *Tuff v. Warman*, 2 C. B., N. S. 740; 26 Law J., C. P. 263. *The Vivid*, 1 Swabey, 88. See *ante*, p. 23; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Silliman v. Lewis*, 49 N. Y. 379.

(*s*) 25 & 26 Vict. c. 63, s. 33.

(*t*) See *Ex parte Ferguson*, L. R., 6 Q. B. 380.

(*u*) *The Queen*, L. R., 2 Adm. & Eccl. 354. As to negligence while performing salvage services, see *The Thetis*, L. R., 2 Adm. & Eccl. 365.

(*v*) *Nicholson v. Mouncey*, 15 East, 384.

(*w*) *Fletcher v. Braddick*, 2 B. & P. N. R. 182. *Best, J.*, *Scott v. Scott*, 2 Stark. 438.

(*x*) *Sandeman v. Scurr*, L. R., 2 Q. B. 86.

Government officer, under whose command the vessel was at the time of the accident, unless the order was only meant to apply to a particular state of circumstances, and leaves a certain discretion in the master of the transport, and the circumstances change, and the master carelessly and imprudently fails to direct his conduct in accordance with the altered circumstances and the requirements of good seamanship(y).

559 *Collisions between vessels—Limitation of liability.*—The ninth part of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 502, *et seq.*, contains various provisions for limiting the liability of shipowners in certain cases to the value of the ship and freight, etc., and the 514th section provides, that in cases where any liability has been incurred by any shipowner in respect of loss of life, personal injury or damage to ships or goods, and several claims are made or apprehended, the Court of Chancery may entertain a suit for the purpose of determining the amount of such liability, and for its distribution rateably among the claimants, and may stop all actions or suits in other courts in relation to the same subject-matter. This jurisdiction may also be exercised by the Court of Admiralty under the 13th section of the 24 Vict. c. 24, in cases where the ship or the proceeds thereof are “under arrest” of the court. The Court of Admiralty has jurisdiction under the above section, to entertain a suit for limitation of liability in cases of damage caused by a collision between two vessels, although the vessel, on behalf of which the application is made, was sunk by the collision, and cannot therefore, strictly speaking, be “under arrest” of the court. And if the court orders that all actions in other courts in relation to the subject-matter of the suit be stopped, this will operate to stop an action brought in a court of common law by a third person against the owners of the applicant vessel for loss of goods, delivered by him to them as common carriers, and lost through the collision(z). The court of common law, however, will not it seems, itself interfere to stop the action in pursuance of such an order(a).

560 *Negligent navigation causing damage to owners of cargoes.*—The owner of a cargo on board a ship is entitled, as we have seen, to recover compensation for damage sustained by collision through negligence.

(y) *Hodgkinson v. Fernie*, 2 C. B., N. S. 415; 26 Law J., C. P. 219.

(z) *The Normandy*, L. R., 3 Adm. & Ecc. 152.

(a) *Milburn v. Lond. & South-West. Rwy.*, L. R. 6 Exch. 4. And it has been lately held, that where in such a case the owners of the sunken ship have, in a suit for the collision in the Court of Admiralty, paid into Court 15*l.* per ton, on the registered tonnage of the ship under the 17 & 18 Vict. c. 104, s. 54, the ship, nevertheless cannot be considered as ‘under arrest;’ the Court of Admiralty, therefore, has no jurisdiction to stop a suit commenced in the Common Law Courts, and if it attempts to do so, the plaintiff will be entitled to a writ of prohibition. *James v. South-West. Rwy.*, L. R., 7 Exch. 187, 287.

He may sue the shipowner, if the latter is in default(*b*), and, if not, he is entitled to sue the wrong-doer causing the damage. And the owner of a cargo on board of one of two delinquent ships is not precluded in the Court of Admiralty from recovering from the other delinquent ship a moiety of the damage he has sustained, for he is not there considered to be in anywise identified with the negligent management of the ship he has selected to carry his goods, nor to be in anywise responsible for the collision(*c*).

561 *Duty of master or shipowner as to goods damaged on the voyage.*—In every contract to carry for freight there is an implied obligation on the part of the shipowner, that in the event of any disaster happening to the ship or cargo in a port where correspondence cannot be had with the freighter, the master shall act as his agent, and use his best efforts for the protection and preservation of the cargo. If the cargo is a perishable one, and the vessel is unable to proceed, the master must exercise his judgment whether to tranship the cargo or to proceed. He is not bound materially to delay his voyage to the prejudice of his owner, but he is not at liberty to carry on the cargo, with the certainty that it will perish or materially deteriorate on the voyage, for the sole purpose of earning the full freight(*d*).

562 *Negligent stowage causing injury to goods.*—The 6th section of the 24 Vict. c. 10, gives the Court of Admiralty jurisdiction “over any claim by the owner or consignee, or assignee of any bill of lading, of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty, on the part of, the owner, master, or crew of the ship,” unless any owner or part owner is domiciled in England or Wales at the time of the institution of the suit. It has been held that under this section the assignee of a bill of lading may sue the shipowner for the negligent stowage of goods(*e*), although the property in the goods may not have passed to him(*f*). Such assignee may also, under the above section, institute civil proceedings against the ship in the Court of Admiralty for the master’s misfeas-

(*b*) Although the bill of lading contain an exception of “barratry of masters or mariners,” and “accidents or damages of the seas, rivers, and steam navigation of whatever nature or kind soever.” *Lloyd v. Screw Collier Co.*, 33 L. J., Exch. 269. *Grill v. The same*, L. R., 3 C. P. 476.

(*c*) *The Milan*, ante, p. 393. As to what is “improper navigation” within the meaning of a deed of indemnity against the consequences of such navigation, see *Good v. The London Steam Shipowners’ Mutual Protecting Association*, L. R., 6 C. P. 563.

(*d*) *Notara v. Henderson*, L. R., 5 Q. B. 346. Affirmed on appeal, L. R., 7 Q. B. 225.

(*e*) *The Figlia Maggiore*, L. R., 2 Adm. & Eccl. 106. See *The Freedom*, L. R., 2 Adm. & Eccl. 346; 3 P. C. Ca. 594.

(*f*) *The Nepoter*, L. R., 2 Adm. & Eccl. 375.

ance in cutting down and destroying parts of the ship, and ultimately abandoning her, by which the delivery of the cargo to the assignee was delayed and rendered more expensive(*g*).

563 *Negligent navigation causing personal injury—Damage to sea walls, etc.*

—The 7th section of the 24 Vict. c. 10, enacts that the “Court of Admiralty shall have jurisdiction over *any* claim for damage done by any ship.” Under this section it has been held that a dock company may sue a ship for injury done through negligent navigation to a break-water(*h*); and that a diver who has sustained injury from a similar cause, may also sue the ship which caused it(*i*). If a ship, through the negligent navigation of the master, runs aground, and is then driven on to a sea wall by the force of the wind or tide, the shipowner will be responsible for the damage done to the wall. In the absence of negligence, however, the shipowner has a reasonable time for the recovery of valuable property contained in the ship, and, as between him and the proprietor of the wall, is not bound to break up the ship immediately(*k*).

564 *Negligence of masters causing injury to their servants.*—Every workman

who engages in a dangerous employment takes it, as we have seen (*ante*, pp. 223, 224), with all its ordinary risks. The master is bound to provide for the safety of his servant in the course of his employment, to the best of his judgment(*l*); but the law does not impose upon the master the obligation of taking more care of the servant than he may be reasonably expected to take of himself. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, he is just as likely to be acquainted with the probability and extent of it as the master. The master, therefore, is not responsible for injuries sustained by his servant through the viciousness of the horse which the servant is employed to groom, or through the breaking down of a van or carriage in which the servant is directed by the master to ride or drive, or from the employer's keeping an insufficient staff of servants for the performance of the work he has to do(*m*), or through

(*g*) *The Princess Royal*, L. R., 3 Adm. & Eccl. 41. *Seem*, also, although the conduct of the master amounted to a criminal offence, and no criminal proceedings had been taken against him. *S. C.*

(*h*) *The Uhla*, L. R., 1 Adm. & Eccl. 29, n.

(*i*) *The Sylph*, L. R., 2 Adm. & Eccl. 24. But this case can hardly be considered law since the decision in *Smith v. Brown*, *ante*, p. 483.

(*k*) *The Bailiffs of Romney Marsh v. Trinity House*, L. R., 5 Exch. 204; affirmed on appeal, L. R., 7 Exch. 247. See *The George and Richard*, L. R., 3 Adm. & Eccl. 466.

(*l*) *Paterson v. Wallace*, 1 Macq. 751.

(*m*) *Skipp v. East. Co. Rail. Co.*, 9 Exch. 223.

the use of dangerous machinery, with the use of which the servant is, or professes to be acquainted, and which he has voluntarily undertaken to use(n), or for the dangers attendant upon the mounting of scaffolds, or unfinished staircases and landings, which the workman has voluntarily undertaken to mount with as much knowledge of the attendant risk as the person who employs him(o).

Where the master's coach broke down through the negligence of a coach-maker who had contracted with the master to furnish the latter with sound roadworthy coaches, and repair them, and keep them in good working order, and the coachman was mutilated and maimed for life, it was held that he had no remedy for the injury. The law does not permit him to recover damages from his own master and employer. Neither can he sue the coach-maker whose negligence occasioned the injury. "It is no doubt a hardship upon the plaintiff," observes Rolfe, B., "to be without a remedy, but by that consideration we ought not to be influenced"(p). "There would be no end of actions if we were to hold that a person having once done a piece of work carelessly, should, independently of honesty of purpose" (or contract), "be fixed with liability in this way by reason of bad materials or insufficient fastening"(q).

The master is bound, as we have seen (*ante*, pp. 223-226), to protect his servant from latent dangers on the master's premises, known to the latter and not known to the servant. If a man employs ignorant, inexperienced workmen in dangerous employments, and exposes them improperly to risks, of which he is cognizant, and which are not known to the ignorant workman, he will be liable for the consequences of his misconduct(r). For personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable(s). And where rules are framed by employers for the purpose of regulating the management and exercise of a dangerous employ-

(n) *Dynen v. Leach*, 26 Law J., Exch. 221.

(o) *Aslop v. Yates*, 2 H. & N. 770; 27 Law J., Exch. 156. *Griffiths v. Gidlow*, ib. 404. *Potts v. Plunkett*, 9 Ir. C. L. R. 290. See *Lanning v. New York Central R. R. Co.*, 49 N. Y. 521; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124.

(p) *Winterbottom v. Wright*, 10 M. & W. 115. *Priestly v. Fowler*, 3 M. & W. 6. *Riley v. Baxendale*, 6 H. & N. 455; 30 Law J., Exch. 87. *Potts v. Port Carlisle, etc., R. Co.*, 2 Law T. R., N. S. 283. See *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 127.

(q) *Per Willes, J., Collis v. Selden*, L. R., 3 C. P. 498.

(r) *Bartonshill Coal Co. v. Reid*, 3 Macq. 295. *Mellors v. Shaw*, 30 Law J., C. P. 333. *Weems v. Matthieson*, 4 Macq. H. L. C. 215. *Farrant v. Barnes*, 31 Law J., C. P. 139. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572. *Lalor v. Chicago, Burlington & Quincy R. R. Co.*, 52 Ill. 401. *Cleghorn v. New York Central & Hudson River R. R. Co.*, 56 N. Y. 44.

(s) *Ashworth v. Stanwix*, 30 Law J., Q. B. 183. *Kegan v. Western R. R. Co.*, 8 N. Y. 175. *Warner v. Erie R. R. Co.*, 39 N. Y. 468. *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 562. *Hayden v. Smithville Manufacturing Co.*, 20 Conn. 543.

ment, and these rules are carelessly or improperly framed, so as to cause dangers and risks, which might be guarded against and prevented by proper rules carefully prepared, the employers will be responsible for the consequences of their negligence(*t*). Where statutory regulations exist for the management of a colliery(*u*), and securing the safety of the workmen, and these rules are culpably neglected with the knowledge of the owner of the mine, the latter will be responsible for the consequences of his neglect of duty, unless the person injured has brought the mischief upon himself by his own negligence(*x*). And in a case where machinery is required by Act of Parliament to be protected, so as to guard persons working near it from danger, and a servant complains of the want of protection, and continues to work in the mill near the machinery on the faith of a promise by the master that the requisite protection shall be afforded, the master will be responsible if any accident occurs to the servant in the interval, from the want of such protection, unless the accident has been caused by the negligence of the servant himself(*y*).

565 *Injuries to one fellow-servant from the negligence of another fellow-servant*.—Where several servants are employed by the same master in one common employment, the master is not responsible for injury resulting to one of them from the negligence of another, provided the master has taken due care not to expose his servant to unreasonable risks(*z*), and has been guilty of no want of care in the selection of proper servants(*a*). The principle laid down is, that a servant, when

(*t*) *Vose v. Lanc. and York. Rail. Co.*, *ante*, p. 218

(*u*) As to ventilation of collieries, see 23 & 24 Vict. c. 151, s. 10; *Brough v. Homfray*, L. R., 3 Q. B. 771. As to statutory regulations under the Factory Acts, see 27 & 28 Vict. c. 48; 30 & 31. Vict. c. 103; *Kent v. Astley*, L. R., 5 Q. B. 19. And as to the provision of a fan in factories where grinding is carried on, see 30 & 31 Vict. c. 146 s. 8.

(*x*) *Caswell v. Worth*, 5 Ell. & Bl. 855. *Senior v. Ward*, 1 Ell. & Ell. 385; 28 Law J., Q. B. 139; and see *ante*, p. 96, *et seq.*

(*y*) *Holmes v. Clarke*, 6 H. & N. 349; 30 Law J., Exch. 135. *Cowley v. Mayor, etc.*, of Sunderland, *ib.* 127.

(*z*) *Hutchinson v. York., etc., Rail. Co.*, 5 Exch. 353. *Wiggett v. Fox*, 11 Exch. 837; 25 Law J., Exch. 188. *Searle v. Lindsay*, 11 C. B., N. S. 429; 31 Law J., C. P. 106. *Hall v. Johnson*, 34 Law J., Exch. 222. *Wright v. New York Central R. R. Co.*, 25 N. Y. 562. *Farwell v. Boston and Worcester R. R. Co.*, 4 Metc. 49. *Brown v. Maxwell*, 6 Hill, 592. *Coon v. Syracuse and Utica R. R. Co.*, 5 N. Y. 492. *Murray v. South Carolina R. R. Co.*, 1 McMullan, 385. *Hayes v. Western R. R. Co.*, 3 Cush. (Mass.) 270. *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75. *King v. Boston and Worcester R. R. Co.*, 9 id. 113. *Gilshannon v. Stony Brook Co.*, 10 id. 228. *Sherman v. Rochester and Syracuse R. R. Co.*, 17 N. Y. 153. *Chicago and Alton R. R. Co. v. Murphy*, 53 Ill. 336. *Leahey v. Michigan Central R. R. Co.*, 10 Mich. 199. *Lanning v. N. Y. Central R. R. Co.*, 49 N. Y. 521. *Brickner v. N. Y. Central R. R. Co.*, 49 N. Y. 672. *Flike v. Boston and Albany R. R. Co.*, 53 N. Y. 549. *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134.

(*a*) *Tarrant v. Webb*, 18 C. B. 865. See *Wilson v. Merry*, L. R., 1 Scotch & Div. App. 326; *Warner v. Erie R. R. Co.*, 39 N. Y. 468. See *Cleghorn v. N. Y. Central and Hudson River R. R. Co.*, 56 N. Y. 44; *Chapman v. Erie R. R. Co.*, 55 N. Y. 579; *Hofnagle v. New York Central and Hudson River R. R. Co.*, 55 N. Y. 608.

he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service; and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both(b); and when the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. Thus it has been held that a railway company is not responsible for an injury occasioned to one

The only ground upon which the law recognizes a liability on the part of the master for injuries to his servant arising from the negligence, carelessness, or misconduct of a fellow-servant engaged in the same general business, is the personal negligence of the master in the employment of unfit and incompetent servants and agents, which negligence was the occasion of the injury, and without which the injury would have been averted. *Warner v. Erie R. R. Co.*, 39 N. Y. 471. *Wright v. New York Central R. R. Co.*, 25 N. Y. 565. *Laning v. New York Central R. R. Co.*, 49 N. Y. 521. A master is bound to use due care and diligence in the selection and employment of his agents and servants, and for want of such care and diligence he is responsible to all other servants for any damage that may thence arise. *Moss v. Pacific R. R.*, 49 Mo. 167. *Hurper v. Indianapolis and St. Louis R. R. Co.*, 47 Mo. 567. *McDermott v. Pacific R. R. Co.*, 30 Mo. 115. *Rohback v. Pacific R. R. Co.*, 43 Mo. 187. *Laning v. New York Central R. R. Co.*, 49 N. Y. 521. See *Lawlor v. Androscoggin R. R. Co.*, 62 Me. 463.

The duty of the master to the servant, to employ skilful and competent fellow-servants or to use due and reasonable care to that end, must be affirmatively and positively performed. It is not enough that the master selects one or more general agents of approved skill and fitness, and confers upon them the power of selecting, purchasing or hiring.

If the general agent carelessly places by the side of the servant another unskilled and incompetent, and damage results to the servant in consequence, the master is liable. *Laning v. New York Central R. R. Co.*, 49 N. Y. 521. *Walker v. Bolling*, 22 Ala. 294. And see *Gillman v. Eastern R. R. Co.*, 13 Allen, 433; *Noyes v. Smith*, 28 Vt. 59; *Hard v. Vermont Central R. R. Co.*, 32 Vt., 473; *Frazier v. Pennsylvania R. R. Co.*, 38 Penn. St. 104; *Walker v. Bolling*, 22 Ala. 294; *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549; *Chicago & Northwestern R. R. Co. v. Sweet*, 45 Ill. 197.

And the master is liable to his servant for injuries caused by the incompetency or want of skill of a fellow-servant, whether such incompetency existed when such fellow-servant was hired or came upon him since the hiring, if the fellow-servant was in the first instance hired or afterwards continued in service with notice or knowledge or the means of knowledge of such incompetency. *Laning v. New York Central R. R. Co.*, 49 N. Y. 521. *Illinois Central R. R. Co. v. Jewell*, 46 Ill. 99.

But if the fellow-servant was competent when hired, but has since become incompetent, knowledge of such incompetency must in some way be brought to the master, in order to fix his liability. *Davis v. Detroit & Milwaukee R. R. Co.*, 20 Mich. 105. *Chapman v. Erie R. R. Co.*, 55 N. Y. 579.

And if both the master and the servant injured had equal knowledge or means of knowledge of the incompetency of a fellow-servant, and the servant nevertheless continued in his master's service, the servant will be deemed to have accepted the service with the attendant risk, and the master will not be liable unless he has given special directions, or has promised to amend the defect, or held out like inducement for the servant to remain in his service. *Laning v. New York Central R. R. Co.*, 49 N. Y. 521. *Davis v. Detroit & Milwaukee R. R. Co.*, 20 Mich. 105. *Indianapolis & Cincinnati R. R. Co. v. Love*, 10 Ind. 556. *Wright v. New York Central R. R. Co.*, 25 N. Y. 562. *Hayden v. Smithville Manufacturing Co.*, 29 Conn. 548. *Thayer v. St. Louis, Alton & Terre Haute R. R. Co.*, 22 Ind. 29. *Chicago & Northwestern R. R. Co. v. Jackson*, 55 Ill. 492. *Frazier v. Pennsylvania R. R. Co.*, 38 Penn. St. 104. *Mad River, etc., R. R. Co. v. Barber*, 5 Ohio St. 562. *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411. *Patterson v. Railroad Co.*, 22 Pittsburgh Leg. Four. 95. *Buzzell v. Laconia Manuf. Co.*, 48 Me. 113.

(b) See *Morgan v. Vale of Neath Rail. Co.*, 33 L. J., Q. B. 260. *S. C.*, in error, L. R., 1 Q. B. 149. *Boldt v. New York Central R. R. Co.*, 18 N. Y. 432.

of their own servants by a collision on their railway, caused by the negligence of another of their servants, in respect of which injury they would undoubtedly have been liable if the person injured had been a stranger travelling as a passenger for hire(c). But the servants must be fellow-servants, engaged in a common service(d); for if a farmer's servant, delivering corn at the warehouse of a corn merchant, is injured by the negligence of the corn merchant's servant in taking in the sacks, the corn merchant would be answerable for the injury(e). And it is not enough that the servant injured, and the servant causing the injury, should be servants of the same master; they must be employed in the same work: for if a gentleman's coachman was to drive over his gamekeeper, the master would be just as responsible as if the coachman had driven over a stranger(f). Nor is it sufficient

(c) *M'Eniry v. Waterford*, 8 Ir. C. L. R. 312. *Tunney v. Midland Rail. Co.*, L. R., 1 C. P. 291. *Weger v. Pennsylvania R. R. Co.*, 55 Penn. St. 460. *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134; in which case the plaintiff, a laborer, was being carried on the line, in pursuance of his contract of service with the company. *Hando v. Lond., Chat., & Dover Rail.*, L. R., 2 Q. B. 439, n., *acc.*

(d) *Lovegrove v. Lond. & Brighton Rail.*, 33 L. J., C. P. 329. See *Connolly v. Davidson*, 15 Minn. 519; *Gillenwaier v. Madison & Indianapolis R. R. Co.*, 5 Ind. 340; *Smith v. New York & Harlem R. R. Co.*, 19 N. Y. 127.

(e) *Abraham v. Reynolds*, 5 H. & N. 149. *Waller v. S. E. R. Co.*, 32 Law J., Exch. 205.

(f) *Ld. Cranworth, Bartonshill Coal Co. v. Reid*, 3 Macq. 294, 307. *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134, 136. Who is a fellow-servant, within the meaning of the rule exempting the master from liability for injuries to a servant arising from the negligence of a fellow-servant, has been a question of some diversity of decision, though the decided weight of authority is to the effect that all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though in different grades and departments of it, are fellow-servants, each taking the risk of the other's negligence. *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411.

And it seems that, to bring the case within the general rule of exemption, it is not necessary that the servant injured and the servant causing the injury should be at the time engaged in the same operation or particular work; and that it is enough that they are in the employment of the same master, engaged in the same common enterprise, and both employed to perform duties and services tending to accomplish the same general purpose, as, for example, maintaining and operating a railroad, operating a factory, working a mine or erecting a building. *Boldt v. New York Central R. R. Co.*, 18 N. Y. 432. *Warner v. Erie R. R. Co.*, 39 N. Y. 468. *Coon v. Utica & Syracuse R. R. Co.*, 5 N. Y. 492. *Albro v. Agawam Canal Co.*, 6 Cush. (Mass.) 75. *Farwell v. Boston & Worcester R. R. Co.*, 4 Metc. 49. *Hard v. Vermont & Canada R. R. Co.*, 32 Vt. 473. *O'Connell v. Baltimore & Ohio R. R. Co.*, 20 Md. 212.

Thus the brakeman on a railroad train, the conductor and engineer of that train, the mechanics in the repair shop, the inspector of the machinery and rolling stock of the road, the trackman who inspects the rails, the laborer ballasting the track, and the superintendent of the movement of the trains would come under the rule above mentioned and be classed as fellow-servants. *Farwell v. Boston & Worcester R. R. Co.*, 4 Metc. 49. *Hayes v. Western R. R. Co.*, 3 Cush. (Mass.) 270. *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 382. *Sherman v. Rochester & Syracuse R. R. Co.*, 17 N. Y. 153. *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411. *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134. But see *Gillenwaier v. Madison & Indianapolis R. R. Co.*, 5 Ind. 340. In the latter case it was held that a carpenter, employed by a railroad corporation to build a bridge across a certain creek, and who was injured by the carelessness of the servants of the corporation running the train on which he was riding, for the purpose of going to a place where he was directed to assist in loading timber for the bridge, though in some sense a servant of the corporation, yet was, in this particular instance, a passenger, and that the corporation were liable for the injury.

that they are temporarily subject to the same superintendent, if they are not in fact the servants of the same master(*g*). If a fellow-workman in a mine is also a co-proprietor in the mine, and therefore one of the plaintiff's masters, the common master is then responsible for injury caused by the negligence of such fellow-workman(*h*). A subcontractor and his servants engaged in doing the common work of a particular contract, under a contractor, are all fellow-servants, engaged in one common employment, though each directs and limits his attention to particular branches of the work, and they all are held to undertake, as between themselves and the contractor, to run all the ordinary known risks of the service, including the risk of negligence of the other servants engaged in discharging the work of their common employer(*i*). So a carpenter in the service of a railway company cannot sue the company for the negligence of a porter in their employ(*k*).

566 *Injuries to volunteers who assist gratuitously in work of a dangerous nature.*—If a person comes forward as a volunteer, and offers to assist servants engaged in a difficult or dangerous work, and the volunteer gets injured through the negligence of one of the servants, the employer is not responsible for the injury; for a person, by volunteering his services, cannot have any greater rights, or impose any greater duties on the employer, than would have existed if he had been a hired servant(*l*).

567 *Contributory negligence on the part of the plaintiff.*—A plaintiff cannot, as previously mentioned, recover damages in a court of common law, if, but for his own negligence, or that of the person who represents him, the accident would not have happened, though there was negligence on the part of the defendant(*m*); for the plaintiff cannot complain of an injury which his own negligence and want of care has

(*g*) *Warburton v. Gt. West. Rail., L. R., 2 Exch. 30.* See *Connolly v. Davidson*, 15 Minn. 519.

(*h*) *Ashworth v. Stanwix*, 30 Law J., Q. B. 183.

(*i*) *Wiggett v. Fox*, 11 Exch. 832; 25 Law J., Exch. 193.

(*k*) *Morgan v. Vale of Neath Rail., supra.*

(*l*) *Degg v. Mid. Rail. Co.*, 1 H. & N. 773; 26 L. J., Exch. 173. *Potter v. Faulkner*, 1 B. & S. 800; 31 Law J., Q. B. 30. *Flower v. Pennsylvania R. R. Co.*, 69 Penn. St. 210. *New Orleans, etc., R. R. Co. v. Harrison*, 48 Miss. 112.

(*m*) *Waite v. North-East. Rail. Co.*, Ell. Bl. & Ell. 719; 27 L. J., Q. B. 417; 28 Law J., Q. B. 258. *Tuff v. Warman*, 2 C. B., N. S. 740; 27 Law J., C. P. 322. *Senior v. Ward*, 1 El. & El. 385; 28 Law J., Q. B. 139. *Scott v. Dub. & Wick. Rail. Co.*, 11 Ir. Com. Law Rep. 377; *Vaughan v. Cork & Youghal Rail. Co.*, 12 ibid. 297. *Adams v. Lancashire & Yorkshire Rwy., L. R.*, 4 C. P. 738; 38 L. J., C. P. 277. *Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61. *Murphy v. Deane*, 101 Mass. 455. *Macon, etc., R. R. Co. v. Johnson*, 38 Ga. 409. *Dix v. Brown*, 41 Miss. 131. *Wilcox v. Rome, Watertown & Ogdensburg R. R. Co.*, 39 N. Y. 358. *Runyon v. Central R. R. Co.*, 1 Dutch. (N. J.) 566. *Central R. R. Co. v. Moore*, 4 Zab. (N. J.) 824.

contributed to bring upon him(n). If, therefore, children stray upon a railway, and get injured by a passing train, damages cannot be recovered by them from the company, although there should be negligence in the management of the train(o). If a person of full age and mature judgment gets up into the defendant's cart, without any right so to do, and sustains an injury from the negligence of the defendant's servant, the person so trespassing is precluded from recovering damages from the defendant(p). "If," observes Domat, "any one goes across a public cricket-ground whilst people are playing there, and the ball, being struck, chances to hurt him, the injury is to be imputed to the imprudence of the person who sought out the danger, and not to the innocent striker of the ball"(q). Where, the plaintiff and defendant being jointly interested in the pulling down and rebuilding of a party-wall between their respective houses, each appointed an agent to superintend the execution of the work, and the work was negligently done, and the plaintiff's house was much injured from the want of proper support during the execution of the work, it was held that he could not maintain an action for damages against the defendant, as the blame was the common blame of both. "Since the wall," observes Lord Ellenborough, "was taken down by both, neither could impute negligence to the other"(r). If an obstruction has been negligently placed in a public thoroughfare by the defendant, and the plaintiff has ridden against it, he cannot recover damages from the defendant if it appears that he was riding at an improper pace, or was intoxicated, and could have avoided the obstruction if he had ridden with reasonable and ordinary care(s). If

(n) *Jervis, C.J., Martin v. Gt. North. Rail. Co.*, 16 C. B. 192. *Wise v. Gt. West. Rail. Co.*, 1 H. & N. 63; 25 Law J., Exch. 261. *Ante*, pp. 24-28. *Owen v. Hudson River R. R. Co.*, 35 N. Y. 516. *Gonzales v. New York & Harlem R. R. Co.*, 38 N. Y. 440. *Murphy v. Deane*, 101 Mass. 455. *Baltimore, etc., R. R. Co. v. State*, 29 Md. 232. *Northern, etc., R. R. Co. v. State*, id. 420. *Conlin v. Charleston*, 15 Rich. (S. C.) L. 201. *Curran v. Warren Chemical & Manufacturing Co.*, 36 N. Y. 153. *Gay v. Winter*, 34 Cal. 153. *Meyer v. Pacific R. R. Co.*, 40 Mo. 151. *Kellogg v. The T. D. Hine*, 19 La. An. 304. *Callahan v. Warne*, 40 Mo. 131. *Toledo, etc., R. R. Co. v. Goddard*, 25 Ind. 185. *McAunich v. Mississippi, etc., R. R. Co.*, 20 Iowa, 338. *Haley v. Earle*, 30 N. Y. 208. *Michigan, etc., R. R. Co. v. Leahey*, 10 Mich. 193. *Merch v. Concord R. R. Co.*, 9 Foster (N. H.), 9. *Steele v. Burkhardt*, 104 Mass. 59.

(o) *Singleton v. E. C. R. Co.*, 7 C. B., N. S. 287. *Abbott v. Macfie, ante*, p. 26. That the doctrine of the text requires modification, see *Kay v. Pennsylvania R. R. Co.*, 65 Penn. St. 269; *Ihl v. Forty Second Street R. R. Co.*, 47 N. Y. 317; *Daley v. Norwich & Worcester R. R. Co.*, 26 Conn. 591; *North Pennsylvania R. R. Co. v. Mahoney*, 57 Penn. St. 187; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *Boland v. Missouri R. R. Co.*, 36 Mo. 484.

(p) *Lygo v. Newbold*, 9 Exch. 306; 23 Law J., Exch. 109. As to boys climbing on a cart, see *Lynch v. Nurdin, ante*, p. 26.

(q) Domat, liv. 2, tit. 8, s. 4.

(r) *Hill v. Warren*, 2 Stark. 378.

(s) *Butterfield v. Forrester*, 11 East, 60.

the risk is obvious, the plaintiff ought not to incur it(*t*), but should proceed to remove the obstruction (*ante*, p. 233), or take legal proceedings for its removal, and for the recovery of the damages he has sustained by being deprived of the use of the thoroughfare. In the Court of Admiralty, in cases of collision, where both vessels are to blame, the damages, when recovered, are, as we have seen, divided between the delinquent ships(*u*).

If a rule established for securing the safety of workmen in a dangerous employment is habitually violated, to the knowledge of the workman himself, the latter has no ground to recover damages from the employer for injuries sustained from the non-observance of the rule(*x*).

568 *Negligence on the part of the plaintiff forming no impediment to an action for damages.*—Negligence or misconduct on the part of the plaintiff does not, as we have seen, prevent him from recovering damages in those cases where the negligence or misconduct has not been an immediate co-operative cause of the injury of which he complains(*y*).

569 *Injuries from the negligence of skilled workmen and professional men.*—It is the duty of every workman who undertakes the performance of work, to execute it with care and diligence, and with the ordinary amount of skill and knowledge incident to his particular craft, art or profession. If a carpenter undertakes to roof a barn, or build a shed, and employs defective materials, or does his work so negligently and unskilfully that the roof, when finished, will not keep out the rain, he is responsible in damages to his employer(*z*). If a builder undertakes to build a house, and builds it out of the perpendicular, or neglects to examine the ground and secure proper foundations for the building, and constructs the walls so carelessly and negligently that a settle-

(*t*) *Clayards v. Dethick*, 12 Q. B. 446. See *Wyatt v. Gt. West. Rail.*, 34 L. J., R. B. 204.

(*u*) *The Milan*, *ante*, p. 434. *The Favorita*, 1 Benedict, D. C. 23. *The Electra*, *id.* 282. *Meigs v. The Northerner*, 1 Wash. Terr. 91. *The Marcia* *Tribun*, 2 Sprague, 17. *O'Neil v. Sears*, *id.* 52. *Phoenix*, 3 Blatch. C. C. 273. *Thomas Martin*, *id.* 517. *Rival*, Sprague, 128. *Lenox v. Winisimmet Co.*, *id.* 160. *Allen v. Mackay*, *id.* 219. *Chamberlain v. Ward*, 21 How. (U. S.) 548.

(*x*) *Senior v. Ward*, 1 Ell. & Ell. 335; 28 L. J., Q. B. 139.

(*y*) *Ante*, pp. 25-27. *Silliman v. Lewis*, 49 N. Y. 379. *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75. *Haley v. Earle*, 30 N. Y. 208. *Buel v. New York Central R. R. Co.*, 31 N. Y. 314. *Morrissey v. Wiggins' Ferry Co.*, 43 Mo. 380. *Meyer v. People's R. R. Co.*, 43 Mo. 523. *Northern*, *etc.*, R. R. Co. v. State, 29 Md. 420. *Conlin v. Charleston*, 15 Rich. (S. C.) L. 201. *Flynn v. San Francisco*, *etc.*, R. R. Co., 40 Cal. 14. *Walker v. Westfield*, 39 Vt. 246. *Richmond v. Sacramento*, *etc.*, R. R. Co., 18 Cal. 351. *West v. Martin*, 31 Mo. 375. *Brown v. Illius*, 27 Conn. 84. *Isbell v. New York*, *etc.*, R. R. Co., 27 Conn. 393. *Indianapolis*, *etc.*, R. R. Co. v. Caldwell, 9 Ind. 397. *Grant v. Moseley*, 29 Ala. 302. *Steele v. Burkhardt*, 104 Mass. 59. See *Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Murphy v. Deane*, 101 Mass. 455.

(*z*) *Broom v. Davis*, cited in *Batten v. Butter*, 7 East, 479, *n.* *Moneypenney v. Hartland*, 2 C. & P. 378.

ment takes place and cracks make their appearance, and the structure becomes a dangerous nuisance, the builder is responsible in damages for negligence(*a*). So if he is guilty of negligence in not sufficiently underpinning the adjoining house, whereby such adjoining house is injured; and the penalty imposed by s. 94 of the Metropolitan Building Act (18 & 19 Vict. c. 122), on a building owner who, in making his own buildings, damages those adjoining, is cumulative(*b*).

The degree of skill and diligence which is required from the workman depends upon the nature and extent of his public profession, and rises in proportion to the value, the delicacy, and the beauty of the work he undertakes to execute, and the fragility and brittleness of the materials intrusted to him to work upon(*c*). Clockmakers, jewelers, opticians, and all kinds of skilled workmen and all persons belonging to the learned professions (except barristers), are responsible in damages if they profess to accomplish more than they are able to perform, and undertake works of skill without being possessed of sufficient skill, or apply less than the occasion requires(*d*). "Every person," observes Tindal, C.J., "who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon impliedly undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill, but he undertakes to bring a fair and competent degree of skill"(*e*). So a chymist will be liable for negligence in compounding hair wash, by which the plaintiff's wife was injured(*f*).

570 *Negligence of attorneys and solicitors*(*g*).—Every client has a right to the exercise, on the part of his attorney, of care and diligence in the execution of the business intrusted to him, and to a fair average amount of professional skill and knowledge; and if attorneys have

(*a*) *Harman v. Cornelius*, 5 C. B., N. S. 236; 28 Law J., C. P. 88. *Farnsworth v. Garrard*, 1 Campb. 39. *Duncan v. Blundell*, 3 Stark. 7. *Munro v. Butt*, 8 Ell. & Bl. 738. *Williams v. Fitzmaurice*, 3 H. & N. 844.

(*b*) *Williams v. Golding*, L. R., 1 C. P. 69. See *ante*, p. 213.

(*c*) Addison on Contracts, 6th edit. 399.

(*d*) *Seare v. Prentice*, 8 East, 352. *Slater v. Baker*, 2 Wils. 359.

(*e*) *Lamphier v. Phipps*, 8 C. & P. 479. *Hancke v. Hooper*, 7 C. & P. 81. See *Smathers v. Hanks*, 34 Iowa, 286; *Almonds v. Nugent*, id. 300; *Gallaher v. Thompson*, Wright, 466.

(*f*) *George v. Skivington*, L. R., 5 Exch. 1. See *Norton v. Sewall*, 106 Mass. 143; *Thomas v. Winchester*, 6 N. Y. 397; *Fleet v. Hollenkemp*, 13 B. Monr. 219. So of a patent agent for negligence in not being aware of a legal decision which made an important change in the practice of obtaining patents. *Lee v. Walker*, L. R., 7 C. P. 121.

(*g*) As to their duty to keep accounts, see *Ex parte Neville*, L. R., 4 Ch. App. 43. No agreement between an attorney and his client as to the former's remuneration made in pursuance of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), will absolve such attorney from the consequences of his negligence. See s. 7.

not as much of these qualities as they ought to possess, or if, having them, they have neglected to employ them, the law makes them responsible for the loss which has accrued to their clients from their deficiencies(*h*). It is the duty of every attorney and solicitor to act with fidelity to his client, and to keep the secrets of the latter; "for if a man, being intrusted in his profession, deceive him who intrusted him, or if a man retained of counsel become afterward of counsel with the other party in the same cause, or discover the evidence or secrets of the cause; or if an attorney act deceptive, to the prejudice of his client, or make default by collusion with others, whereby his client is injured, an action lies for damages"(*i*). If an attorney, when his client's deeds are put into his hands, for the purpose of raising money, discloses defects of title to the person who was about to lend, and the client sustains damage therefrom, the attorney is responsible for neglect of duty, and cannot shelter himself from the consequences by showing that he was also employed on the part of the proposed lender, and was actuated by a sense of justice towards him; for whenever an attorney finds that he has a conflicting duty to discharge towards his several clients, he must at once withdraw from the inconsistent employment, and decline to act in the matter(*ii*). Whenever the attorney has his client's title-deeds put into his hands for any purpose whatever, "he is to consider his lips sealed with a sacred silence as to the whole of their contents"(*k*).

It is also the duty of every attorney, by reason of the emolument he receives for the exercise of his professional skill, to take care that his client does not enter into any covenant or stipulation that may expose him to a larger responsibility than the nature of the business he is instructed to transact may, in the ordinary course of practice, require. If the stipulations are more onerous in their consequences than usual, the matter should be fully explained to the client, and the unusual extent of liability be made known to him(*l*).

If an attorney conducting a suit neglects to comply with the practice or orders of the court, and neglects to take some necessary step

(*h*) *Hart v. Frame*, 6 Cl. & Fin. 209. *Russell v. Palmer*, 2 Wils. 325. *Holmes v. Peck*, 1 R. I. 242. *Stevens v. Walker*, 55 Ill. 151. *O'Barr v. Alexander*, 37 Ga. 195. *Reilly v. Cavanaugh*, 29 Ind. 435. *Goodman v. Walker*, 30 Ala. 482. *Cox v. Sullivan*, 7 Ga. 144. *Wilson v. Russ*, 7 Shep. 421. As to the liabilities of a firm for the negligence, etc., of one member of it, see *Dundonald (Earl of) v. Masterman*, L. R., 7 Eq. Ca. 504; 38 Law J., Ch. 350; *Bickford v. Darcy*, L. R., 1 Exch. 354.

(*i*) Com. Dig., Action on the Case for Deceit, A. 5.

(*ii*) See *Williams v. Reed*, 3 Mason, 405.

(*k*) *Tindal, C.J., Taylor v. Blacklow*, 3 B. N. C. 235.

(*l*) *Stannard v. Ullithorne*, 4 M. & Sc. 376; 10 Bing. 491.

in the cause, by means whereof all the previous proceedings become useless, he will be responsible in damages to his client(*m*). And the same consequences follow if he brings an action for his client, within a limited jurisdiction, on a cause of action manifestly arising out of the jurisdiction(*n*), or negligently suffers judgment to go by default when he is retained to defend an action(*o*); or fails to instruct counsel properly, and to deliver briefs in sufficient time to enable his counsel effectively to perform the duty intrusted to him; or if he is not present in person, or by his agent at the trial, to see that the witnesses are forthcoming when called upon(*p*). When present at the trial, it is the duty of the attorney not to suffer the case to be called on, unless he has previously ascertained that all the necessary witnesses are in attendance(*q*); but he is not bound to search after his counsel, nor is he answerable for the non-attendance or neglect of the latter(*r*). If he has received instructions from his client not to compromise an action he is retained to prosecute, he will be guilty of a breach of duty if he does compromise, and cannot shelter himself from an action by showing that it was done under the advice of counsel(*s*), although that circumstance might go in reduction of damages. But in the absence of a distinct prohibition to compromise, the general authority of an attorney is sufficient for that purpose(*t*).

"It would be extremely difficult," observes Tindal, C.J., "to define the exact amount of skill and diligence which an attorney undertakes to furnish in the conduct of a cause. The cases, however, appear to establish in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of his court(*tt*), for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his de-

(*m*) *Bracey v. Carter*, 12 Ad. & E. 373. *Frankland v. Cole*, 2 Cr. & J. 590. *Pitt v. Yalden*, 4 Burr. 2063.

(*n*) *Williams v. Gibbs*, 6 N. & M. 788.

(*o*) *Godefroy v. Jay*, 5 M. & P. 297; 7 Bing. 419; *Smallwood v. Norton*, 2 App. 83; *Grayson v. Wilkinson*, 5 Smedes & Marsh. 283. As to the liability of an attorney for negligence in the collection of a debt, see *Wilson v. Coffin*, 2 Cush. (Mass.) 316; *Stevens v. Walker*, 55 Ill. 151; *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 2 Chip. 117; *Oldham v. Sparks*, 28 Texas. 425. For negligence in issuing execution, see *Phillips v. Bridge*, 11 Mass. 246. In not applying for a new trial, *Hastings v. Halleck*, 13 Cal. 203.

(*p*) *Hawkins v. Harwood*, 4 Exch. 506; 19 Law J., Exch. 33. *De Rouffigny v. Peale*, 3 Taunt. 483. *Svannel v. Ellis*, 8 Moore, 340; 1 Bing. 347.

(*q*) *Reece v. Rigby*, 4 B. & Ald. 202.

(*r*) *Lowry v. Guildford*, 5 C. & P. 234.

(*s*) *Fray v. Voules*, 1 El. & El. 839; 28 Law J., Q. B. 232. *Butler v. Knight*, L. R., 2 Exch. 109.

(*t*) *Pristwick v. Paley*, 34 L. J., C. P. 189. *Butler v. Knight*, *supra*.

(*tt*) See *Lee v. Walker*, *ante*, p. 496.

partment of the profession ; but he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law, unless he has thought fit to act upon his own judgment and opinion respecting matters which ought to have been laid before counsel"(u). *Prima facie* the attorney's retainer ceases on judgment being obtained, but it may be renewed by any acts showing the client's intention that he shall continue to act in that relation(x).

If an attorney is employed to investigate the title to an estate, or to seek out an eligible investment, and obtain good security for money advanced, and the title is obviously defective, or the security is manifestly bad or insufficient, the attorney will be responsible for his negligence both at common law and in equity(y). But he is not responsible for an advance on a mortgage which turns out a deficient security, if he has taken the opinion of a competent surveyor as to the value of the property(z). He is not justified in relying upon an extract from a will furnished to him by his client, unless the latter agrees to take the entire responsibility upon himself ; but he ought to search for and examine the original will(a). If he relies upon his own judgment and opinion as to the interpretation and legal operation of deeds and conveyances, he does so at his peril. If he draws a wrong conclusion from them, he will be responsible in damages to his client. He ought, therefore, to lay them before counsel, if he wishes to avoid the responsibility of acting upon his own judgment respecting them(b).

If, when retained by a client who is about to advance his money on the security of a mortgage, he has reason to suspect that the intended mortgagor has been insolvent, or in embarrassed circumstances, he will be responsible for a breach of duty if he neglects to make searches in the proper quarter to ascertain whether such intended mortgagor has ever taken the benefit of the Insolvent Act(c) ; or to make inquiry

(u) *Godefroy v. Dalton*, 6 Bing. 468. *Purves v. Landell*, 12 Cl. & Fin. 98. *Shilcock v. Passman*, 7 C. & P. 292. *Kemp v. Burt*, 4 B. & Ad. 431. *Long v. Orsi*, 18 C. B. 610. *Cox v. Leech*, 1 C. B. N. S. 617. *Ireson v. Pearman*, 3 B. & C. 812, 813. *Townley v. Jones*, 8 C. B. N. S. 289. See *Morrill v. Graham*, 27 Texas, 646.

(x) *Butler v. Knight*, *supra*. But see *Smyth v. Harvie*, 31 Ill. 62.

(y) *Knight v. Quarles*, 4 Moore, 532 ; 2 B. & B. 102. *Whitehead v. Greetham*, 10 Moore, 183 ; 2 Bing. 464. *Howell v. Young*, 5 B. & C. 259. *Chapman v. Chapman*, L. R., 9 Eq. Ca. 276. See *Watson v. Muirhead*, 57 Penn. St. 161.

(z) *Chapman v. Chapman*, *supra*. As to his duty to get the best price for property intrusted to him for sale, see *Morgan v. Steble*, L. R., 7 Q. B. 611.

(a) *Wilson v. Tucker*, 3 Stark. 156.

(b) *Ireson v. Pearman*, 3 B. & C. 813 ; 5 D. & R. 699.

(c) *Cooper v. Stephenson*, 21 Law J., Q. B. 292.

whether there are any existing incumbrances on the property(*d*). If he neglects to register a judgment, or to file a cognovit or warrant of attorney, or to file writs, and his client sustains damage from his default, he will be responsible for the consequences(*e*). Nor has he any implied authority, after judgment in favor of his client, to enter into an agreement on his behalf to postpone execution(*f*). When employed by a purchaser of leasehold property, he is not exonerated from the duty of investigating the title of the vendor by a stipulation in the conditions of sale that the lessor's title is not to be gone into, and that no abstract of the vendor's title will be furnished. He must, nevertheless, ascertain that the vendor has a lease, and that the whole transaction is not a mere pretence(*g*).

571 *Negligence of barristers*.—There is no instance of any action having been successfully brought against a barrister for neglect of duty; but if a barrister intentionally does a wrong, and acts with malice, fraud, or treachery in the discharge of his professional duties he will be responsible, like every other wrong-doer, for the mischief thereby occasioned(*h*).

572 *Negligence of surveyors or valuers*.—Where the plaintiff undertakes to perform work to the satisfaction of the defendants' surveyor, payment to be made only on the certificate of such surveyor, if the defendants and the surveyor collude to withhold the giving of the certificate to prevent the plaintiff from being paid for his work, there is abundant authority, both at law and in equity, that the defendants cannot shelter themselves by means of any such misconduct(*i*). But a declaration against the defendant, that his surveyor wrongfully and improperly neglected and refused to give his certificate, discloses no cause of action, for that would be to substitute the opinion of a jury for a certificate of the surveyor, which it was the very object of the contract to prevent(*k*). Where two persons were employed to value between the incoming rector and the representatives of the deceased incumbent, and the defendant, through ignorance of the true principle for the valuation of ecclesiastical dilapidations, valued so favorably to the opposite party and adversely to the plaintiff, that his valuation was

(*d*) *Hopgood v. Parkin*, L. R., 11 Eq. Ca. 74. See *Ratcliffe v. Barnard*, L. R., 6 Ch. App 652.

(*e*) *Hunter v. Caldwell*, 10 Q. B. 82; 16 Law J., Q. B. 274.

(*f*) *Lovegrove v. White*, L. R., 6 C. P. 440.

(*g*) *Allen v. Clark*, 11 W. R. 304.

(*h*) *Swinfen v. Id. Chelmsford*, 5 H. & N. 918; 29 Law J., Exch. 332.

(*i*) *Erle, C.J., Clarke v. Watson*, 34 L. J., C. P. 148.

(*k*) *Clarke v. Watson*, *supra*.

accepted, it was held that he was liable for the results of his ignorance(*l*).

573 *Negligence of bank-managers*.—It has been mentioned, *ante*, p. 11, that a refusal by a banker to honor his customer's cheque, if he has sufficient funds in his hands, is actionable. It is no breach of duty on the part of the manager of a bank to discount bills for companies in which he is interested, provided the advances are made within the scope of his authority and in the ordinary course of business, and no allegation of *mala fides* can be sustained, nor is he, it seems, under any obligation to disclose to the directors the fact that he is a shareholder in companies keeping accounts with the bank(*m*). It has never been decided whether there is any legal obligation on a banker not to disclose the state of his customer's account except upon a reasonable and proper occasion; but, assuming that such an obligation exists, the question what is a reasonable occasion is clearly one for the jury to decide, and if the customer sustain any special damage by the banker having disclosed the state of his account, the banker would, it seems, be responsible(*n*). A banker is not liable for the loss of a box left under his care by a customer for safe custody, of which the customer keeps the key, and for which no payment is made, if it be stolen by one of the clerks of the bank, unless the loss was occasioned by gross negligence on the part of the banker(*o*). But if a banker or banking company undertakes the custody of securities for a customer and charges a commission for the receipt of the dividends from them, they would, it seems, be liable for negligence, if they left the securities in the uncontrolled power of their clerk or manager, who fraudulently disposed of them(*p*).

574 *Negligence of directors of public companies*.—If directors of a joint-stock company receive the deposits of shareholders for a company with certain objects, and subsequently, by the memorandum of association, register other and different objects, the shareholder may defend an action for calls, and obtain the cancellation of the contract in equity, and, it would seem, may, at least in cases of actual fraud, sue the directors in a court of equity for neglect of duty, and so obtain the return of the money deposited(*q*). And the official liquidator, on

(*l*) *Jenkins v. Betham*, 15 C. B. 168; 24 L. J., C. P. 94.

(*m*) *Bank of Upper Canada v. Bradshaw*, L. R., 1 P. C. Ca. 479.

(*n*) *Hardy v. Veasey*, L. R., 3 Exch. 107.

(*o*) *Giblin v. McMullen*, *post*, p. 527. See *Foster v. Essex Bank*, 17 Mass. 500.

(*p*) *Re United Service Co.*, L. R., 6 Ch. App. 212.

(*q*) *Stewart v. Austin*, L. R., 3 Eq. Ca. 299. *Ship v. Crosskill*, L. R., 10 Eq. Ca. 73.

behalf of all the shareholders, or the individual shareholders, according to circumstances, may institute a suit in equity against the directors for the purpose of compelling them to make good losses occasioned by their misconduct in the management of the company's affairs, *e.g.*, by their acting contrary to provisions in the deed of settlement, issuing false balance-sheets, paying dividends out of capital(*r*), paying bonuses without a proper balance-sheet, or making due allowance for risks which the company had incurred, etc.(*s*). But the directors of a company, who purchase the business of an insolvent partnership composed of men possessed of real estate, are not necessarily liable for negligence, in not taking mortgages on the estates of such partners(*t*). Nor would they as a body be liable for the acts of a few of their number, acting as an executive committee, who, with a view to enhance the price of the shares, bought them with the company's money, but concealed the transaction under color of a loan to third persons apparently solvent and respectable(*u*). Nor for publishing a debtor and creditor account of the company, in which they credited the company with debts as good, believing them to be such, which subsequently turned out to be bad, and issuing fresh shares at a premium on that assumption(*x*).

SECTION II.

OF ACTIONS FOR NEGLIGENCE—DIRECT AND CONSEQUENTIAL INJURIES.

575 *Actions for compensating the families of persons killed by negligence.*—

By 9 & 10 Vict. c. 93, it is enacted, that whensoever the death of a person shall be caused by any wrongful act, neglect, or default, which, if death had not ensued, would have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to

(*r*) *Turquand v. Marshall*, L. R., 6 Eq. Ca. 112; 4 Ch. App. 376; 38 L. J., Ch. 639. See *General Exchange Bank v. Horner*, L. R., 9 Eq. Ca. 480.

(*s*) *Rance's case*, L. R., 6 Ch. App. 104.

(*t*) *Overend & Co. v. Gurney*, L. R., 4 Ch. App. 701. Nor for mere imprudence, not amounting to *crassa negligentia*, fraud, or malfeasance. *Overend & Co. v. Gibb*, L. R., 5 Engl. & Ir. App. 480.

(*u*) *Land Credit Co. of Ireland v. Lord Fermoy*, L. R., 5 Ch. App. 783.

(*x*) *Jackson v. Turquand*, L. R., 4 Engl. & Ir. App. 395.

an action for damages(*y*), although the death shall have been caused under such circumstances as amount in law to felony. And (s. 2) that every such action shall be for the benefit of the wife, husband, parent, and child(*z*) of the deceased person, and shall be brought by, and in the name of, his executor or administrator(*a*), and the damages recovered, after deducting certain costs, shall be divided amongst the before-mentioned relatives, in such shares as the jury by their verdict shall find and direct. But not more than one action shall (s. 3) be brought in respect of the same subject-matter of complaint, and the action must be commenced within twelve calendar months after the death of the deceased person, and the plaintiff must deliver (s. 4), together with the declaration of his cause of action, a full particular of the persons on whose behalf the action is brought, and of the nature of the claim(*b*). If the deceased has brought an action in his lifetime, or has received satisfaction during his life in respect of the injury, no fresh action, or no action, as the case may be, can be brought by his personal representatives after his death(*c*).

Contributory negligence on the part of the deceased will be a bar to an action by his personal representatives where the deceased himself, if he had lived, could have maintained no action for the injury(*d*). But if the circumstances of the negligence were such that, if death had not ensued, the deceased might have brought his action in respect of it, his representatives may maintain an action in respect of pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to the deceased himself, had he lived.

The loss of the benefit of education, and of the enjoyment of the comforts and conveniences of life, depending upon the possession of pecuniary means to obtain them, through the death of a father, whose income ceases with his life, is an injury in respect of which an action can be maintained on the statute; and so, also, is the loss of a pecuniary provision which fails to be made, owing to the premature death of a person by whom such provision would have been made had he lived;

(*y*) See *The Guldfaxe*, *ante*, p. 483. See Laws of New York, 1847, ch. 450; Laws of 1849, ch. 256; North Carolina Rev. Code, ch. 1; *Kesler v. Smith*, 66 N. C. 154; Maryland Code, art. 65.

(*z*) An illegitimate child is not within the purview of the statute. *Dickinson v. North East Rail. Co.*, 33 Law J., Exch. 91.

(*a*) In case there is no executor, etc., or of his unwillingness, etc., to sue, the action may be brought by the persons beneficially interested. 27 & 28 Vict. c. 95.

(*b*) *Duckworth v. Johnson*, 4 H. & N. 653.

(*c*) *Read v. Great East. Rail. Co.*, L. R., 3 Q. B. 556.

(*d*) *Ante*, pp. 24-28, Contributory Negligence.

for wherever there is a reasonable expectation of pecuniary advantage from the prolongation of the life of a person, the extinction of such expectation by negligence occasioning his death will be sufficient to sustain an action upon the statute(e).

576 *Actions at law, and proceedings in the High Court of Admiralty for negligence.*—The High Court of Admiralty has jurisdiction over all causes of action arising from collisions between vessels caused by negligence either in a port or river, or on the British seas or high seas(f), and over any claim for damage done by any ship(g). The proceeding in the Court of Admiralty is an action *in rem*, the first step in the process being a seizure of the delinquent ship, which is impounded and detained to answer the plaintiff's claim; but the proceedings may be either *in rem* or *in personam*(h). The Trinity Masters attend to assist the Court, and this has been thought to make it a desirable tribunal for the trial of causes involving questions of nautical skill and science(i). Proceedings *in rem* in the Admiralty Court are no bar to an action for damages(k), but the Admiralty Court may provide against the parties being harassed by actions for the same collision by other parties, by providing that the compensation awarded shall not be paid till such other parties have released their claims(l). In the Court of Admiralty, in cases of collision where both ships are to blame, and the provisions of the Merchant Shipping Act do not intervene, the owners of the cargo, equally with the owner of the ship, recover a moiety of the damage(m). The remedy is equally open to the ship-owner and the owner of the cargo.

By the Mercantile Shipping Act, 1854 (17 & 18 Vict. c. 104), it is enacted (s. 512), that in cases where *loss of life* or *personal injury* has occurred by any accident, in respect of which the shipowner is alleged to be liable in damages, no person shall be entitled to bring an action until the completion of any inquiry that may be instituted by the Board of Trade, or until the Board of Trade has refused to institute an inquiry; and the Board of Trade is to be deemed to have refused whenever notice has been served on it by any person of his desire to

(e) *Pym v. Gt. North. Rail. Co.*, 31 Law J., Q. B. 249; 32 ib. 377. *McIntyre v. New York Central R. R. Co.*, 37 N. Y. 287. *Tilley v. Hudson River R. R. Co.*, 24 N. Y. 471. *Kresler v. Smith*, 66 N. C. 154. See *Pennsylvania R. R. Co. v. Keller*, 67 Penn. St. 300.

(f) 4 Inst. c. 22; 7 & 8 Vict. c. 2; 3 & 4 Vict. c. 63. *The Melvina*, 31 Law J., Adm. 113.

(g) 24 Vict. c. 10, s. 7. See *ante*, p. 483; *Smith v. Brown*.

(h) *Ibid.* s. 35.

(i) *The Anne & Mary*, 2 W. Rob. 196; and see 23 Jur. part 2, 483.

(k) *Nelson v. Couch*, 33 Law J., C. P. 46.

(l) *The Minna*, L. R., 2 Adm. & Eccl. 97.

(m) *The Milan*, 31 Law J., Adm. 105.

bring an action, and no inquiry is instituted by the Board for one month after service of the notice. And, after the completion of such inquiry, if any person injured estimates the damage at a greater sum than the statutory amount, or (in case of a compromise having been made by the Board) the amount accepted by the Board by way of compensation, such party may, subject to the limitations and restrictions there provided, bring an action for damages (*ante*, pp. 480-486). The owner of a cargo on board a ship that has violated the statute, and so contributed to the injury, is not, as we have seen, prohibited thereby from recovering; in the Court of Admiralty, compensation against another ship which also by negligence contributed to the collision (*ante*, p. 487).

577 *Parties to be made plaintiffs.*—A person who has let chattels out to hire may, nevertheless, sue for damages in respect of a permanent injury to his reversionary interest. Thus, where the owner of a barge, who had let it out to hire to a bailee, brought an action for damages done to it, by reason of the negligence of a third party, it was held that he had a right to sue for the injury, notwithstanding the bailment⁽ⁿ⁾.

578 *Joint and separate rights of action.*—When there are several joint-owners of a chattel which has been damaged or destroyed by negligence, all should be joined as plaintiffs; and if they are not so joined, the defendant may object to the non-joinder, in order that he may not be harassed by several actions for the same cause^(o). Where two persons were owners of a ship in unequal proportions as tenants in common, A being the owner of a fourth part, and the plaintiff of the remaining three-fourths, and the former brought an action against the defendants, the owners of another ship, for wrongfully running down and injuring the vessel in which they were mutually interested, and the defendants omitted to plead the non-joinder of the other part-owner in abatement, and A had judgment, and obtained full satisfaction for all the damage that he had sustained to his share of the ship, and afterwards the plaintiff, the owner of the remaining three-fourths of the ship, sued the same defendants for the damage he had sustained, and the defendants pleaded the non-joinder of A in abatement, and the plaintiff then set forth in his replication the proceedings in the former action, it was held that as the other part-owner had already received satisfaction, he could not be entitled to any part of

(n) *Mears v. Lond. & S.-W. Rail. Co.*, 11 C. B., N. S. 850; 31 Law J., C. P. 220.

(o) *Ante*, pp. 85, 244; *post*, ch. 20.

the damages to be recovered in that action, and that he need not, consequently, be joined as a plaintiff(*p*).

579 *Parties to be made defendants*.—The person who actually inflicts the injury through his own negligence, is of course always responsible for the injurious consequences of his default. “Those,” observes Domat, “who construct works, or who do any other thing from whence may ensue damage to others, will be answerable for that damage, if they have not taken the necessary precautions to prevent it. Thus masons, carpenters, and others, who carry materials up their scaffolds, and those who, from the top of a tree, cut down the branches thereof, must give timely warning to all persons likely to be endangered by their proceedings, and will be answerable in damages if they neglect so to do”(q); but as these persons are generally acting under the directions of some master and employer, and are unable themselves to make compensation in damages to the persons injured, the law properly holds the master and employer responsible for the act of his servant, whether the work is done by a domestic servant or day-laborer, or by a person who works by the job or piece, and contracts to do the work for a specific sum(*r*); provided always, that the workman is an ordinary laborer, personally engaged in the execution of the work, acting under the control of the master, and not a contractor exercising an independent employment, and selecting his own servants and workmen for the performance of the work(*s*).

If the person for whom the work is done selects the servant who is to do it, that will not relieve the master of such servant from liability for his negligence(*t*).

A servant who merely hires laborers for the performance of the master's work, is not answerable for the negligence of such fellow-servants, or for injuries inflicted by them in the course of their employment. Thus a gardener or a steward, who employs laborers under him to do his master's work, is not answerable for the defaults or improper conduct of such laborers causing damage to a third person. In such cases the action must either be brought against the hand

(*p*) *Sedgworth v. Overend*, 7 T. R. 280. *Bloxam v. Hubbard*, 5 East, 420. Under the Pennsylvania statutes an action against a railroad company for negligently causing the death of a parent is properly brought in the name of all the children. *North. Penn. R. R. Co. v. Robinson*, 44 Penn. St. 175.

(*q*) Domat, liv. 2, tit. 8, s. 4.

(*r*) *Ante*, pp. 30-34. *Birket v. Whitehaven Junco. Rail. Co.*, 4 Exch. 137.

(*s*) *Sadler v. Henlock*, 4 Ell. & Bl. 578; 24 Law J., Q. B. 138.

(*t*) *Holmes v. Onion*, 2 C. B., N. S. 790; 26 Law J., C. P. 263; *ante*, p. 30.

committing the injury, or against the owner for whom the act was done(u), or against both the one and the other jointly(x).

Where the lessee of a ferry hired of the defendants a steamer with a crew, for the day, to carry his passengers, it was held that the defendants were liable for injuries caused to the passengers by the negligence of the crew, who were the servants of the defendants, although the passengers contracted with the lessee of the ferry for conveyance in the steamboat, and paid their fares to such lessee(y).

The liability of any one other than the person actually doing the act from whence the injury results, proceeds on the maxim *qui facit per alium facit per se*. The master has the selection of the servant employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule nor the rule itself can apply to a case where the person sought to be charged does not stand in the character of employer and master to the person by whose negligent act the injury has been occasioned(z). Therefore where the defendant employed a carpenter to make a signboard, and obtained permission for him to make it in the plaintiff's shed, and the carpenter in lighting his pipe negligently set fire to the shed, it was held that the plaintiff could not recover against the defendant, for the act of the carpenter in lighting his pipe was not connected with the employment on which he was engaged by the defendant(a).

The master is not relieved from his responsibility for the wrongful act of his servant whilst doing his master's work, merely because an Act of Parliament has limited and controlled the choice of the master in the selection of his servants, and has compelled him to choose from a particular class of skilled or educated persons, supposed to be peculiarly fitted for the performance of the duties intrusted to them to discharge(b).

The general rule is, that the person injured by the negligence of another, cannot go beyond the person who actually did the injury,

(u) *Stone v. Cartwright*, 6 T. R. 411.

(x) *Wilson v. Peto*, 6 Moore, 49. A joint action will lie against both master and servant for a personal injury caused by the negligence of the servant in the discharge of his duties to his master and in the absence of the latter. *Phelps v. Wait*, 30 N. Y. 78. *Wright v. Wilcox*, 19 Wend. 343. *Montfort v. Hughes*, 3 E. D. Smith, 591. *Suydam v. Moore*, 8 Barb. 358. *Hewett v. Swift*, 10 Am. Law Reg. 505. But see *Parsons v. Winchell*, 5 Cush. 592.

(y) *Dalyell v. Tyrer*, El., Bl. & El. 899; 28 L. J., Q. B. 52.

(z) *Reedie v. London & North-West. Rail. Co.*, 4 Exch. 255.

(a) *Williams v. Jones*, 33 Law J., Exch. 297.

(b) *Martin v. Temperley*, 4 Q. B. 298.

unless he can establish that the latter stood in the relation of a servant to the defendant, or that the injury was the inevitable result of some specific order given by the defendant. There are two classes of cases: the first, where the act is done under the order of the employer, and the order cannot be obeyed without doing what is complained of; the second, where the improper mode of doing what might be rightly done occasions the mischief(*bb*). Endeavors have been made to hold all parties liable from whom the act ultimately originates; but it has been held, that if the act ordered to be done can be lawfully done without injury to others, the act of the person personally engaged in doing the mischief is not the act of the person who set him in motion, unless the relationship of master and servant can be established between them(*c*).

580 *Contractor and sub-contractor*.—Although, therefore, a person has ordered or directed a particular thing to be done, yet if he does not employ his own servants and workmen to do it, but intrusts the execution of the work to a person who exercises an independent employment, and has the immediate dominion and control over the workmen engaged in the work, he is not responsible for injuries done to third persons from the negligent execution of the work(*d*); unless a nuisance is thereby created and continued on his own premises (*ante*, p. 247). Thus, where a butcher employed a licensed drover in the way of his ordinary calling to drive a bullock from Smithfield to the butcher's slaughter-house, and the drover negligently sent an inexperienced boy with the bullock, who drove the beast into the plaintiff's show-room, where it broke several marble chimney-pieces, it was held that the butcher was not answerable for the damage(*e*). And where a company, empowered by Act of Parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractors' workmen for incompetence, and the workmen, in constructing a bridge over a highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall

(*bb*) In the first class of cases both the employer and contractor are liable; in the second, the contractor alone is responsible. *Chicago v. Robbins*, 2 Black (U. S.), 413. *Homan v. Stanley*, 66 Penn. St. 464. *Allen v. Willard*, 57 Penn. St. 374. *Clark v. Fry*, 8 Ohio, N. S. 358. *Eaton v. European & Northern R. R. Co.*, 59 Me. 520. But if in the latter case the negligent act was done under the direction of the employer, both the employer and contractor would be liable, but separately. *Clark v. Fry*, 8 Ohio, N. S. 358.

(*c*) *Butler v. Hunter*, 7 H. & N. 826; 31 Law J., Exch. 214. *Cincinnati v. Stone*, 5 Ohio, N. S. 38. *Allen v. Willard*, 57 Penn. St. 374. *Stevens v. Armstrong*, 6 N. Y. 435.

(*d*) *Cuthbertson v. Parsons*, 12 C. B. 304. *Eaton v. European & Northern R. R. Co.*, 59 Me. 520. *Forsyth v. Hooper*, 11 Allen (Mass.), 419. *Kellogg v. Payne*, 21 Iowa, 575. *Allen v. Willard*, 57 Penn. St. 374. *Schwartz v. Gilmore*, 45 Ill. 455.

(*e*) *Milligan v. Wedge*, 12 Ad. & E. 737.

upon him, it was held, in an action against the company by the administratrix of the deceased, that they were not liable(*f*). And it is immaterial that the defendant lends some of his own men to the contractor, if they are acting substantially as the contractor's servants at the time of the injury(*g*). But where the defendants, who were occupiers of a bonded warehouse in Liverpool, employed a master-porter for the purpose of removing some barrels of flour from their warehouse and lowering them into a cart, and the master-porter used his own tackle, and brought and paid his own men; and, through the negligence of the men or the insufficiency of the tackle, one of the barrels slipped from the tackle whilst it was being lowered into the cart, and fell upon the plaintiff and injured him, it was held that the defendants were responsible for the injury(*h*). Here the work, it has been observed, was in effect done by the defendants themselves at their own warehouse, the workmen, though engaged by the master-porter, being under the control of the defendants, and acting substantially as their servants(*i*), and it is upon this ground alone it seems, that the above case can be supported(*k*).

After the contract has been properly completed, and the works handed over to the commissioners or persons who have employed the contractor, the liability of the contractor ceases, and for any subsequent injury caused by the natural result of the work the contractor has completed, the commissioners and not the contractor will be responsible; as where the defendant, under a contract with the Metropolitan Board of Works, opened a highway for the purpose of constructing a sewer thereunder, and after finishing the sewer, properly filled in and made good the road, which, however, subsequently subsided, which is the natural result of such opening the road and loosening the materials of which it is composed, and the plaintiff's horse stumbled in one of the holes so caused and was injured(*l*).

581 *Negligence of servants working under builders, contractors and sub-contractors.*—Where work which can lawfully be done without injury to others is placed in the hands of a builder or contractor, who selects his own workmen and servants for the performance of the work, and

(*f*) *Reedie v. Lond. & N.-W. Rail. Co.*, 4 Exch. 344. See *Eaton v. European & Northern R. Co.*, 59 Me. 520.

(*g*) *Murray v. Currie*, L. R., 6 C. P. 24. See *Wood v. Cobb*, 13 Allen (Mass.), 58.

(*h*) *Randleson v. Murray*, 8 Ad. & E. 109.

(*i*) *Denman, C. J.*, 12 Ad. & E. 741. And see *ante*, p. 220; *West Riding Rail. Co. v. Wakefield Board of Health*. See p. 245.

(*k*) *Murphy v. Caralli*, 34 Law J., Exch. 14.

(*l*) *Hyams v. Webster*, L. R., 2 Q. B. 264; 4 *ibid.* 138. *Bartlett v. Baker*, 34 Law J., Exch. 8, *acc.*

directs the manner of doing it, exercising his own judgment in the matter, and having the immediate control over the workmen, such contractor, and not the person who employs him, is the person responsible for injuries to strangers from the negligent execution of the work^(m). If a person orders his wall or his house to be pulled down, he is not responsible for the negligence of the workmen employed by the builders for the purpose⁽ⁿ⁾. And if the work is done under the immediate control and superintendence of a sub-contractor, then the latter is the party responsible for any wrong done by the workmen he employs in the execution of the work. It must not be understood, however, that a contractor cannot become liable for the negligence of his sub-contractor. If the contractor personally interferes and gives directions to the latter, or to the workmen employed by him, he would be responsible for the orders given, but he cannot be charged simply on the ground of his filling the character of contractor^(o).

Where a builder had contracted with the committee of a club to make alterations and improvements in the club-house, and prepare and fix the necessary gas-fittings, and the builder made a sub-contract with a gas-fitter to do this latter portion of the work, and the gas-fitter's workmen allowed the gas to escape and cause an explosion, which injured the butler of the club and his wife, it was held that the gas-fitter, and not the builder, was liable for the negligence^(p).

582 *Voluntary and involuntary trespasses*.—*Direct and consequential injuries*.—If a squib is thrown amongst a crowd in a public place, and is then tossed from one person to another, the first thrower, and all who have tossed the squib otherwise than in pure self-defence, are responsible, as we have seen, for the injury it occasions^(q). “If *A* takes the hand of *B*, and with it strikes *C*, *A* is the trespasser and not *B*”^(r).

“If,” observes Lord Denman, “I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely

(m) *Steel v. S. E. Rail. Co.*, 16 C. B. 550. *Gray v. Pullen*, 5 B. & S. 790, 981. *Clark v. Fry*, 8 Ohio (N. S.), 358. *Callahan v. Burlington, etc.*, R. R. Co., 23 Iowa, 562. *Hunt v. Pennsylvania R. R. Co.*, 51 Penn. St. 475. *Clark v. Vermont & Canada R. R. Co.*, 28 Vt. 103. *Pawlet v. R. & W. R. R. Co.*, 28 Vt. 298. *Blake v. Ferris*, 5 N. Y. 48.

(n) *Butler v. Hunter*, *ante*, p. 508. See *Benedict v. Martin*, 36 Barb. (N. Y.) 288.

(o) *Overton v. Freeman*, 11 C. B. 873; 21 Law J., C. P. 52. *Blake v. Thirst*, *ante*, p. 246. See *Heffernan v. Benkard*, 1 Rob. (N. Y.) 432.

(p) *Rapson v. Cubitt*, 9 M. & W. 710.

(q) *Scott v. Shepherd*, 3 Wils. 403.

(r) *Gibbons v. Pepper*, 1 Ld. Raym. 38. Bac. Abr. TRESPASS, D. 2, *ante*, pp. 8, 9. Where *F* caught *R* by the arm, swung him around violently and let him go, thereby throwing him against *T*, who immediately pushed him off and against a hook, whereby he was severely injured, it was held that *R* could maintain an action of trespass *vi et armis* against *F*. *Ricker v. Freeman*, 50 N. H. 420.

probable that some other person will unjustifiably set it in motion to the injury of a third party, and if that injury should be so brought about, the sufferer may have redress by action against both or either of the two, but unquestionably against the first. If, for example, a gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the playground of schoolboys, and one of these should playfully point the gun at a schoolfellow, and fire it off and maim him, the gamekeeper must answer in damages to the wounded party”(s). If a horse and cart are left standing in the street without any person to watch them, and a person strikes the horse and causes it to back against a shop-window, the owner is liable for the damages, for he must, as we have seen, take the risk of all the consequences that result from the horse being left unattended(t). In such a case the owner, who has left his cart unattended, and the person who struck the horse, are both liable for the injury(t).

“If I deliver my horse to a smith to shoe, and he delivers him to another smith, who pricks him, I may have an action on the case against the latter, though I did not deliver the horse to him. So if I deliver goods to A, who delivers them to B, to keep to the use of A, and B wastes these goods, I may have an action on the case against B, though I did not deliver the goods to him”(u).

583 *Joint and separate liabilities*.—If several co-proprietors of a stage-coach intrust the driving of the coach to one of them, all will be responsible for injuries caused by his negligent driving(x). And if two omnibuses are racing, and one of them runs over a man who is crossing the road and has not time to get out of the way, the injured person has a remedy against the proprietor of either omnibus(y).

584 *Declarations for injuries from negligence* must set forth either an injury to the property or to the person of the plaintiff, or to both. If the injury is an injury to goods and chattels, the declaration must

(s) *Lynch v. Nurdin*, 1 Q. B. 36.

(t) *Illidge v. Goodwin*, 5 C. & P. 192. See *Frazer v. Kimlar*, 5 N. Y. Sup. Ct. 18. Where a druggist carelessly labels a deadly poison as a harmless medicine, and the poison so labelled after passing through many intermediate sales finally reaches the hand of one who, without fault, uses it as a medicine, and is injured thereby, the druggist is liable for the result of his negligence notwithstanding the number of intermediate sales. *Thomas v. Winchester*, 6 N. Y. 397. See *Fleet v. Hollenbeck*, 13 B. Monr. 219.

(u) *Roll. Abr.* 90. *Loeschman v. Machin*, 2 Stark. 311.

(x) *Moreton v. Hardern*, 4 B. & C. 223.

(y) *Cresswell, J.*, in *Thorogood v. Bryan*, 8 C. B. 121. One injured by the concurrent negligence of two other persons, may maintain a joint action against both. *Colegrove v. New York & New Haven, & New York & Harlem R. R. Co.*, 20 N. Y. 492. *Klauder v. McGrath*, 35 Penn. St. 123. Or he may at his election sue either of the wrong-doers. *Creed v. Hartmann*, 29 N. Y. 591. *North. Pennsylvania R. R. Co. v. Mahoney*, 57 Penn. St. 152. See *Milford v. Holbrook*, 9 Allen (Mass.), 17.

allege them to be the goods and chattels of the plaintiff: for if there is no averment to this effect, and nothing on the record to show the plaintiff's right or title to the chattels or to the possession of them, there is no cause of action(z). The declaration for an injury to a ship or carriage through the negligent management of another ship or carriage by the defendant or his servants, should set forth the plaintiff's possession of his ship on the high seas or in a certain river, or of his carriage on a certain highway, and the defendant's possession of another ship on the high seas, or in the same river, or of another carriage on the same highway, and that the defendant navigated his ship or drove his carriage in so negligent a manner, that the defendant's ship or carriage, through his carelessness and mismanagement, ran foul of the plaintiff's ship or carriage, and injured the same, and spoiled divers goods and chattels in the said ship, and caused the plaintiff to incur great expense in repairing, etc., and caused the plaintiff to be deprived of the use of his ship, etc., and to lose the profits of a voyage, concluding with a claim of damages.(a).

If the plaintiff complains of an injury to the person, the declaration will either be for an immediate injury, such as an assault (*post*, ch. 15), or trespass; or a consequential injury, such as the breaking of the plaintiff's leg through the upsetting of a coach negligently driven by the defendant(b), or the loss of the plaintiff's eye through the negligence of the defendant in intrusting a loaded gun to the care of a young and inexperienced person, who carelessly shot off the gun pointed at the plaintiff(c). If the cause of action be a breach of duty, arising *ex contractu*, the circumstances and the nature of the contract or employment creating the duty must be truly set forth on the face of the declaration, and be supported by the evidence at the trial(d).

A declaration alleging that the plaintiff was the servant of the defendant, and that the defendant ordered the plaintiff to ascend and use certain scaffolding, etc., well knowing it to be dangerous and unfit for use, and that the plaintiff, in obedience to the order of the defendant, used the scaffolding, etc., believing it to be safe and fit for use, and not knowing the contrary, and not having the same means that the plaintiff had of forming a correct opinion upon its sufficiency and safety, and that the scaffolding, etc., by reason of its being unsafe

(z) *Pritchard v. Long*, 9 M. & W. 666. *Forman v. Dawes*, Car. & M. 129.

(a) *Leame v. Bray*, 3 East, 593.

(b) *Curtis v. Drinkwater*, 2 B. & Ad. 160.

(c) *Dixon v. Bell*, 5 M. & S. 198.

(d) *Lopes v. De Tastet*, 4 Moore, 279; *ante*, p. 17.

and unfit for use, gave way with the plaintiff upon it, and precipitated the plaintiff upon the ground, etc., discloses a good cause of action(e).

If the plaintiff complains of injuries received by the upsetting of a coach in which he was riding as a passenger, the declaration should allege that the defendant was the proprietor of a stage-coach, and that the plaintiff was received by him as a passenger, to be carried safely for hire, and that the defendant did not take proper care in the driving and management of the coach, but suffered the coach to be overloaded, etc., stating the facts constituting the act of negligence, and the injury resulting to the plaintiff, and claiming damages.

The allegation in the declaration that the plaintiff was to be safely carried, does not mean that he is to be conveyed safely absolutely, like a bale of goods, but that he is to be carried with due care(f).

585 *Plea of not guilty.*—The plea of not guilty in actions for injuries caused by the negligence of the defendant, operates as a denial only of the wrongful act alleged to have been committed by the defendant, and no defence other than such denial is admissible under that plea.

All other pleas in denial must take issue on some particular matter of fact alleged in the declaration(g). If the plaintiff complains of damage done to his goods and chattels, or personal property, through the negligence of the defendant or his servants, the plea of not guilty operates as a denial only of the defendant's having committed the wrong alleged by damaging the goods mentioned, but not of the plaintiff's property therein(h). The defendant cannot, therefore, under the plea of not guilty, show that the damaged chattel did not belong to the plaintiff, or that it was not in his possession at the time of the injury(i). But where the plaintiff's own negligence is the immediate cause of the injury, or has contributed to the mischief of which he complains, the defence is admissible under the plea of not guilty(k).

And if the injury was the result of an inevitable accident, and was not occasioned by any default on the part of the defendant, the defend-

(e) *Williams v. Clough*, 3 H. & N. 258; 27 Law J., Exch. 325.

(f) *Harris v. Costar*, 1 C. & P. 636. *Aston v. Heaven*, 2 Esp. 535. See *ante*, p. 467-S. Where the action is against the master for the negligent act of his servant, the declaration may charge the negligence to be that of the master without mentioning the servant; and it should state that the act was committed negligently, but not that it was committed wilfully. *Brasher v. Kennedy*, 10 B. Monr. 28.

(g) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxix, lxxxixii.; *post*, ch. 21.

(h) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxix, lxxxixii.

(i) *Hart v. Crowley*, 12 Ad. & E. 378. *Taverner v. Little*, 5 B. N. C. 678.

(k) *Bridge v. Grand Junc. Rail. Co.*, 3 M. & W. 244. *Holden v. Liv. Gas Co.*, 3 C. B. 1; 15 Law J., C. P. 301.

ant will be entitled to a verdict under the plea of not guilty(*l*). This has been held to be the case where a horse, being frightened by a clap of thunder, ran away with the defendant, and knocked down the plaintiff(*ll*); also, where a horse, being frightened by the noisy and rapid approach of a butcher's cart, furiously driven, became ungovernable, and ran against and killed another horse, notwithstanding all the efforts of the defendant to control the animal(*m*). But where an action was brought against the defendant for running over the plaintiff with a horse and cart, and breaking his leg, it was held that the defendant could not under the plea of not guilty, show that there was no negligence on his part, but that the plaintiff accidentally slipped from the pavement at the moment when the cart was passing, and had so got his leg under the wheel. "The authorities show," observes Lord Denman, "that if the accident had resulted entirely from a superior agency, that would have been a defence, and might have been pleaded under the general issue; but a defence admitting that the injury resulted from an act of the defendant is not so proveable"(*n*).

586 *Evidence at the trial—Proof of negligence.*—Proof of the commission by the defendant, or his servants, of the injury of which the plaintiff complains, very generally carries with it *prima facie* proof of negligence, and it is for the defendant to show that the injury was the result of inevitable accident (*ante*, pp. 2, 465, 469, 470), or that it was occasioned by the negligence or misconduct of the plaintiff himself (*ante*, pp. 24–28), or by circumstances over which the defendant had no control (*ante*, pp. 468–470). So the fact that a barrel from the defendant's warehouse, or a brick from the defendant's bridge, fell upon the plaintiff, who was passing along the street, or under the bridge, is sufficient to raise the presumption of negligence by the defendant(*o*). Where the declaration of the cause of action stated that the defendant struck the plaintiff's cow divers blows, by reason

(*l*) One, who by his own negligence gets into a position which renders an accident inevitable, cannot avail himself of the defence of "inevitable accident." *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75.

(*ll*) *Gibbons v. Pepper*, 1 Ld. Raym. 38; 2 Salk. 638.

(*m*) *Wakeman v. Robinson*, 1 Bing. 213.

(*n*) *Hall v. Fearnley*, 3 Q. B. 921.

(*o*) *Byrne v. Boodle*, 33 Law J., Exch. 13. *Scott v. London Dock Co.*, *ante*, p. 472. *Kearney v. Lond. and Brighton Rwy.*, L. R., 5 Q. B. 311; 6 *ibid.* 759. See *Welfare v. Brighton Rwy. Co.*, L. R., 4 Q. B. 693. "Where a horse, in course of carriage by railway, got injured, apparently by getting down on the floor of the horse-box, and it was proved, on the one hand, that the train proceeded on its journey without disturbance or interruption; and on the other, that the horse was quiet and accustomed to travel by rail, it was held that the railway company were not liable, for that the proper inference to be drawn from such facts was that the injury had resulted from the 'proper vice' of the horse. *Kendall v. S. W. Rwy.*, L. R., 7 Exch. 273, *diss.* *Pigott, B.*"

whereof she died, it was held that it was sufficient to prove that the cow received such injury at the hands of the defendant, that it became necessary to kill her(*p*).

Where an Act of Parliament directed a water company to lay down pipes, with plugs in them, as safety-valves to prevent the bursting of the pipes, and the plugs were properly made, and of proper material, and a severe frost came and prevented the plugs from acting, and the pipes burst and flooded the plaintiff's cellar, it was held that there was no evidence of negligence against the company(*q*).

A declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse, or with having so negligently kept his fire that it spread to and consumed the plaintiff's corn, is supported by proof that the defendant's servant negligently drove the cart, or lighted and kept the fire(*r*), (*ante*, pp. 30-34, 301, 475). But in order to make the master responsible, it is not sufficient to show that the servant has been guilty of negligence in driving, it must be shown that the servant was driving at the time with the authority of the master on his business; but it is not necessary to prove any express request or order by the master to the servant to use the master's horse or carriage. If, at the time of the injury, the servant appears to have been driving his master's carriage in the ordinary course of his employment, the master will be *primâ facie* responsible(*s*). Where the plaintiff was injured by the negligence of a person left in charge of a ship lying in dock, the production of the ship's register was held to be *primâ facie* evidence that the ship-keeper was the servant of the person appearing on the register as owner, and, therefore, that such owner was responsible(*t*).

If the action is brought under the statute 9 & 10 Vict. c. 93, for compensating the families of persons killed by accident (*ante*, p. 502), it must be proved that actual pecuniary damage has been sustained by the relatives of the deceased person, and that the plaintiff, who sues as administrator, or the person for whose benefit the action is brought, had some pecuniary interest in the life of the person killed. It was intended by the Act to give compensation for damage actually sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making

(*p*) *Hancock v. Southall*, 4 D. & R. 202.

(*q*) *Blyth v. Birmingham Water Co.*, 11 Exch. 781.

(*r*) *Brucker v. Fromont*, 6 T. R. 659. *Turberville v. Stampe*, 1 Ld. Raym. 264. *Croft v. Alison*, 4 B. & Ald. 590.

(*s*) *Patten v. Rea*, 2 C. B., N. S. 613; 26 Law J., C. P. 237.

(*t*) *Hibbs v. Ross*, L. R., 1 Q. B. 534.

them pay costs; but the loss of anticipated benefit, founded on a reasonable and just expectation of pecuniary advantage derivable from the continuance of the life of the deceased, may be the subject-matter of damage, and a sufficient foundation for an action(*u*).

If the plaintiff complains of a breach of duty on the part of the defendant, in his character of an attorney, it must be clearly shown that it was the duty of the defendant to do that which he is charged with having neglected. If the matter is at all left in doubt, he is clearly entitled to the benefit of the doubt(*x*).

587 *Proof of retainer and employment*.—Where an action for negligence was brought against a surgeon, and it was proved that the plaintiff's mother sent for the defendant, and that her father paid him, it was held that the plaintiff's submitting to the defendant's treatment was sufficient proof that the defendant had been employed by the plaintiff(*y*).

588 *Proof of the ownership of chattels damaged by negligence*.—Where the plaintiffs hired a chariot for the day, appointed the coachman, and furnished the horses, it was held that they were properly described as owners and proprietors of the carriage in a declaration against a defendant for an accident arising from his servant's negligence in driving against the chariot(*z*).

589 *Evidence for the defence(a)*.—*Questions for the jury*.—If it appears that there was negligence on the part of the plaintiff as well as on the part of the defendant, the proper question for the jury is, "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence, that, but for such negligence on his part, the misfortune would not have happened. In the first place the plaintiff would be entitled to recover, in the latter not"(*b*).

In an action for damages resulting from the negligent driving of the defendant's servant, the proper question for the jury is, whether

(*u*) *Duckworth v. Johnson*, 4 H. & N. 659. *McIntyre v. New York Central R. R. Co.*, 37 N. Y. 287. *Tilley v. Hudson River R. R. Co.*, 24 N. Y. 471; *S. C.* 29 N. Y. 252. *Kresler v. Smith*, 66 N. C. 154.

(*x*) *Chapman v. Van Toll*, 8 Ell. & Bl. 396; 27 Law J., Q. B. 1; *ante*, pp. 496-500.

(*y*) *Gladwell v. Steggall*, 8 Sc. 67; 5 B. N. C. 733.

(*z*) *Croft v. Alison*, 4 B. & Ald. 590.

(*a*) Admissions made by the plaintiff, by his conduct, that he has a bad case, are admissible for the defence, *e.g.*, his asking a person not present at the accident to come forward and give evidence: *Moriarty v. L. C., & D. Rwy., L. R.*, 5 Q. B. 314.

(*b*) *Tuff v. Warman*, 2 C. B., N. S. 740; 27 Law J., C. P. 322; *ante*, pp. 24-28. That the doctrine stated in the text is not the correct rule of law in cases of negligence, see *Murphy v. Deane*, 101 Mass. 455.

at the time of the commission of the injury the servant was driving on his master's business and with his authority(c).

In actions against an attorney for negligence, it is the province of the judge to inform the jury for what species or degree of negligence an attorney is properly answerable, and what duty is cast upon him by law, or by the practice of the court in the particular instance, and to leave them to say whether the attorney has performed his duty; and in case of non-performance, whether the neglect was of that sort or degree which is culpable or venial in the sense of sustaining or not sustaining an action(d).

Where the injury complained of has resulted from negligence in leaving instruments of danger, such a horse and cart, unattended in a public thoroughfare or place of public resort, it is for a jury to inquire whether the horse was vicious or steady, whether the horse was left for an unreasonable time, and whether there was any excuse for leaving it at all unattended, whether assistance could have been procured to watch the horse, whether the street was unfrequented or thronged, and especially whether large numbers of young children might reasonably be expected to be about the spot(e).

590 *The damages recoverable* will mainly depend upon the nature and character of the injury, whether it is the mere result of such negligence as amounts to little more than accident, or whether it is of a wilful or insolent character(f). In cases of injuries to chattels from negligence, the measure of damages is the actual deterioration in the value of the chattel, and if the owner has been deprived of the use of the chattel, and has been obliged to hire another chattel, and been put to expense, and has sustained special damage, which is the natural and necessary result of the wrongful act, such damages are recoverable if claimed in the plaintiff's declaration. In an action for an injury to a horse from negligent driving, it was held that the proper measure of damages was the keep of the horse at a farrier's, the amount of the farrier's bill, and the difference between the value of the horse at the time of the accident and at the time of the commencement of the action(g).

(c) *Patten v. Rea*, 2 C. B. N. S. 607; 26 Law J., C. P. 235.

(d) *Hunter v. Caldwell*, 10 Q. B. 82. *Hatch v. Lewis*, 1 F. & F. 467.

(e) *Lynch v. Nurdin*, 1 Q. B. 38; *ante*, pp. 24-27.

(f) *Emblem v. Myers*, 6 H. & N. 54.

(g) *Hughes v. Quentin*, 8 C. & P. 703. In an action brought to recover damages for injuries caused by the gross negligence of the defendants, the jury may in their discretion give exemplary damages. *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304. *Hopkins v. Atlantic & St. L. R. R. Co.*, 36 N. H. 9. *Whipple v. Walpole*, 10 N. H. 130. But in an action against

591 *Damages not too remote.*—Where through the default of a coach proprietor in neglecting to provide proper means of conveyance a passenger is placed in so perilous a position as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible for the damage, though the coach be not actually overturned(*h*). But if the negligence of the defendant only cause some personal inconvenience to the plaintiff, and the injury is proximately caused by the plaintiff unreasonably trying to remedy such inconvenience, the defendant will not be liable. Thus, where from a defect in the latch of a railway carriage the door flew open, and a passenger, in endeavoring to shut it, fell out, it was held that the company were not responsible(*i*)

592 *Negligent management or navigation of vessels.*—The liability of a shipowner for damage done by the negligent management of his vessel, causing a collision with another vessel, is, as we have seen, limited to the value of the vessel and freight at the time of such collision: and if the vessel instantly founders, he is not thereby exempted from liability(*j*). The value is to be taken at the moment of collision(*k*). Where the plaintiff, in consequence of the collision, has been obliged to avail himself of the assistance of persons who demand an exorbitant sum for salvage, and it is reasonable and prudent to resist this demand, and costs are incurred in resisting it, the plaintiff will be entitled to recover these costs, if he claims them in his declaration as part of the damages(*l*). The proceedings in the Court of Admiralty in cases of collision are, as we have seen, generally speaking, against the ship (*ante*, p. 483); and where both vessels are found to blame, and the Merchant Shipping Act does not preclude the recovery of damage (*ante*, p. 482), the shipowners can only recover a moiety of the damage which

a railroad company to recover damages for injuries resulting from the negligence of an employee, the company will not be liable in punitive damages, however gross or culpable the negligence of the employee, unless the company is also chargeable with gross misconduct. *Cleghorn v. New York Central & Hudson River R. R. Co.*, 56 N. Y. 44.

(*h*) *Jones v. Boyce*, 1 Stark, 493, cited in *Wilson v. Newport Dock Co.*, L. R., 1 Exch. 187. So where a passenger sees another train of cars approaching the one in which he is being conveyed at such a speed as to make a serious collision inevitable, and in his attempt to escape, gets upon the platform of the car only in time to have his leg broken by the collision, the company will be liable, notwithstanding the regulation prohibiting passengers from standing or riding on the platform while the cars are in motion, and notwithstanding the fact that the other passengers who did not see the approaching danger and kept their seats escaped uninjured. *Buel v. New York Central R. R. Co.*, 31 N. Y. 314.

(*i*) *Adams v. Lancashire and Yorkshire Rwy.*, L. R., 4 C. B. 739. See *Re United Service Co.*, L. R., 6 Ch. App. 212.

(*j*) *Brown v. Wilkinson*, 15 M. & W. 391.

(*k*) *The Mary Caroline*, 3 W. Rob. 101.

(*l*) *Tindall v. Bell*, 11 M. & W. 228.

they have respectively sustained; and the same rule applies to actions by the owners of the cargoes on board the delinquent ships(*m*). Nor can the one recover salvage from the other in such a case(*n*).

593 *Damages when the plaintiff is insured against loss, or has received full indemnity under a contract of insurance.*—The recovery by the plaintiff of full compensation for the loss or damage his property has sustained under a contract with insurers, cannot be given in evidence in reduction of damages in an action against the wrong-doer who has done the mischief. The plaintiff's contract with the underwriters or insurers is *res inter alios acta*, of which the defendant, who is sued for negligence, cannot avail himself. If it were not so, the wrong-doer would take the benefit of a policy of insurance without paying the premium(*o*). A plaintiff, however, who has received a full indemnity for his loss under a contract of insurance, and has afterwards recovered compensation in an action for damages against the wrong-doer, is not entitled to a double satisfaction, but is bound to hand over the damages to the insurer or underwriter, who is the person really damnified by the wrongful act(*p*).

594 *Damages recoverable by personal representatives in cases of death from negligence.*—In all actions by the personal representatives of persons killed by negligence, brought under the 9 & 10 Vict. c. 93 (*ante*, pp. 502, 515), to recover damages proportioned to the injury resulting from his death to the persons for whose benefit the action is brought, the jury, in assessing the damages, must confine themselves to injuries of which a pecuniary estimate may be made, and cannot lawfully increase them by adding a solatium to those persons in respect of the mental sufferings occasioned by such death. They cannot, therefore, lawfully inquire into the degree of mental anguish which each member of the family has suffered from the bereavement, and cannot take into consideration the mental sufferings of a widow or child for the loss of a husband or a parent(*q*). It is clear, also, that the damages are not to be given merely in reference to the loss of any legal right against the deceased, which might have been turned to profit if he

(*m*) *The Milan*, *ante*, p. 484.

(*n*) *The Capella*, L. R., 1 Adm. & EccL 356.

(*o*) *Yates v. Whyte*, 4 B. N. C. 283. *Propeller Monticello v. Gilbert Mollison*, 17 How. (U. S.) 152. *Harding v. Town of Townshend*, 43 Vt. 536. *Althorff v. Wolfe*, 22 N. Y. 355. See *Clark v. Wilson*, 103 Mass. 219; *Perrott v. Shearer*, 17 Mich. 48; *Mayor, etc., of New York v. Stone*, 20 Wend. 139.

(*p*) *Ante*, p. 315; and *post*, ch. 22. See *Hart v. Western R. R. Co.*, 13 Metc. 99.

(*q*) *Blake v. Mid. Rail. Co.*, 21 Law J., Q. B. 233; 18 Q. B. 93. *Armstrong v. S. E. Rail. Co.*, 11 Jur. 759. *Oldfield v. New York & Harlem R. R. Co.*, 14 N. Y. 310.

had lived, and which has been lost by his death, for the damages recovered are to be distributed amongst the relations only, and not to all individuals sustaining loss; and, accordingly, the practice has been to ascertain what benefit could have been claimed from the deceased, if he had lived, by the person seeking to obtain damages; and if the latter can show that he had a reasonable expectation of pecuniary benefit from the continuance of the life, and is also within the requisite degree of relationship, his claim may fairly be considered by the jury in assessing the amount of damages^(r). Thus the loss of the benefit of education and of the comforts and conveniences of life, and of an expected pecuniary provision, may, as we have seen, be taken into consideration; and it is for a jury to say, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages^(s). No damages can be given in respect of funeral expenses and mourning, there being no language in the statute referring to these expenses and rendering them recoverable^(t).

(r) *Franklin v. S. E. Rail. Co.*, 3 H. & N. 214. *Kresler v. Smith*, 66 N. C. 154. Proof of special pecuniary damages is not necessary to maintain an action for causing the death of an infant, or to warrant the jury to find more than nominal damages. It is within the province of the jury in such cases, after taking into consideration the position in life and occupation of the parents, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. *Ihl v. Forty-Second Street & Grand Street Ferry R. R. Co.*, 47 N. Y., 317. *O'Marer v. Hudson River R. R. Co.*, 38 N. Y. 445. *Oldfield v. New York & Harlem R. R. Co.*, 14 N. Y. 310. *Drew v. Sixth Avenue R. R. Co.*, 26 N. Y. 49.

(s) *Pym v. Gt. North. Rail. Co.*, *ante*, p. 504. *McIntyre v. New York Central R. R. Co.*, 37 N. Y. 287. *Tilley v. Hudson River R. R. Co.*, 29 N. Y. 252.

(t) *Dalton v. S.-E. Rail. Co.*, 4 C. B. N. S. 296; 27 Law J., C. P. 227.

CHAPTER IX.

OF NEGLIGENCE ON THE PART OF BAILORS AND BAILEES— DETENTION AND LOSS OF CHATTELS BY BAILEES^(a).

SECTION I.—*Of negligence on the part of bailors and bailees.*—Bailments of chattels—Negligence of bailees—Loss of chattels by workmen to whom they have been delivered—Negligent keeping of goods by warehousemen, wharfingers, etc.—Losses by robbery and theft—Losses occasioned by the negligence of the bailor—Loss of cattle—Liabilities of agisters of cattle—Deposit of goods under a special contract—Deposit of luggage and parcels at railway stations—Delay in delivery—Loss of goods by persons who have received them to be carried, but who are not common carriers—Limitation of the liability of ship-owners in respect of the carriage of merchandise and chattels—Detention of chattels by bailees claiming lien—Particular liens and general liens—Ordinary lien of workmen and artificers—Persons against whom a lien may be claimed—General lien—Lien of factors, brokers, bankers, attorneys, solicitors, etc.—Lien for freight—Lien of consignees—Notice that goods will be held subject to general lien—Custom of trade—Extinguishment of liens—Detention of chattels by one of several joint-owners or tenants in common—Re-delivery of chattels to one of several bailors.

SECTION II.—*Of actions for the negligent management, negligent keeping, and unlawful detaining of goods and chattels.*—Parties to be made plaintiffs—Joint and separate rights of action—Power of bailees to compel rival claimants to interplead and establish their title—Declarations against bailees for negligence and breach of duty—Payment of money into court—Pleadings, defences, evidence, and damages recoverable—Orders for the delivery of the specific thing detained—Assessment of the value thereof—Assessment of damages, where all or part of the things detained have been delivered up after action

(a) See further, as to bailments, Addison on Contracts, ch. 12, 6th ed.

SECTION I.

OF NEGLIGENCE ON THE PART OF BAILORS AND BAILEES—DETENTION
AND LOSS OF CHATTELS BY BAILEES.

595 *Of bailments of chattels.*—"There are," observes Holt, C.J., "six sorts of bailments. The first is a bare, naked bailment of goods delivered by one man to another, to keep for the use of the bailor; and this I call a depositum, and it is that sort of bailment which is mentioned in *Southcote's case*. The second sort is, when goods or chattels that are useful are lent to a friend, gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored in specie. The third sort is, when goods are left with the bailee, to be used by him for hire; this is called *locatio et conductio*, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called, in Latin, *vadium*, and in English, a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward, to be paid by the person who delivers them to the bailee, who is to do the thing about them(b). The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them gratis, without any reward for such his work or carriage"(c).

596 *Negligence of bailors.*—It is the duty of every bailor of dangerous, explosive, and combustible substances, knowing the dangerous nature of them, to take care that the danger is communicated to a bailee to whom they are delivered to carry, to take care of, or to keep; and if the bailor fails to make the necessary disclosure, he is responsible if an accident occurs, and damages are sustained by the bailee or his servant(d).

597 *Of the negligent keeping of chattels by bailees.*—"As to the first sort of bailment," observes Holt, C.J., "where a man takes goods into his

(b) If property is delivered on a contract for an equivalent in money, or some other commodity, and not for the return of the specific goods, *e.g.*, where a farmer sends corn to be ground, to be mixed up by the miller when ground with corn belonging to other people, the farmer to have an equivalent quantity in return, that is a sale and not a bailment. *South Australian Co. v. Randell*, L. R., 3 C. P. Ca. 101.

(c) *Coggs v. Bernard*, 1 Smith's L. C., 8th ed. 177.

(d) *Farrant v. Barnes*, *ante*, p. 22.

custody, to keep for the use of the bailor, such a bailee is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable; but he must be guilty of some gross neglect(*dd*). If he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his honesty"(*e*). But if he is guilty of gross negligence, it is no answer to say that he lost his own goods at the time he lost the goods of the bailor(*f*).

"As to the second sort of bailment—viz., *commodatum*, or lending gratis—the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them, he will be answerable if he be guilty of the least neglect(*ff*); as if a man should lend another a horse to go in one direction, or for one month, and the bailee goes in another direction, or keeps the horse above a month, and an accident happens to the horse, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under; and it may be, that if the horse had been used no otherwise than as he was lent, that accident would not have befallen him. If the bailee put the horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leave the house or the stable-doors open, and thieves take the opportunity of that and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse. Bracton says the bailee must use the utmost care, but yet he shall not be chargeable where there is such a force as he cannot resist"(*g*).

"The duties of the borrower and lender," observes Coleridge, J., "are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower,

(*dd*) *Foster v. Essex Bank*, 17 Mass. 500. *Edson v. Weston*, 7 Cow. 278. *Sodowsky v. M'Farland*, 3 Dana, 205. *McKay v. Hamblin*, 40 Miss. 472. *Dunn v. Branner*, 13 La. An. 452. *Spooner v. Mattoon*, 40 Vt. 300. *Johnson v. Reynolds*, 3 Kans. 257.

(*e*) *Holt, C.J.*, *Coggs v. Bernard*, 2 Ld. Raym. 909. *Walker v. Guarantee Assoc.*, 18 Q. B. 286; 21 Law J., Q. B. 257. *Fulton v. Alexander*, 21 Texas, 148.

(*f*) *Doorman v. Jenkins*, 2 Ad. & E. 258. See *post*, p. 529, 530; *Gulladge v. Howard*, 23 Ark. 61.

(*ff*) *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5. *Bennett v. O'Brien*, 37 Ill. 250. *Wood v. McClure*, 7 Ind. 155. *Phillips v. Condon*, 14 Ill. 84.

(*g*) *Coggs v. Bernard*, 2 Ld. Raym. 911. See *Wood v. McClure*, 7 Ind. 155. Where *A* delivers a horse to *B*, to be used by the latter in compensation for its feed and keeping, the transaction is not a mere gratuitous loan, but a contract for the mutual benefit of both parties, under which *B* is required to exercise only ordinary care in the keeping of the animal. *Chamberlain v. Cobb*, 32 Iowa, 161.

therefore, is not responsible for reasonable wear and tear, but he is for negligence, for misuse, for gross want of skill in the use, above all, for anything which may be defined as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which, directly, the borrower is injured(*gg*). ‘*Adjuvari quippe nos, non decipi, beneficio oportet,*’ is the maxim which Story borrows from the ‘Digest;’ and Pothier is express to the same effect, citing, as Story does also, the instance, ‘*Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum corruptum effusumve est, condemnandus eo nomine est.*’ This is so consonant to reason and justice that it has become part of our law. If, therefore, the owner of a horse, knowing it to be vicious and unmanageable, and highly dangerous to ride, should lend it to one who is ignorant of its bad qualities, and conceals them from him, and the rider, using ordinary care and skill, is thrown and injured, the lender would be responsible. By the necessarily implied purpose of the loan, a duty is contracted by the lender towards the borrower not to conceal from him those defects, known to the lender, which may make the loan perilous to him”(*h*). In the absence of all proof of knowledge by the lender of the defect which caused the injury, there would of course be no cause of action against him(*i*).

“As to the third sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound,” observes Lord Holt, “to take the utmost care, and to return the goods when the time of hiring is expired; for when goods are let out for reward, the hirer is bound to use such care as the most diligent father of a family uses, and if he uses that he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable if the goods be stolen”(*j*). These expressions of Lord Holt, making a hirer answerable to the same extent as a borrower, have been shown by Sir W. Jones to be too strong, the hirer being bound only to take such care as a prudent man would take of his own property(*k*).

(*gg*) See *Sims v. Chance*, 7 Texas, 156.

(*h*) *Blakemore v. Bristol & Exeter Rail. Co.*, 8 Ell. & Bl. 1051; 27 Law J., Q. B. 167. *Cowley v. Mayor, etc., of Sunderland*, 6 H. & N. 565; 30 Law J., Exch. 127.

(*i*) *MacCarthy v. Young*, 6 H. & N. 329; 30 Law J., Exch. 227.

(*j*) *Coggs v. Bernard*, 2 Ld. Rayn. 909.

(*k*) *Jones on Bailments*, 86; *Harrington v. Snyder*, 3 Barb. 380; *Kennedy v. Ashcroft*, 4 Bush (Ky.), 530; *Howard v. Babcock*, 21 Ill. 259; *Vaughn v. Webster*, 5 Harring. (Del.) 256; *Swigert v. Graham*, 7 B. Mon. 661; *Mayor of Columbus v. Howard*, 6 Ga. 213; *Angus v. Dickerson*, 1 Meigs, 459; *Millon v. Salisbury*, 13 Johns. 211.

The owner must stand to all the ordinary risks to which the chattel is naturally liable, but not to risks occasioned by negligence or want of ordinary caution on the part of the hirer. If a carriage, for example, let to hire, breaks down on the ordinary public thoroughfare, through the badness of the road, or is injured by a flood or inundation, the owner must bear the loss, although the carriage was driven by the servants and horses of the hirer. But if the hirer had gone out of his way to meet the danger—if he had travelled by unusual and difficult roads, or crossed a plain subject to floods, when he might have kept the high ground, and been safe, he must make good the loss that has been occasioned thereby. If the owner sends his own postillion or coachman to drive the carriage, the hirer is discharged from all attention to the horses and the risks of the road, and is bound only to take ordinary care of the glasses and inside of the carriage whilst he sits in it, unless he officiously interferes and gives orders, and takes the management and direction of the vehicle into his own hands(*l*). If a horse is hired as a saddle-horse, the hirer has no right to use it in a cart, or as a beast of burden. If it is hired to go to Richmond he has no right to go with it to York; and if, during such misuser, a loss occurs, the hirer will be responsible therefor(*ll*).

If a horse hired for a journey is taken ill on the road, and the hirer calls in a farrier, he will not be responsible if the horse dies, although the death may have been occasioned by the injudicious treatment of the latter; but if the hirer neglects to avail himself of proper advice and assistance, or chooses ignorantly to prescribe himself, and from unskilfulness gives the horse improper medicine, and the horse dies, he is liable to the owner for the loss(*m*). It is of course the primary duty of the hirer, in the absence of an express stipulation to the contrary, to supply an animal hired by him with suitable food during the time it is intrusted to him for use; and if a hired horse is exhausted, or becomes ill, and refuses its food, and the hirer notwithstanding pursues his journey, and by so doing injures or kills the horse, he will be responsible therefor to the owner(*n*).

“As to the fourth sort of bailment,” says Lord Holt, “viz., *vadium*, or

(*l*) Jones on Bailments, 88; Pothier LOUAGE, No. 106, 190; Tr. des Oblig. 1, 543. Hughes v. Boyer, 9 Watts, 556.

(*ll*) Hall v. Corcoran, 107 Mass. 251; Kennedy v. Ashcraft, 4 Bush (Ky.), 530; Mayor of Columbus v. Howard, 6 Ga. 213; Lewis v. McAfee, 32 Ga. 465; Wheelock v. Wheelright, 5 Mass. 104; Homer v. Thwing, 3 Pick. 492; Rotch v. Hawes, 12 Pick. 136; Schenck v. Strong, 1 South. 87; M'Neills v. Brooks, 1 Yerg. 75; Martin v. Cuthbertson, 64 N. C. 328.

(*m*) Deane v. Keate, 3 Campb. 4.

(*n*) Handford v. Palmer, 5 Moore, 79; 2 B. & B. 359. Bray v. Mayne, 1 Gow, N. P. C. 1. Thompson v. Harlow, 31 Ga. 348.

a pawn, if the pawn be such as will be the worse for using, the pawnee cannot use it, as clothes, etc.; but if it be such as will be never the worse, as jewels pawned to a lady, she might use them; but then she must do it at her peril: for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and is not liable to be used. But if the pawn be of such a nature that the pawnee is at any charge about the thing pawned to maintain it, as a horse, cow, etc., then the pawnee may use the horse in a reasonable manner, or milk the cow, etc., in recompense for the meat⁽ⁿⁿ⁾. And as to neglects for which the pawnee shall make satisfaction, Bracton tells us that if a creditor takes a pawn he is bound to restore it upon payment of the debt; but yet, if the pawnee uses true diligence in keeping of the pawn^(o), it is sufficient, and, notwithstanding the loss of it, he may resort to the pawnor for his debt. And the true reason of all these cases is, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods^(p). But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrong-doer; and a man that keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss. The same law holds in relation to goods found^(q). Should the pawnee dispose of the goods under a power of sale, he will be liable for gross negligence in conducting the sale, by which the goods are disposed of at an inadequate value^(r).

“As to the fifth sort of bailment,” says Lord Holt, “viz., a delivery to carry, or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, etc.” (*post*, ch. 10). “The second sort are bailees, factors, and such like; and though a

(nn) *Lawrence v. Maxwell*, 53 N. Y. 19, 22; Story on Bailm. s. 89.

(o) See *Donald v. Suckling*, *post*, p. 551.

(p) See *Shackell v. West*, 2 Ell. & Ell. 328.

(q) As to pledges to pawnbrokers, see Addison on Contracts, 6th ed., 279-293.

(r) *Maughan v. Sharpe*, 34 Law J., C. P. 19; *secus*, if he be mortgagee, *S. C.*

bailee is to have a reward for his management, yet he is only to do the best he can, and if he be robbed, etc., it is a good account."

"As to the sixth sort of bailment, it is to be taken that the bailee is to have no reward for his pains, and that by his ill-management the goods are spoiled. Then the bailee, having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, the bailee is answerable. It is an obligation which arises *ex mandato*. It is what we call in English, acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable; and the reasons are, first, because in such a case a neglect is a deceit to the bailor, for when he intrusts the bailee, upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of such a trust, undertaken voluntarily, will be a good ground for an action. A strong case to this matter was an action against a man who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because, when the party has taken upon him to keep the sheep, and after suffers them to perish by his default, inasmuch as he has taken them, and has them in his custody, if after he does not look to them, an action lies. And if a man will enter upon the thing, and take the trust upon himself, and miscarries in the performance of the trust, an action will lie against him for that; though nobody could have compelled him to do the thing"(s). A banker, the gratuitous bailee of a box belonging to his customer, and containing securities, is not liable for the loss of the box, by the theft of his clerk, unless he has omitted to take some precaution which a reasonable and prudent man would have taken of his own property(t).

Where a bystander was asked by the owner of a horse to get on the horse and ride it, for the purpose of showing it off for sale, and the bystander recklessly and carelessly rode the horse over very slippery and dangerous ground, and threw it down and injured it, it was held that he was responsible for the injury(u).

598 *Loss of chattels by workmen*.—Every bailee for hire of a chattel is bound to take the same care of the chattel, whilst it remains in his

(s) *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith's L. C., 6th ed. 177. *Doorman v. Jenkins*, 2 Ad. & E. 262.

(t) *Giblin v. McMullen*, 38 Law J., P. C. 25; L. R., 2 P. C. Ca. 317. See *ante*, p. 501.

(u) *Wilson v. Brett*, 11 M. & W. 113.

possession, that a prudent and cautious man ordinarily takes of his own property. If clothes are delivered to a fuller to be dressed, and he suffers them to be eaten by mice, he will be responsible for the damage, unless he can discharge himself from all imputation of neglect, by showing that he had been subjected to some unusual and unexpected visitation from such vermin. The very occurrence of the disaster affords a strong *prima facie* presumption of a want of ordinary caution(v). Where a ship, bailed to a shipwright to be repaired, was put into a dry dock belonging to the shipwright, and whilst she lay there a high tide arose, and pressed against the dock gates; and it appeared that the gates might have been shored up so as to resist the pressure of the water, but nothing was done, and the water at last burst open the gates and dashed the bailor's vessel against another vessel, it was held that the bailee was responsible for the injury, as he might, by proper precautions, have guarded against the accident(x). Wherever the loss of the thing bailed arises from the want of the degree of care which, from the nature of the bailment, ought to be exercised, it is immaterial whether the negligence be imputable personally to the bailee or to the servants employed by him(y).

599 *Theft by servants*.—If the subject-matter of the bailment is secretly purloined by the bailee's servant, the bailee will be responsible for the loss, unless he can show that he could not, by the exercise of the greatest vigilance, have guarded against the theft; but he will not be responsible for a robbery by irresistible violence(z). Where a chronometer, bailed to a watchmaker to be repaired for hire, was placed by the bailee in a drawer in his shop amongst a variety of common watches, part of which belonged to the bailee, and the rest to his customers, which drawer was locked at night, and in a recess in the same room stood a strong iron chest, in which watches belonging to the watchmaker, of the value of several thousand pounds, were deposited and locked up, and in the night the drawer was broken open by the watchmaker's servant, who slept in the shop, and the chronometer was stolen by him, together with the other watches there deposited, but the watches in the iron chest remained untouched, it was held, that as the watchmaker had taken more care of his own watches, by lock-

(v) In the Roman law proof of such a disaster was held to be proof of negligence. "Si fullo vestimenta polienda acceperit; eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere." Dig. lib. 19, tit. 2, lex 13, s. 5.

(x) *Leck v. Maestaer*, 1 Campb. 137.

(y) *Ld. Campbell, C.J.*, *Dansey v. Richardson*, 3 Ell. & Bl. 169; 23 Law J., Q. B. 223.

(z) *Walker v. British Guarantee Ass.*, 21 Law J., Q. B. 260; 18 Q. B. 277.

ing them up in the iron safe, than he had taken of the bailor's chronometer, he was responsible for the loss, and Dallas, C.J., was of opinion that the watchmaker "was bound to protect the property against depredation from those who were within the house"(a).

600 *Negligent keeping of goods by warehousemen, wharfingers, and depositaries for hire.*—All persons to whom goods and chattels are delivered to be kept for hire and reward, and who are paid expressly and specifically for the exercise of their labor and care in keeping them, and not merely for the finding of a place of deposit, are bound to exercise that amount of care and vigilance for their preservation, which the most prudent and careful of men exercise for the protection of their own property(b). If the goods are injured by mice or rats, the warehouseman will be responsible for the damage(c), although he keeps cats to destroy vermin(d). It is no answer to an action against a warehouseman for the non-delivery of a chattel intrusted to him to keep for hire, to say that he has lost it(e); the mere fact of the loss is *prima facie* proof of negligence, and he must rebut this presumption by showing that he had taken the greatest care of the thing intrusted to him, and had no means of preventing the loss. A booking-office keeper who receives money for booking parcels, is bound to put them into a safe place, and if he leaves them in a public room, or an open shop, and they are lost or stolen, he will be responsible to the owner(f).

(a) Clark v. Earnshaw, Gow, 30.

(b) "Quod si horrearius nominatim custodiam mercium in se receipt, videbitur locasse operas non solum exactæ, sed etiam *exactissimæ* custodia."—Pandect. Just. ed. Poth. lib. 19, tit. 2, art. 3, 72. Warehousemen are bound to exercise ordinary care and diligence in the keeping of goods, and are responsible only for ordinary neglect. Tittsworth v. Winnegar, 51 Barb.(N. Y.) 148. Knapp v. Curtis, 9 Wend. 60. Ducker v. Barnett, 5 Mo. 97. Baltimore, etc., R. R. Co. v. Shumacher, 29 Md. 168. Chicago, etc., R. R. Co. v. Scott, 42 Ill. 132. Jackson v. Sacramento, etc., R. R. Co., 23 Cal. 268; Myers v. Walker, 31 Ill. 353.

A want of ordinary care on the part of a warehouseman in one particular, will not render him responsible for a loss occasioned by causes unconnected with that particular in which he is negligent. Gibson v. Hatchett, 24 Ala. 201.

A warehouseman is not required by law to render his buildings secure against all possible contingencies; and will not be liable for injuries to goods if the buildings in, which they were stored were reasonably and ordinarily safe against ordinary and common occurrences. Cowles v. Pointer, 26 Miss. 253.

And if the bailor knows at the time he intrusts his goods to another how and where his bailee will keep them, he thereby assents to such keeping, and can maintain no action for their loss. Knowles v. Atlantic & St. L. R. R. Co., 38 Me. 55. Warehousemen are not insurers against loss by an accidental fire; nor are they chargeable with the negligence of their servants in failing to remove goods from a burning warehouse, unless the removal of goods in such cases was within the scope of the servant's employment. Aldrich v. Boston & Worcester R. R. Co., 100 Mass. 31.

(c) White v. Humphry, 11 Q. B. 44.

(d) Laveroni v. Drury, 8 Exch. 166. See Kay v. Wheeler, L. R., 2 C. P. 302.

(e) Cairns v. Robins, 8 M. & W. 258. Reeve v. Palmer, 5 C. B., N. S. 84. Goodman v. Boycot, 2 B. & S. 1; 31 Law J., Q. B. 69.

(f) Dover v. Mills, 5 C. & P. 175.

601 *Distinction between robbery and theft.*—A very sensible distinction is taken in the civil law between a public palpable robbery by force and violence, when a house is broken into and robbed of its contents, and a theft or secret purloining of goods. In the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery(*g*), it being considered that individual care or vigilance could avail but little against the open attack of the determined robber; in the other, he was bound to make good the loss, unless he could show that he had taken the greatest care of the things intrusted to him, and that it had been purloined, notwithstanding every precaution for its safety(*h*). Where an officer in the army, on leaving London, delivered a trunk containing divers articles of value to an upholsterer to be kept for a shilling a week, and the trunk was returned to the officer emptied of its contents, which were supposed to have been stolen by the upholsterer's servant, it was held by Lord Kenyon, that if the upholsterer had taken as much care of the articles as he had taken of his own property, he was not responsible for the theft committed by his servant(*i*); but every depositary of chattels to be kept for hire is *prima facie* responsible for a theft committed by his own servants within the house(*h*), and can only discharge himself from liability by showing that the theft was committed under such circumstances, or was of such a nature, that the greatest care and vigilance on his part could not have guarded against it, or prevented it.

602 *Losses occasioned by the negligence of the bailor.*—If the owner himself in any way conduces to the loss; if he brings people to the warehouse or place of deposit to look at the goods, opens packages in which they are contained, etc., and the loss is as likely to have arisen from the misconduct of the persons so introduced, or from the carelessness of the owner, as from the neglect of the warehouseman or bailee, the latter is not responsible for the loss. Thus, where a quantity of gin-seng contained in a box was deposited by the plaintiff in the defendant's warehouse, and the plaintiff was in the habit of resorting to the box, and ordering the lid to be taken off, for the purpose of showing

(*g*) Dig. lib. 17, tit. 2, lex 52, 53. Instit. lib. 3, tit. 15, s. 2, 3

(*h*) "Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpa conjuncti esse solent; cujusmodi sunt *furta*. Quamobrem, qui rem *furto* amissam dicit, *is diligentiam suam probare debet*." Vin. Com. ad Instit. lib. 3, tit. 15, s. 5. Pothier (Pret a Usage), art. 53. Abbott, C.J., in *Robinson v. Ward*, Ry. & M. 276.

(*i*) *Finucane v. Small*, 1 Esp. 315.

(*h*) *Hodgson v. Fullarton*, 4 Taunt. 787. Dallas, C.J., in *Clarke v. Earnshaw*, Gow, 32. Campbell, C.J., and Coleridge, J., in *Dansey v. Richardson*, 3 Ell. & Bl. 156-171; 23 Law J., Q. B. 223-229. *De Rothschild v. Royal Mail, etc., Co.*, 7 Exch. 734; 21 Law J., Exch. 273.

the ginseng to expected purchasers, who came to the warehouse to view it on the invitation of the plaintiff, and rats at last got into the box and destroyed the ginseng, it was held that the defendant, the warehouseman, was not responsible for the loss(l).

603 *Loss of chattels by wharfingers.*—The duties and responsibilities of the wharfinger, in respect of the safe keeping of the goods intrusted to him, to be dealt with in the way of his trade, are analogous to those of the warehouseman(ll). If he receives directions to ship them on board a particular vessel, he does not discharge his duty by delivering them to one of the crew; but he is bound to place them in the hands of the captain, or some person in authority on board the vessel(m). If he is clothed merely with the custody of the goods, and the duty of shipping them devolves, by usage and custom, upon the master of the vessel to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them at the disposal and under the care of the master and officers of such vessel, although they are not actually removed from the wharf(n).

604 *Loss of cattle—Liabilities of agisters of cattle.*—A person who receives cattle or horses, or living animals to keep for the owner, and is paid expressly for his care and watchfulness in preserving them, as well as for their sustenance, is bound to take the utmost care of them, and he is responsible for damage and injury resulting from ordinary casualties, if such damage might have been averted and prevented by the exercise of great care and vigilance. Very slight evidence of neglect has been sufficient to induce juries to return verdicts in favor of those who have sought compensation for the loss of cattle delivered to bailees to be kept for hire. Thus, where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed and was lost, and never after heard of, and the plaintiff gave evidence of the gates having been occasionally seen left open, and the fences being in parts out of order, but it did not appear directly that the horse had strayed through any defect in the fences, or through any of the gates being left open, the jury, nevertheless, returned a verdict against the defendant for the full value of the horse(o). If the bailee suffers his fences to be defective, or puts the horse into a dangerous

(l) *Calliff v. Danvers*, 1 Peake, N. P. C. 155; *ante*, p. 24-28.

(ll) A wharfinger is liable only for want of ordinary diligence. *Blin v. Mayo*, 13 Vt. 56. See *Holtzcluw v. Duff*, 27 Mo. 392; *Foot v. Storrs*, 2 Barb. (N. Y.) 326.

(m) *Leigh v. Smith*, 1 C. & P. 638, 641; 2 Esp. 695.

(n) *Cobban v. Downe*, 5 Esp. 41; *Story on Bailments*, 293; *Jones on Bailments*, 97.

(o) *Broadwater v. Blot*, Holt, 547.

pasture, and the animal, by reason thereof is lost or injured, this is a degree of neglect for which he is undoubtedly responsible(*p*).

605 *Deposit of luggage and parcels at railway stations.*—If the ticket or receipt given on the deposit of goods at the station of a railway company does not state that the goods will not be delivered back on a Sunday, or specify the times at which parcels are deliverable, it is the duty of the company to be always ready to deliver them within a reasonable time after demand(*q*). Where a railway company provided a place of deposit for the reception of articles and luggage for the convenience of passengers on payment of a trifling charge, and gave public notice that they would not be responsible for any package exceeding the value of 10%, and the plaintiff deposited a leathern bag containing jewelry and articles exceeding 10% in value, and received a ticket in exchange, on the back of which the terms of the deposit were printed, and the bag was delivered by mistake to a wrong person, but was ultimately recovered and returned to the plaintiff by the company, with a portion of the jewelry missing, it was held that the company was not responsible for the loss(*r*).

606 *Deposit of goods under a special contract.*—In a contract of bailment, the bailee may impose any fair and reasonable terms he pleases upon the bailor, and may make his acceptance of the goods to be kept, and his responsibility for the re-delivery of them dependent upon those terms being assented to and observed by the parties who deal with him; but if he accepts the goods and takes them into his possession, he will not be allowed to impose terms utterly repugnant to, and inconsistent with, any contract at all(*s*). Where public notice is given of the terms upon which goods are received, or the terms are printed on a paper or receipt delivered to the bailor, and it is sought to hold him to the terms on the ground that he has impliedly assented to them, it should be shown that the terms are reasonable and fair, and not devised for the purpose of fraud or extortion, or for the purpose of exonerating the bailee from responsibility for his own negligence and misconduct(*t*).

(*p*) *Mosley v. Fosset*, 1 Roll. Abr. 4; *ante*, p. 185. The liability of an agister of cattle comes within the general rule of bailment, and is merely that of reasonable care and ordinary diligence in providing for their safety. *Halty v. Markel*, 44 Ill. 225. *Umlauf v. Bassett*, 38 Ill. 96. *McCarthy v. Wolfe*, 40 Mo. 520. *Rey v. Toney*, 24 Mo. 600.

He is liable for damages resulting from the negligent, but not for the wilful acts of his servants. *Halty v. Markel*, 44 Ill. 225.

(*q*) *Stallard v. Great Western Rail. Co.*, 2 B. & S. 419; 31 Law J., Q. B. 137.

(*r*) *Van Toll v. South-Eastern Rail. Co.*, *infra*; *ante*, pp. 24-28.

(*s*) Addison on Contracts, p. 921, 6th ed.

(*t*) *Byles, J., Van Toll v. S.-E. Rail. Co.*, 12 C. B., N. S. 75; 31 Law J., C. P. 245. *Peck v. North Staff. Rail. Co.*, 10 H. of L. Ca. 473.

607 *Loss of goods by parties receiving them to be carried, but who are not common carriers.*—"Every man," observes Gould, J., "that undertakes to carry goods is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage; and if a reward be given, then it is without question so. The reason of the action is the particular trust reposed in the bailee, to which he has concurred by the assumption of the work, and in the executing which he has miscarried by his neglect. And when a man undertakes specially to do such a thing it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms"(u). The law casts upon him the obligation of using due and proper care and skill, whether any hire or reward has or has not been agreed to be paid. If, therefore, a person receives a free pass, and is carried gratuitously upon a railway, the railway company is not thereby released from the duty of using due and proper care in the performance of the work of carrying him(uu).

When a bailee has undertaken to carry money, or goods and chattels, gratuitously, to a distant part, it is no answer to an action brought against him for the breach of his engagement to say that he lost the articles in a brothel or a lodging-house, or by the wayside, without giving any satisfactory or excusable account of the loss. The loss itself unexplained affords the strongest presumption of negligence(x), and the bailee must rebut this presumption by showing that he was forcibly robbed, or that the property was stolen without any gross neglect or wilful default on his part(y), or that his vehicle broke down or was overturned, and that the articles were lost during the hurry and confusion and fright of an undoubted accident. Where the bailee of a parcel upon which the word "value" was written promised to carry it gratuitously from Bedford to London, and direc-

(v) *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith's L. C., 6th ed. 177.

(uu) But otherwise where the parties have provided to the contrary by express contract. *Kinney v. Central R. R. Co. of New Jersey*, 34 N. J. 513. *Wells v. New York Central R. R. Co.*, 24 N. Y. 181. *Perkins v. New York Central R. R. Co.*, 24 N. Y. 196. *Bissell v. New York Central R. R. Co.*, 25 N. Y. 442. See *Smith v. New York Central R. R. Co.*, 24 N. Y. 222; *Stinson v. New York Central R. R. Co.*, 32 N. Y. 333.

(x) *Parry v. Roberts*, 3 Ad. & E. 120; 5 N. & M. 670; *Maule, J.*, in *Melville v. Doidge*, 6 C. B. 456. See *Colyar v. Taylor*, 1 Cold. (Tenn.) 372.

(y) *Doorman v. Jenkins*, 2 Ad. & E. 256; *Holt, C.J.*, in *Coggs v. Bernard*, 2 Ld. Raym. 913. A bailee of goods, without reward, to be carried from place to place, is responsible only for gross negligence; and what constitutes such negligence is a question for the jury. *Lobenstein v. Pritchett*, 8 Kan. 213. *Storer v. Gowen*, 6 Shep. 174. *Allen v. Sackrider*, 37 N. Y. 341.

If he has used the money with which he was intrusted, and has been afterwards robbed of other money, he must bear the loss. *Anderson v. Foresman, Wright*, 598. So if he loses the money with which he is intrusted while other money which is his own is not lost he must bear the loss. *Bland v. Womack*, 2 Murph. 373.

tions were given to him to take particular care of it upon the road, and to deliver it to the book-keeper at the Bell and Crown, Holborn, and, the parcel not being delivered, an action was brought against the bailee for the breach of his engagement, and no satisfactory evidence was offered by him to excuse or account for his neglect, it was held that the bailee was responsible for the value of the parcel(z).

Where the captain of a vessel was intrusted with a seaman's chest to be carried gratuitously from Trinidad to England, and during the voyage the chest was opened to see if it contained any contraband articles; and was found to be filled with money and valuables, which were taken out by order of the captain, put into a canvas bag, and deposited in the captain's own chest in his cabin, where his own money and valuables were kept, and on the arrival of the vessel at Gravesend, the captain and one of the mates went ashore, leaving the vessel in charge of the other mate, and the next morning the captain's chest was missing, and was never afterwards discovered, and it appeared that the night preceding the loss of the chest an excise officer and two young men belonging to the ship had been allowed to sleep in the captain's cabin, Lord Ellenborough left it to the jury to say whether the captain had been guilty of negligence, telling them that as soon as he had discovered the valuable nature of the property, he was bound to watch it with great care and diligence, and the jury being of the opinion that proper care had not been taken of the money, found a verdict for the plaintiff for the full value of the property(a).

When the bailee is to be paid for carrying the things, he cannot, of course, in any case, set up a mere loss of goods by the way, as an answer to an action for the non-delivery of them(b). But the duty to carry safely, which the law imposes upon all persons who undertake the carriage of goods for hire, is not understood to mean that the goods shall be carried and delivered safely at all events, but that they shall be kept safe from all such hazards and contingencies as might have been foreseen and guarded against by the exercise of vigilance and skill.

Where the defendant received eleven boxes of gold dust, to be carried and delivered at the Bank of England, "robbers and dangers of the road excepted," and one of the boxes was secretly stolen, it was held that the defendant was responsible for the loss; that a secret

(z) *Beauchamp v. Powley*, 1 M. & Rob. 38.

(a) *Nelson v. Mackintosh*, 1 Stark. 237.

(b) *Rogers v. Head*, Cro. Jac. 262. *Matthews v. Hopping*, 1 Keb. 852. *Ross v. Hill*, 2 C. B. 877; 15 Law J., C. P. 182.

theft or pilfering was not within the exception as to robbers, nor was it a danger of the road within the meaning of the contract(c). If the owner accompanies the goods to take care of them and loses them himself, the carrier is not, of course, responsible for the loss(d). But if the goods are actually bailed or delivered into the hands of the carrier, the latter cannot exonerate himself from the consequences of negligent keeping by showing that the owner sent his own servant with the goods for greater security(e).

There is no duty imposed upon electric telegraph companies to deliver messages correctly, so as to enable the receiver of the message, in the absence of any privity between him and the company, to sue them for negligence in case he suffers injury from the misdelivery or inaccurate delivery of the message(f).

(c) *De Rothschild v. R. M. St. P. Co.*, 7 Exch. 734; 21 Law J., Exch. 273.

(d) *Brind v. Dale*, 8 C. & P. 209, 211; 2 M. & Rob. 80.

(e) *Robinson v. Dunmore*, 2 B. & P. 416.

(f) *Playford v. United Kingdom Telegraph Co.*, L. R., 4 Q. B. 706; 38 L. J., Q. B. 249.

By the 31 & 32 Vict. c. 110, power is given to the Postmaster-General to purchase the telegraphs in this country, and this has been done. By the 32 & 33 Vict. c. 73, s. 23, telegraphic messages are to be deemed post letters within 7 Will. 4 & 1 Vict. c. 36, but this is not to relieve officers of the post-office from producing such messages in courts of law when duly required so to do. The liability of telegraph companies is regulated by contract, and the nature of their public employment. In the absence of any special contract limiting or regulating their liability, they do not insure the safe and accurate transmission of messages, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and if they fail in such care and diligence, they become responsible. *Breese v. United States Telegraph Co.*, 48 N. Y. 132.

But, while they are bound to transmit all messages delivered to them, they have the right to make reasonable rules and regulations for their business; and can limit their liability for mistakes not occasioned by gross negligence or wilful misconduct, either by notice brought home to the sender of the message or by special contract entered into with him. *Breese v. United States Telegraph Co.*, 48 N. Y. 132. *Redf. on Carr.* 405. *Birney v. New York & Washington Telegraph Co.*, 18 Md. 341. *New York & Washington Printing Telegraph Co. v. Dryburgh*, 35 Penn. St. 298. *Ellis v. American Telegraph Co.*, 13 Allen, 226. *Western Union Telegraph Co. v. Carew*, 15 Mich. 525. *Wann v. Western Union Telegraph Co.*, 37 Mo. 472. *Camp v. Western Union Telegraph Co.*, 1 Metc. (Ky.) 164.

Thus a telegraph company may relieve itself from liability for errors in the transmission of a message by a notice printed on the blank on which the message is written to the effect that the company will not be responsible for such errors unless the message is repeated, provided such notice was brought to the knowledge of the party injured by the error. *Camp v. Western Union Telegraph Co.*, 1 Metc. (Ky.) 164. *Wann v. Western Union Telegraph Co.*, 37 Mo. 472. *Sweetland v. Illinois & Mississippi Telegraph Co.*, 27 Iowa, 433.

But while telegraph companies may, within certain limits, thus limit their liability for certain errors in the transmission of messages, they cannot make such rules and regulations as will protect them from liability for damages resulting from their own gross negligence or the gross negligence of their agents and servants. *Western Union Telegraph Co. v. Buchanan*, 35 Ind. 429. *Western Union Telegraph Co. v. Graham*, 1 Colorado, 230. *Ellis v. American Telegraph Co.*, 13 Allen, 234. *Sweetland v. Illinois & Mississippi Telegraph Co.*, 27 Iowa, 433. *True v. International Telegraph Co.*, 60 Me. 9.

Thus a notice with regard to the repetition of messages, usually printed on the blank on which the message is sent, will not relieve the company from liability for loss occasioned by the neglect of the operator, through forgetfulness, to send the message. *Birney v. New York & Washington Telegraph Co.*, 18 Md. 341.

Nor will such notice relieve the company from liability where the neglect to send the mes-

608 *Limitation of liability of shipowners.*—The Merchant Shipping Acts, 17 & 18 Vict. c. 104, s. 503, and 25 & 26 Vict. c. 63, s. 54, exempt the owners and shareholders of sea-going ships from liability to make good any loss or damage that may happen, without their actual fault or privity, to any goods, merchandise, or things *from fire* on board ship, or to any gold, silver, diamonds, watches, jewels, or precious stones, by reason of robbery or embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship, the true nature and value of such articles.

609 *Detention of chattels by bailees under a claim of lien.*—The detention of chattels by a bailee is frequently justified on the ground that the bailee has a right to hold them in his hands until some pecuniary demand upon or in respect of them has been satisfied by the bailor. A

sage arose from the ignorance of the operator as to the existence of a town which is a county seat and one of the stations on the company's line. *Western Union Telegraph Co. v. Buchanan*, 35 Ind. 429.

Nor will such notice relieve the company from liability for a negligent failure to deliver a message, not repeated, after its receipt at the office to which it was addressed. *Western Union Telegraph Co. v. Graham*, 1 Colorado, 230. *True v. International Telegraph Co.*, 60 Me. 9.

Nor will such notice relieve the company from damages caused by defective instruments. *Sweetland v. Illinois & Mississippi Telegraph Co.*, 27 Iowa, 433.

Or by the want of proper skill in the operators, or by their failure to use due care. *Id.*

Where the operator changes the words of the message to be sent to conform to what he supposes to be the intention of the sender of the message, and damage is sustained hereby, the party injured may hold the company liable, notwithstanding the message was written on a blank containing the ordinary notice as to repeating the message. *New York & Washington Telegraph Co. v. Dryburgh*, 35 Penn. St. 298.

So the company is liable in like case where the operator at the receiving office makes the change. *Sellers v. Western Union Telegraph Co.*, 3 Am. Law Rev. 777.

But where the condition as to repeating exists, and is known to the party sending a message, or where he is bound to take notice of it, and a mistake occurs in an unrepeatable message, the mere proof of such mistake, without some other evidence of carelessness on the part of the company, will not make it liable. It must be further shown that the mistake was caused by the fault of the company. *Sweetland v. Illinois & Mississippi Telegraph Co.*, 27 Iowa, 433.

In *Rittenhouse v. Independent Line of Telegraph* (44 N. Y. 263), it was held that the negligence of a telegraph company is proved by showing that it did not transmit the message in the form in which it was delivered to it; and that the burden was upon the company to show that the mistake happened without its fault.

In *Baldwin v. United States Telegraph Co.* (45 N. Y. 744), it was held that an error in transcribing the direction of a message and a consequent misdelivery, is *prima facie* evidence of neglect and want of care in the operator; and that the burden of proof was upon the company to explain the error and show that it occurred without fault.

A telegraph company may also be liable for the negligence of its operators in allowing a fraudulent message to be sent over its wires, thereby causing injury to third parties.

Thus it has been held that the sending of a message addressed to a banking house, in the name of the cashier of a bank, at the request of a party who was thereby held out to be entitled to credit to a large amount, without any evidence of his authority to use the name of the cashier, is an act of gross negligence for which the telegraph company is liable to the bank for the damages occasioned thereby. *Elwood v. Western Union Telegraph Co.*, 45 N. Y. 549.

right of lien may exist in favor of the unpaid vendor of chattels, who has not parted with the possession of the things he has sold(*g*); or in favor of persons who have advanced money upon the security of a deposit of title-deeds, or of goods and chattels; of innkeepers who have provided lodging and food for travellers and guests(*h*); of common carriers who have received goods to be carried for hire; of ship-owners who have earned freight for the conveyance of a cargo, or the hire of their vessels under a charter-party of affreightment, when the ship itself has not been demised to the charterer, or who have a claim against the owners of goods for general average or salvage(*i*); of the salvor or rescuer of property from perils of the sea, who has earned salvage for his services: of the factor, broker, or auctioneer, who has received goods for sale, and has made advances or given acceptances upon the credit of them to his employer, or who has sold them and earned commission, etc., and retains in his hands the produce of the sale. It generally exists, also, in favor of artizans and others who have bestowed labor and service on goods and chattels which have been delivered to them to be repaired, improved, or mended. It may exist also in many other cases by custom, or by the express agreement of the parties(*j*).

The right of lien, when once established, is not destroyed by reason of the remedy for the recovery of the debt secured by the lien being barred by the statute of limitations(*k*). And it will exist, although it arises out of an immoral consideration, if the plaintiff cannot recover without relying on the immorality, on the principle of *in pari delicto potior est conditio possidentis*(*l*).

610 *Particular liens and general liens.*—There are two species of liens known to the law, namely, particular liens and general liens. Par-

(*g*) *Cooper v. Bill*, 34 Law J., Exch. 161; or a right to stop in transitu, if the transitus has not been determined. *Bolton v. Lanc. & Yorkshire Rail. Co.*, L. R., 1 C. P. 431. And see *Rodger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C. Ca. 393; L. J., P. C. 30; L. R. 3 P. C. Ca. 465; *Addison on Contracts*, 6th ed., p. 200, *et seq.*; *McClure v. McDearmon*, 26 Ark. 66; *Flint v. Rawlings*, 20 La. An. 557.

(*h*) *Allen v. Smith*, 31 Law J., C. P. 306. *Gamwell v. Schley*, 41 Ga. 112. *Case v. Fogg*, 46 Mo. 44. *Manning v. Hollenbeck*, 27 Wis. 202. *Nichols v. Holliday*, 27 Wis. 406. *Colquitt v. Kirkman*, 47 Ga. 555.

(*i*) *Briggs v. Mercht. Trad. etc.*, 13 Q. B. 167; 18 Law J., Q. B. 178. *Wilson v. Grand Trunk R. R. Co.*, 56 Me. 60; *Fox v. Holt*, 36 Conn. 558; *The Davis*, 16 Wall. 15.

(*j*) *Small v. Moates*, 9 Bing. 574. *Norris v. Williams*, 1 Cr. & M. 842. *Hague v. Dandeson*, 17 Law J., Exch. 269. *Gray v. Carr*, L. R., 6 Q. B. 522. *Peek v. Larsen*, L. R., 12 Eq. Ca. 378. See *Wiltshire Iron Co. v. Gt. West. Rwy.*, L. R., 6 Q. B. 101, 776, as to the effect of a liquidation on a lien. Also *Re Sankey Brook Coal Co.*, L. R., 12 Eq. Ca. 472. As to the lien of pledgees and pawnbrokers, see *Addison on Contracts*, 6th ed. 279–290.

(*k*) *Spears v. Hartly*, 3 Esp. 81. *Re Broomhead*, 16 Law J., Q. B. 355.

(*l*) *Taylor v. Chester*, L. R., 4 Q. B. 309; 38 L. J., Q. B. 225.

ticular liens are where persons claim a right to retain goods in respect of labor and money expended upon them, and these liens are favored in law. General liens are claimed in respect of a general balance of accounts, and these are founded on custom only, and are therefore to be taken strictly.

611 *Ordinary lien of workmen and artificers.*—Whenever a person has bestowed work and labor or skill in repairing or improving a chattel at the request, or by the employment, of the owner, he has a lien upon it for a fair and reasonable remuneration, or for the contract price, if a price has been fixed by agreement(*m*). Thus the artificer to whom goods are delivered to be worked up, the shipwright to whom a vessel has been delivered to be repaired(*n*), the printer to whom paper has been delivered to be printed(*o*), the miller who has ground corn or meal at his mill(*p*), the horsebreaker or trainer by whose skill a horse is trained and rendered manageable(*q*), the stallion-keeper who has received a mare to be covered by his stallion, have each a lien for their hire, or the customary charges for their services, unless there be some express or tacit understanding between the parties to the particular contract inconsistent with the exercise of such a right. But where no work is to be done upon the chattel to improve or increase its value, or to carry it from one place to another for hire, no lien attaches upon it. Thus, if a power of attorney, or an authority to receive money, is intrusted to a bailee in order that he may exhibit it as a voucher, he has no lien upon the document for money due to him from the bailor. Where a mortgage deed was delivered to an auctioneer in order that he might obtain payment of the principal and interest due thereon, and the auctioneer made several applications for the money, it was held that he had no lien upon the deed for his charges(*r*).

The lien of the manufacturer and workman extends only to the principal chattels placed in his hands to be worked up, and not to the accessorial materials which may have been furnished by the employer, and left upon the premises of the manufacturer or workman unused. Thus, where oil, madder, dyewood, and fustic, were furnished to scrib-

(*m*) *Chase v. Westmore*, 5 M. & S. 183. *Morgan v. Congdon*, 4 N. Y. 552. *Burdick v. Murray*, 3 Vt. 302.

(*n*) *Franklin v. Hosier*, 4 B. & Ald. 341. *Williams v. Allsup*, 10 C. B., N. S. 417; 30 Law J., C. P. 353. As to a maritime lien, see *The Two Ellens*, L. R., 3 Adm. & Eccl. 345; L. R., 4 P. C. C. 161.

(*o*) *Blake v. Nicholson*, 3 M. & S. 167.

(*p*) *Chase v. Westmore*, 5 M. & S. 180.

(*q*) *Bevan v. Waters*, 3 C. & P. 520. *Jacobs v. Latour*, 2 M. & P. 201; 5 Bing. 130. *Scarfe v. Morgan*, 4 M. & W. 284.

(*r*) *Sanderson v. Bell*, 2 Cr. & M. 304.

blers and fullers by a person who sent them cloth to be scribbled and fulled and dyed upon their premises, it was held that the lien of the scribblers and fullers was confined to the cloth, and did not extend to the oil, etc., furnished by the employers, and left upon the premises after the scribbling and fulling had been completed(s). And where a stereotype printer received stereotype plates from his employer to print from, it was held that his lien for printing was confined to the paper, and did not extend to the plates from which he printed. But such a lien may be established by custom and the usage of trade, or by agreement of the parties(t). The lien of the artificer upon a chattel is strictly confined to work done upon it in making, mending, or repairing it. He cannot set up any claim against the owner for expenses incurred by him for warehousing it and taking care of it during the period of its detention(u); nor can he sell any portion of the property to cover the expenses he has incurred(v).

- 612 *A person cannot set up a right of lien which is at variance with the terms or conditions, or implied understanding, upon which he received the property.*—Thus, if a livery-stable keeper takes in a horse to be stabled and fed for hire, upon the understanding that the horse is to be re-delivered to the owner whenever he requires it, the livery-stable keeper has no right of lien upon the horse for his keep(x), or for money paid by him to a veterinary surgeon for blistering the horse according to the owner's directions(y), the right of the owner to the possession of the horse for the purpose of riding him being deemed inconsistent with the right of lien. The livery-stable keeper, indeed, who holds a horse at the constant disposal of the owner, is the mere servant of the latter, and has nothing more than the bare custody of the animal. This is the case also with the agister of milch cows, who receives them to be depastured, agisted, or fed, the owner having a right to the possession of the cows whenever he requires them for the purpose of milking(z). And if the trainer of a race-horses holds them on the understanding that the owner may send them to be ridden by a jockey of his own choice at any race he chooses, and the trainer cannot lawfully refuse to deliver them to the owner for such a purpose, that state of things is

(s) *Cumpston v. Heigh*, 2 Sc. 684.

(t) *Bleaden v. Hancock*, M. & M. 465.

(u) *Brit. Emp. Ship Co. v. Somes*, 27 Law J., Q. B. 397; 30 ib. Q. B. 229; Ell., Bl. & Ell. 353, 8 H. L. C. 338. See *Nevair v. Roup*, 8 Clarke (Iowa), 207.

(v) *Thames Iron Works Co. v. Patent Derrick Co.*, 1 Johns. & H. 97; 29 Law J., Ch. 714.

(x) *Judson v. Etheridge*, 1 C. & M. 743. *Yorke v. Grenaugh*, 2 Ld. Raym. 868.

(y) *Orchard v. Rackstraw*, 19 Law J., C. P. 303.

(z) *Jackson v. Cummins*, 5 M. & W. 342. *Chapman v. Allen*, Cro. Car. 273.

inconsistent with the existence of a right of lien(*a*). If a policy of insurance is deposited for safe custody only, the depositary cannot set up a lien upon it for an antecedent debt(*b*). If a person receives a bill of exchange to get it discounted, and pay over the proceeds to the owner, or apply them in some specified manner, he has no lien upon the bill for money that may be due to him from the latter(*c*). If a ship-factor receives the certificate of registry of a ship in order to pay the tonnage dues, he has no lien upon it for a debt due to him from the shipowner(*d*). Whenever goods in the hands of a bailee or depositary are, by the terms of the contract, to be re-delivered to the owner at some stated period, or "if by the agreement the plaintiff is to have the goods immediately, and the payment in respect of them is to take place at a future day, the bailee cannot set up any lien"(*e*). A lien is wholly inconsistent with a dealing on credit, and can only exist where payment is to be made in ready money, or security is to be given the moment the work is completed(*f*). "If security" (such as a bill, note, or bond) "is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone"(*g*).

If a person, when goods are demanded of him, rests his refusal to deliver them up on grounds quite distinct from any claim of lien, he cannot afterwards, on finding that those grounds fail him, put forward a claim of lien as a justification for his refusal. Where, therefore, a warehouseman, on being applied to for brandy which had been delivered to him for safe custody, refused to give it up, saying that it was his own property, it was held that he could not afterwards justify his refusal on the ground that warehouse rent was due to him, and was not tendered at the time the brandy was demanded(*h*), "for it would be absurd to offer the expenses of keeping the goods to one who insisted on retaining them as his own property"(*i*). But a person does not, of course, lose his right of lien by merely omitting to mention it

(*a*) *Forth v. Simpson*, 13 Q. B. 685.

(*b*) *Muir v. Fleming*, D. & R., N. P. C. 30.

(*c*) *Key v. Flint*, 8 Taunt. 23; 1 Moore, 451. *Buchanan v. Findlay*, 9 B. & C. 749.

(*d*) *Burn v. Brown*, 2 Stark. 273.

(*e*) *Crawshay v. Homfrey*, 4 B. & Ald. 52. *Woollen Manufactory v. Huntley*, 8 N. H. 441.

(*f*) *Raitt v. Mitchell*, 4 Campb. 146.

(*g*) *Hewison v. Guthrie*, 3 Sc. 298; 2 B. N. C. 759. *Cowell v. Simpson*, 16 Ves. 280. *Horn castle v. Farran*, 3 B. & Ald. 497. *Coburn v. Kerswell*, 35 Me. 126. *Hutchins v. Olcutt*, 4 Vt. 549.

(*h*) *Boardman v. Sill*, 1 Campb. 410, n. *Weeks v. Goode*, *ante*, p. 408. *Scott v. Jester*, 13 Ark. 437. *Picquet v. McKay*, 2 Blackf. 465. *Dows v. Morewood*, 10 Barb. 183. See *Hanna v. Phelps*, 7 Ind. 21.

(*i*) *White v. Gainer*, 9 Moore, 45.

when the goods are demanded. And if he claims a right to retain them for two separate charges, and has a lien only in respect of one of them, this will not dispense with the necessity of a tender of the one in respect of which the lien exists(*k*).

613 *Parties against whom a lien may be claimed.*—A mere trespasser or wrong-doer, who gets possession of property without the consent of the owner, cannot in general deal with it so as to create a right of lien thereon as against the true owner(*l*), unless the person in whose possession the property is placed is a public innkeeper, or common carrier, or common ferryman, or is bound to exercise his craft in favor of all who require his services (*post*, ch. 10). Where the owner of a pony phaeton intrusted the phaeton to a painter to be painted, and the latter carried it to the premises of the defendant, who was in the habit of taking carriages to stand on his premises for hire, and there left it, and, the phaeton never having been painted or brought back, the plaintiff, after the expiration of three months, made search for it, and found it on the premises of the defendant, who claimed a lien on it for the price of the standing-room, it was held that the defendant had no such lien(*m*). And where a chaise, which had been broken by the negligence of a servant, was taken by the latter to a coach-maker's, without the knowledge or sanction of the master, and was there repaired, it was held that the coach-maker had no lien upon the chaise as against the master for the price of the repairs(*n*). It would seem also, from the adjudged cases, that if a servant is directed to take a carriage to *A* to be repaired, and he by mistake takes it to *B*, *B* would have no lien upon it for the price of the repairs, as the servant was not authorized to employ *B* in the matter. This may be law, but it is hardly just, and opens a wide door to fraud, as it is impossible for the coach-maker to be cognizant of the particular directions given by the master to the servant. If the servant has received general directions to get the carriage repaired, he may then of course give a right of lien to any coach-maker he may employ to do the repairs(*o*). It has been held, that if a person obtains possession of goods by fraud, and pawns them, the pawnee is entitled to a lien upon them for the money advanced as against the true owner(*p*). But the possession of the

(*k*) *Searle v. Morgan*, 4 M. & W. 281. See *Everett v. Coffin*, 6 Wend. 603.

(*l*) *Hartop v. Hoare*, 3 Atk. 44. *Lempriere v. Pasley*, 2 T. R. 485. *Castellain v. Thompson* 13 C. B., N. S. 105. See *Guilford v. Smith*, 30 Vt. 49.

(*m*) *Buxton v. Baughan*, 6 C. & P. 674.

(*n*) *Hiscox v. Greenwood*, 4 Esp. 174.

(*o*) *Weldon v. Gould*, 3 Esp. 268.

(*p*) *Parker v. Patrick*, 5 T. R. 175; doubted in *Peer v. Humphrey*, 2 Ad. & E. 499; said *tr*

goods by the pawnor must have been obtained by virtue of a contract intended to pass the property to him. If a person pawns with another property to which he has no color of title, the *jus tertii* may always be set up against the pawnor by the pawnee(*q*).

- 614 *General lien* is a right on the part of a manufacturer, or workman, factor, broker, or commission agent for the sale of goods, warehouseman or wharfinger, into whose hands goods have been placed to be worked up, repaired, improved, sold, or taken care of for hire, in the ordinary course of their trade or employment, to retain possession of them, not only until they have received payment of the hire due to them for their services in the particular employment, but for the general balance due to them from their employer in the ordinary course of dealing for work and services of the like nature bestowed at other times upon other goods of the employer. This right depends either upon the express agreement of the parties, or the custom and usage of the particular trade or business. The onus of making out and establishing the right, whether it exists by agreement or by custom, lies upon the person claiming it. When custom and usage of trade are relied upon as establishing the right, the usage must be shown to have governed the parties in their previous dealings together, or to prevail to such an extent that the contracting party must be supposed to be cognizant of it, and to have contracted subject to the usage; but, as the right is an encroachment upon the ordinary rules and principles of the common law, it is regarded with jealousy by the courts, and requires the strongest proof.

Where persons carry on a trade or business in which a general lien is recognized, they cannot claim a general lien in respect of goods or securities which are, by agreement, held for a particular purpose, or under special conditions inconsistent with the claim of a general lien(*r*). A general lien cannot be set up in opposition to the terms and conditions upon which the goods were received. Thus, if a broker or factor receives goods to sell, and applies the proceeds in some particular manner, he cannot set up a lien for his general balance, because a lien of this nature would be utterly inconsistent with the terms upon which he acquired possession of the goods(*s*). And if a debtor deposits a bill of exchange with his creditor, in order that the latter may

be good law by Parke, B., in *Load v. Green*, 15 M. & W. 219; and Cresswell, J., in *White v. Garden*, 20 Law J., C. P. 168

(*q*) *Chessman v. Exall*, 6 Exch. 345. As to pledges by factors and agents, see *Addison on Contracts*, 6th ed., p. 281, *et seq.*

(*r*) *Bock v. Gorrisen*, 2 De G., F. & J. 434; 30 Law J., Ch. 42.

(*s*) *Walker v. Birch*, 6 T. R. 262.

get the bill discounted and pay over the proceeds to the debtor, the creditor cannot set up a lien upon the bill for the general balance due to him(*t*). In some places, dyers, calico-printers, fullers, warehousemen, wharfingers, and packers, have been held, in accordance with the proved usage of their several trades in the particular locality, to have a lien on goods sent to them to be dyed, printed, warehoused, worked upon, or taken care of, not only for the work done upon, or in respect of, the particular goods in their possession, but also for their charges of dyeing, printing, warehousing, etc., other goods which had previously been delivered back to their owners(*u*); and in other places, where no such usage has been shown to exist, they have been held to have no such general lien(*x*). The usage, when it exists, must be shown to be long established, and notorious, fair, and reasonable, and not contrary to any established principle of law(*y*). It has been held that a publisher has a lien upon any one or more parts or numbers of a work for his charges and disbursements for printing or publishing the various numbers, though not consecutive, of an entire work(*z*); also, that an agent who carries on business in his own name, on behalf of an undisclosed principal, has a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liability which he has incurred in the conduct and management of the business(*a*).

615 *Lien of factors and brokers.*—Factors and brokers to whom goods are consigned to be sold, have a lien for the general balance due to them from their employers or principals in the ordinary course of their business as factors, and for their acceptances on behalf of such employers, upon the goods whilst they are in their possession, and on the moneys realized by the sale of them(*b*). This right exists universally by the custom of the trade. It is part of the law merchant, and as such is judicially taken notice of by the courts, no proof being ever required as a matter of fact that such general lien exists; but no such lien can be claimed as resulting from any general law of principal

(*t*) *Key v. Flint*, 1 Moore, 451; 8 Taunt. 21.

(*u*) *Savill v. Barchard*, 4 Esp. 52. *Naylor v. Mangles*, 1 ib. 109. *Spears v. Hartley*, 3 ib. 81. *Rose v. Hart*, 8 Taunt. 499; 2 Moore, 547. *Webb v. Fox*, 2 Peake, N. P. C. 167.

(*x*) *Green v. Farmer*, 4 Burr. 2214; 1 W. Bl. 651. *Holderness v. Collinson*, 7 B. & C. 216.

(*y*) *Rushforth v. Hadfield*, 6 East, 528. *Leuckhart v. Cooper*, 3 Sc. 521; 3 B. N. C. 99.

(*z*) *Blake v. Nicholson*, 3 M. & S. 167.

(*a*) *Foxcraft v. Wood*, 4 Russ. 488.

(*b*) *Kruger v. Wilcox*, Amb. 252. *Hudson v. Granger*, 5 B. & Ald. 31. *Hammond v. Barclay*, 2 East, 227. *Grieff v. Cowguill*, 2 Disney (Ohio), 54. *Winne v. Hammond*, 37 Ill. 99. *Cator v. Merrill*, 16 La. An. 137. *Davis v. Bradley*, 28 Vt. 118. *Aicher v. McMechan*, 21 Mo. 43. *Matthews v. Menedger*, 2 McLean, 145. *Baker v. Fuller*, 21 Pick. 318.

and agent(c). The lien does not extend to a collateral debt not growing out of the relationship of principal and factor, such as a debt due for rent(d), nor to goods which have not actually reached the hands of the factor(e), or which have come into his possession without the consent and direction of the owner; consequently, if goods have been left at the factor's place of business by mistake or inadvertence(f), or have been taken possession of by him without the authority of the owner, he cannot set up a lien upon them for his balance(g). And if the person from whom he receives the goods is only an agent, he cannot retain them as against the true owner for a debt that was due to him from the agent at the time the goods were put into his hands, and which was not contracted on the credit of the deposit of the goods; but it is otherwise if he has made advances on the credit of the deposit, not knowing the depositor to be an agent(h). The factor can only claim a lien for his general balance upon goods which come to his hands as factor. A factor, therefore, who effects a policy of insurance, not as factor, but as an insurance broker, is not entitled to a general lien on a policy in his hands for a balance due to him in his character of factor(i).

- 616 *Insurance brokers* have also, by the general usage and custom of trade, a lien upon every policy effected by them for the premium paid on such policy, and for their commission, and also for the general balance due to them from their employers upon all policies effected by them for such employers, and left in their hands, and upon all moneys received by them upon such policies from the underwriters, unless the person for whom they effected the policy was himself only an agent in the matter; in which case the extent of their lien will depend upon the disclosure or concealment of the agency, and the degree of credit they may have given to the agent, under the impression that he was the person really interested in the policy. The lien does not extend to a collateral debt not incurred in respect of brokerage business(k).

(c) *Bock v. Gorrisen*, 30 Law J., Ch. 42.

(d) *Houghton v. Matthews*, 3 B. & P. 485.

(e) *Kinloch v. Craig*, 3 T. R., 123. *Bruce v. Andrews*, 36 Mo. 593. But see *Wade v. Hamilton*, 30 Ga. 450; *Kollock v. Jackson*, 5 Ga. 153.

(f) *Lucas v. Dorrien*, 7 Taunt. 278.

(g) *Taylor v. Robinson*, 2 Moore, 730.

(h) *Pultney v. Keymer*, 3 Esp. 181. Addison on Contracts, 6th ed., pp. 279-283. *Freeman v. Appleyard*, 32 Law J., Exch. 175. See *Wesling v. Noonan*, 31 Mo. 599.

(i) *Dixon v. Stansfeld*, 10 C. B. 398.

(k) *Mann v. Forrester*, 4 Campb. 60. *Mann v. Shiffner*, 2 East, 259. *M'Kenzie v. Nevins*, 9 Shep. 138. See *Reed v. Pacific Ins. Co.*, 1 Met. 166.

617 *Lien of bankers.*—Bankers also, who are a species of factors in pecuniary transactions, have, by the general law of the land, a lien upon all the securities for money of their customers in their hands for their advances to such customers in the ordinary course of business(*l*), unless such securities have been received under special circumstances, and not in the ordinary way of their business as bankers, or under some special arrangement or understanding inconsistent with the exercise of the right, or limiting it to some specified amount(*m*). By the term securities is meant notes, bills and negotiable instruments, coupons, bonds of foreign governments, etc.(*n*). If title-deeds and securities for money, not being negotiable, are deposited in the hands of a banker by a person who is wrongfully possessed of them, or is not the true owner thereof, and is not authorized to raise money upon them, the banker has no better or further rights over them than the person who deposited them in his hands, and cannot set up a lien upon them as against the true owner(*o*). But as regards negotiable securities, such as exchequer bills of exchange, and promissory notes, the right of general lien will extend to them, although the customer who delivered them to the banker was not the owner, but was holding them as an agent or trustee of some third person, unless the banker knew at the time he received the securities that they did not belong to the person from whom he received them. The lien of a banker upon the securities in his hands belonging to his customers is part of the law merchant, and as such is judicially taken notice of by the courts(*p*).

618 *Lien of attorneys and solicitors.*—Attorneys and solicitors also have a lien upon all money recovered by them in the actions and suits in which they are employed (matrimonial, in bankruptcy, or otherwise(*q*)),

(*l*) *Davis v. Bowsher*, 5 T. R. 488. *Bank of the Metropolis v. New England Bank*, 1 How. (U. S.) 234. *Russell v. Haddock*, 3 Gill, 233. *Baltimore, etc., R. R. Co. v. Wheeler*, 18 Md. 372. The articles of association of joint-stock banks not unfrequently provide that the bank shall have a lien on the shares of a shareholder for all money due to the bank by such shareholder. See *Re General Exchange Bank*, L. R., 6 Ch. App. 818.

(*m*) *Vanderzee v. Willis*, 3 Bro. C. C. 21. *Bank of the Metropolis v. New England Bank*, 1 How. (U. S.) 234. *Russell v. Haddock*, 3 Gill, 233. *Baltimore, etc., R. R. Co. v. Wheeler*, 18 Md. 372.

(*n*) *Brandao v. Barnett*, 12 Cl. & F. 787. *Wylde v. Bradford*, 33 Law J., Ch. 53.

(*o*) *Lucas v. Dorrien*, 7 Taunt. 278. *Newton v. Newton*, L. R., 6 Eq. Ca. 135.

(*p*) *Barnett v. Brandao*, 7 Sc. N. R. 331. *Wookey v. Pole*, 4 B. & Ald. 11. *Collins v. Martin*, 1 B. & P. 648.

(*q*) *Ex parte Bremner*, L. R., 1 Prob. & Div. 254. *Ex parte Cleland*, L. R., 2 Ch. App. 811. *The Jeff Davis*, L. R., 1 Adm. & Eccl. 1. *The Leader*, 2 *ibid.* 314. *Mercer v. Graves*, L. R., 7 Q. B. 499. *Morrison v. Ponder*, 45 Ga. 187. *Marshall v. Meech*, 51 N. Y. 141. *Pulver v. Harris*, 52 N. Y. 73. *Re Paschal*, 10 Wall. 483. *Whittle v. Newman*, 34 Ga. 377. *Warfield v. Campbell*, 38 Ala. 527. *McGregor v. Comstock*, 28 N. Y. 237. *Carter v. Davis*, 8 Florida, 183.

and upon all the deeds and papers and other articles of their clients which come to their hands in their professional capacity, for the purposes of business, for the costs not only of the particular cause or matter with which such deeds or papers are connected, but for the costs due to them generally from their clients^(r). But a solicitor has no lien upon the will of a client for the costs incurred in the preparation of it, and cannot therefore refuse to produce it after his client's death until his costs have been paid. And, where deeds are delivered for a specific purpose, the right of lien is extinguished as soon as the particular purpose has been accomplished, and it may be superseded altogether by the attorney's taking from the client security for his costs^(s). The town agent of a country attorney has a lien only upon the money recovered, and upon the papers in his hands in the particular cause in which he is engaged, for the amount due to him by the attorney in that particular cause. He cannot set up a claim of lien for the general balance due to him from the country attorney who employs him, and cannot retain the money or papers of the client to satisfy his general debt^(t). And his lien is limited to the debt actually due from the client to the country solicitor, so that if the country client pays the country solicitor the lien is discharged, for the country solicitor can give the town agent no lien which he does not himself possess^(u).

An attorney cannot set up a general lien for the balance due to him in respect of services not rendered by him as an attorney, nor can he detain deeds and papers which do not come to him in his professional

Gammon v. Chandler, 30 Me. 152. *Sexton v. Pike*, 13 Ark. 193. *Baker v. Cook*, 11 Mass. 236. *Potter v. Mayo*, 3 Greenl. 34.

To the contrary, see *Forsyth v. Beveridge*, 52 Ill. 268; *Mansfield v. Dorland*, 2 Cal. 507; *Hill v. Brinkley*, 10 Ind. 102; *Ex parte Kyle*, 1 Cal. 331.

As to the extent of the lien, see *Currier v. Boston & Maine R. R. Co.*, 37 N. H. 223; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368; *Stewart v. Flowers*, 44 Miss. 513; *Wells v. Hatch*, 43 N. H. 246; *Waters v. Grace*, 23 Ark. 118.

As to his lien as against an official liquidator, see *Re Union Cement & Brick Co.*, L. R. 4 Ch. App. C. 27; *Re South Essex Reclamation Co.*, 38 L. J. Ch. 305.

^(r) *Stevenson v. Blakelocke*, 1 M. & S. 535. *Lambert v. Buckmaster*, 2 B. & C. 616. *Blunden v. Desert*, 2 Dru. & W. 405. *Friswell v. King*, 15 Sim. 191. *Robins v. Goldingham*, L. R., 13 Eq. Ca. 440. *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489. *Stewart v. Flowers*, 44 Miss. 513. *Dennett v. Cutts*, 11 N. H. 163.

As to an attorney's lien on a judgment for his costs, see *O'Brien v. Lewis*, 32 Law J., Ch. 665; *Slater v. Sunderland* (Mayor of), 33 Law J., Q. B. 37; *Langley v. Headland*, 34 Law J., C. P. 183; *Re Bank of Hindustan*, L. R., 3 Ch. App. 125; *Ex parte Morrison*, L. R., 4 Q. B. 153. As to a proctor's, *Patterson v. Patterson*, L. R., 2 Prob. & Div. 192.

^(s) *Genges v. Genges*, 18 Vcs. 294. *Balch v. Symes*, Turn. & R. 92.

^(t) *White v. Royal Exchange Ass. Co.*, 7 Moore, 249. *Moody v. Spencer*, 2 D. & R. 6. *Anon.*, 2 Dick. 802.

^(u) *Waller v. Holmes*, 1 Johns. & Hem. 239; 30 Law J., Ch. 24. *Re Andrew*, 7 H. & N. 87; 30 Law J., Exch. 403. *Peatfield v. Barlow*, 38 L. J., Ch. 311.

character. He has no lien, for example, where he acts or holds papers as town-clerk(*x*), or steward of a manor(*y*); he cannot set up any lien which is inconsistent with the nature of his employment, or the terms, or conditions, or express or implied trust upon which he received the papers(*z*). His right, moreover, is dependent upon the rights of his client, and he cannot acquire more extensive powers over the papers in his hands than the client himself possessed at the time he deposited them with him(*a*). If an attorney transacts business for a firm in partnership collectively, and also manages the private business of the members of the firm individually, he has no lien upon the private securities, deeds and writings, of one partner in respect of the business done for the firm(*b*).

By the 23 & 24 Vict. c. 127, s. 28, it is provided, that in any case before a court of justice where an attorney shall be employed to prosecute or defend, the court or judge may declare the attorney entitled to a charge upon the property recovered or preserved through his instrumentality(*c*), and may make an order for the taxation of the attorney's costs, and for the payment of them out of such property; and all conveyances and acts done to defeat such charge, except to a *bond fide* purchaser for value, without notice, shall be void(*d*). The attorney's charge for his costs under this section only extends to the property of his own client and not to that of other persons(*e*). But, independently of any order under the above statute, the proctor's lien in the Admiralty Court will attach and take precedence of the claim of a garnishee(*f*).

619 *Certificated conveyancers have no lien* upon the papers and instructions placed in their hands for the purpose of enabling them to draw a conveyance(*g*).

620 *Lien of shipmasters.*—An agent cannot acquire a lien upon the property of his principal for work done by others whom he has employed

(*x*) *Champernown v. Scott*, 6 Mad. 93.

(*y*) *Rex v. Sankey*, 5 Ad. & E. 426.

(*z*) *Lawson v. Dickenson*, 8 Mod. 307. See *Re Faithful*, L. R., 6 Eq. Ca. 324; *Simmonds v. Gt. East. Rail. Co.*, L. R., 3 Ch. App. 797.

(*a*) *Hollis v. Claridge*, 4 Taunt. 807. *Esdaile v. Oxenham*, 3 B. & C. 229. *Lightfoot v. Keane*, 1 M. & W. 745. *Molesworth v. Robbins*, 2 Jon. & L. 358.

(*b*) *Turner v. Deane*, 3 Exch. 836; 18 Law J., Exch. 343. See *Re Moss*, L. R., 2 Eq. Ca. 345.

(*c*) See *Twynam v. Porter*, L. R., 11 Eq. Ca. 181; *Heinrich v. Sutton*, L. R., 6 Ch. App. 865. *Re National Assurance and Investment Association*, L. R., 7 Ch. App. 221. See *Baile v. Baile*, L. R., 13 Eq. Ca. 497; *The Heinrich*, L. R., 3 Adm. & Eccl. 505.

(*d*) See *The Philippine*, L. R., 1 Adm. & Eccl. 309; *Re Massey*, L. R., 9 Eq. Ca. 367; *Re Keane*, L. R., 12 Eq. Ca. 115.

(*e*) *Berrie v. Howitt*, L. R., 9 Eq. Ca. 1.

(*f*) *The Jeff Davis*, L. R., 2 Adm. & Eccl. 1. See *The Heinrich*, L. R., 3 Adm. & Eccl. 505.

(*g*) *Steadman v. Hockley*, 15 M. & W. 553.

and paid. A shipmaster, therefore, has no lien upon a ship for money expended or debts incurred by him for repairs done to her on the voyage^(h).

621 *Lien for freight*.—The lien of shipowners and masters of ships on goods and cargoes for freight is regulated by the Merchant Shipping Act⁽ⁱ⁾.

622 *Lien of consignees*.—The general lien of a consignee upon goods consigned to him cannot be set up against positive directions given him by the consignor, and if he accepts a consignment accompanied by directions to apply the proceeds of it in a particular way, he is bound by such directions^(j).

623 *Notice that goods will be held subject to a general lien*.—The right to retain for a general balance may, with certain exceptions presently noticed, be created by the express contract of the parties. Every workman and artificer not being a public innkeeper, common carrier, or common ferryman, and not being bound to exercise his calling in favor of all persons who may require his services, has a right to prescribe the terms upon which he will receive goods into his possession to be dealt with in the ordinary course of his trade, and may by express notice reserve to himself a general lien, if he thinks fit so to do. Thus where the dyers, dressers, bleachers, whisters, printers and calenderers, of Manchester, and the neighborhood, came to a public resolution or agreement, at a public meeting in Manchester, that they would receive goods to be dyed, dressed, bleached, etc., on the condition that such goods should not only be subject to the debts for the work and labor performed upon them, but also for the general balance due from the persons employing them for work and labor of the same kind performed upon goods which they had already delivered out of their possession, it was held that persons who had sent goods to the dyer or fuller, with notice of this resolution, conceded to them a lien for their general balance^(k).

624 *General lien by custom of trade—Warehousekeepers—Wharfingers*.—Where certain public warehousekeepers of the city of London claimed a right to retain various bales of wool under an ancient custom of that city, for all public warehousekeepers to have a general lien upon all goods from time to time housed in their warehouses in the name of the merchants or other persons by whom such public warehousekeepers were employed, for all moneys or any balance thereof due from

(h) *Hussey v. Christie*, 9 East, 433.

(i) 25 & 26 Vict. c. 63, see s. 67.

(j) *Frith v. Forbes*, 32 Law J., Ch. 10.

(k) *Kirkman v. Shawcross*, 6 T. R. 14.

such merchants to such public warehousekeepers for their advances, expenses, and charges, etc., it was held that the custom was bad, as the general lien claimed was not confined to goods the property of the person who employed or retained the warehousekeeper. "The custom," it was observed, "if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehousekeeper for safe custody, liable to a private debt of the factor for expenses incurred in respect of other goods of third persons, which had been in his hands at former times, for charges contracted upon such goods, during any antecedent period of time, and that to an unlimited extent; which would be unreasonable and unjust, and obviously prejudicial in a very high degree to foreign trade, for no foreign merchant would consign his goods to this country for sale, if they could be made liable whilst warehoused for custody, to satisfy a debt already due from the factor to the warehousekeeper, in respect of other goods(*l*). Dock companies have no general lien for wharfage charges, and cannot detain the goods of one man to satisfy wharfage dues and charges incurred by another(*m*). If a wharfinger has a general authority to receive all goods directed for *A B*, and goods come to his wharf directed by mistake for *A B*, the real owner of the goods cannot take them away without paying the charges incident to those particular goods; but it is equally clear that the wharfinger could not set up a lien on such goods for a general balance of accounts due from *A B* to him(*n*).

625 *Lien of policy-brokers*.—If a policy-broker is employed by an agent to effect a policy of insurance for the benefit of such agent, and there is no disclosure of the agency, and nothing to lead the broker to think that any third party is interested in the policy, and the insurance is accordingly effected in the name of the agent as owner, and a loss occurs, and the policy is allowed, after the loss, to remain in the broker's hands, and the latter then permits the agent to get into his debt, not knowing him to be an agent, the broker will have a lien as against the principal upon the policy, and upon the money he received thereon from the underwriters, to the extent of the debt due to him from the agent, as well as for his commission, and charges for effecting the policy(*o*). But if there is the slightest indication of the agency to

(*l*) Tindal, C.J., *Leuckhart v. Cooper*, 3 Sc. 531; 3 B. N. C. 99; 35 Hen. 6, 33, cited *Rex v. Humphrey*, McClel. & Y. 193.

(*m*) *Dresser v. Bosanquet*, 32 Law J., Q. B. 57; 4 B. & S. 460, 486.

(*n*) *Richardson v. Goss*, 3 R. & P. 123.

(*o*) *Mann v. Forrester*, 4 Campb. 61. *Westwood v. Bell*, ib. 355. *Olive v. Smith*, 5 Taunt. 56.

the broker, such as a declaration by a British subject in time of war that the property is neutral(*p*), or a statement that the insurance is to be effected "for a correspondent in the country"(*q*), or that the property to be insured belongs to a merchant abroad who has consigned it to the agent with full power of disposition over it, and with authority to indorse the bill of lading(*r*), the broker will have a lien only for his commission and charges for the insurance, and not for the balance due to him from the agent.

626 *Extinguishment of liens by abandonment of possession.*—If a bailee who has a right of lien upon property in his possession voluntarily parts with the possession of such property, the lien is gone; so that if he afterwards recovers possession of the property his right of lien does not revive(*s*); but if it is stolen or taken away by a trespasser or by fraud, and he gets it back again, his right of lien is not extinguished(*t*). Possession of goods and chattels may be given up, and the right of lien extinguished, although the goods and chattels are never actually removed from the premises of the party having the lien(*u*). And, on the other hand, as the possession of the servant is the possession of the master, it follows that a depositary or bailee who has a right of lien upon goods in his possession does not lose his right by placing the goods in the hands of his servant or agent for custody, who is to hold them at his disposal. Warehousekeepers and wharfingers to whom goods have been delivered by masters of ships for safe custody, have been held to be the servants of such masters holding the goods at their disposal, so as to preserve the shipmaster's lien for the freight after the goods have been taken out of the ship(*v*).

The right of lien being a mere personal right, which cannot be parted with, it follows that a bailee who has got a lien cannot sell his right to another, nor can he transfer, as we have just seen, the property over which the lien extends, to another, without losing his right of lien(*x*), unless the property has been pledged to secure the repayment of money advanced, with an express or implied power of sale(*y*),

(*p*) *Maauss v. Henderson*, 1 East, 337.

(*q*) *Snook v. Davidson*, 2 Campb. 218.

(*r*) *Lanyon v. Blanchard*, ib. 597.

(*s*) *Sweet v. Pym*, 1 East, 4. *Brackett v. Hayden*, 3 Shep. 347. *M'Farland v. Wheeler*, 26 Wend. 467. *Matthews v. Menedger*, 2 M'Lean, 145. *Bailey v. Quint*, 22 Vt. 474. *King v. Indian Orchard Canal Co.*, 11 Cush. (Mass.) 231. *Danforth v. Pratt*, 42 Me. 50. See, however, *Spaulding v. Adams*, 32 Me. 211.

(*t*) *Wallace v. Woodgate*, R. & M. 194.

(*u*) *Jacobs v. Latour*, 2 M. & P. 205.

(*v*) *Reeves v. Capper*, 5 B. N. C. 136.

(*x*) *Clerk v. Gilbert*, 2 B. N. C. 357.

(*y*) See *Johnson v. Stear*, 33 L. J., C. P. 130.

for there is a clear distinction in this respect between a lien, which is a mere personal right of detention, and a pledge deposited to secure the repayment of money(z). An innkeeper, consequently, cannot sell the horse of his guest for the expense of his keep, except within the city of London(a). A sheriff cannot sell an interest of this description, and he cannot, consequently, seize property covered by the lien under an execution against the party claiming the lien(b); but if the execution is against the owner of the goods, he is entitled then to seize them, after tendering the amount of the debt for which they are a security. A person may, as we have before seen, reserve to himself, by express contract, a right to take and to hold goods as a security for the payment of a debt, so that he will be entitled to resume possession of the goods after he has parted with them, and to re-establish his lien, provided the rights of no third person have intervened.

627 *Statutory power of sale in discharge of a right of lien.*—By the Merchant Shipping Act, 1862, power is given to wharf or warehouse owners, in certain cases, to sell by public auction goods placed in their custody, and apply the proceeds of the sale in satisfaction and discharge of the charges upon them(c).

628 *Tender of the debt in extinguishment of the right of lien.*—Wherever a person has a lien upon goods for the payment of money due upon them, whether he be an unpaid vendor in possession of goods sold, or a manufacturer or workman in possession of goods that have been worked up or repaired by him, or a pledgee holding chattels as a security for a debt, the lien may be at once extinguished, and a right to the possession of the goods created, by a tender of the money due upon them(d). Where a lease was deposited with the defendants as a security for the repayment of 150*l.* on a promissory note payable on demand, and the defendants agreed that they would not enforce their remedy upon the note so long as the maker should duly pay the interest thereon, the rent of the premises, and what might from time to time be due to them for beer, and if he failed in any of these respects, the defendants were to be at liberty, after notice, to sell the lease and to deduct the expenses of the sale, the principal money and interest, and any account then due from the plaintiff to the defendant, it was held that the moment the amount of the note was paid or

(z) *Donald v. Suckling*, L. R., 1 Q. B. 585.

(a) *Jones v. Pearle*, 1 Str. 556.

(b) *Legg v. Evans*, 6 M. & W. 42. See *Young v. Lambert*, L. R., 3 P. C. Ca. 142.

(c) 25 & 26 Vict. c. 63, ss. 73-76.

(d) *Ratcliff v. Davies*, Cro. Jac. 244.

tendered, there was an end of all the stipulations as to what should be done with the lease in the event of the non-payment of the note and interest, and that the plaintiff had a right to maintain an action of detinue to recover back his lease(e).

629 *Detention of goods and chattels, deeds and securities, by one of several joint-owners or tenants in common.*—"If two be possessed of chattels personal in common by divers titles, as of a horse, an ox, or a cow, etc., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common, etc., when he can see his time"(f). Where two have an equal interest in a deed, and each may have occasion to use it, as for instance, where the same deed grants Whiteacre to A, and Blackacre to B, it is manifest that both cannot hold the deed at the same time; and to avoid any unseemly contest for the possession of it, it has been held that he who first gets hold of it is entitled to keep it. For fraud or force which may be used to get possession of the deed, either party may perhaps have a remedy against the other; but the title to the deed is ambulatory between those who may have an interest in, and may have occasion to use it, and each is entitled to keep the deed from the other so long only as he actually retains it in his custody and control, but no longer(g).

630 *Re-delivery of chattels to one of several joint-bailors.*—If an action is brought by several joint-bailors against a bailee for the non-delivery of goods deposited in his hands by a joint-bailment from all of them, it is a good defence to the action that the goods bailed by the plaintiffs to the defendant have been delivered up to one of them. "It is said," observes Lord Campbell, "that this is no defence, because the contract of bailment was not to deliver them except to the plaintiffs jointly. But as, in fact, one of the plaintiffs has got the goods, the question arises whether he can sue the defendants for giving them to himself. It would be contrary to all principle, and the cases show that it would be contrary to all law, if he could. I do not think an action could be maintained against bankers in this position more than against others: but it is not to be supposed they could therefore with impunity deliver up to one person securities deposited with them to hold for several persons. I think, in such a case, they would stand in the relation of

(e) *Chilton v. Carrington*, 15 C. B. 105.

(f) *Litt. sec. 323.*

(g) *Foster v. Crabb*, 12 C. B. 136.

trustees for all the joint-bailors; and there would be a clear remedy in equity for the breach of trust in delivering the joint property to one only of the cestui que trusts”(h).

SECTION II.

OF ACTIONS FOR THE NEGLIGENT MANAGEMENT, NEGLIGENT KEEPING, AND UNLAWFUL DETAINING OF GOODS AND CHATELS.

631 *Parties to be made plaintiffs.*—Where injury has been sustained by the servants of a bailee from the negligence of the bailor, in not giving notice of the dangerous nature of the subject-matter of the bailment, the servant is the proper person to sue for damages(i). A mere gratuitous bailment of a chattel to another does not, as we have seen, remove the chattel out of the possession of the bailor, and does not prevent the latter from suing a third person who takes the chattel out of the hands of the bailee and refuses to deliver it to the bailor on demand (*ante*, pp. 445, 446). In case of gratuitous bailment, the bailee generally holds the chattels merely at the will of the bailor, and is bound to return them whenever required so to do. Where, therefore, brewers sell porter in casks, and lend the casks to their customers until they are emptied, they[†] may maintain an action against a wrong-doer for taking and detaining the empty casks(k). And where chattels lent to hire have been permanently injured or destroyed whilst in the hands of the bailee by a wrong-doer, the bailor, or owner of the chattels, may maintain an action on the case in respect of the damage done to his reversionary interest in them. The mere outstanding right of the bailee to the use of the chattels does not debar the owner of this right of action(l).

In all cases of bailment of chattels by one person to another for hire or reward, it is essential that the bailee should preserve his dominion and control over the property, and his power of restoring it to the

(h) *Brandon v. Scott*, 7 Ell. & Bl. 237; 26 Law J., Q. B. 163.

(i) *Farrant v. Barnes*, 11 C. B., N. S. 553; 31 Law J., C. P. 137.

(k) *Manders v. Williams*, 4 Exch. 343.

(l) *Mears v. Lond. & S.-West Rail. Co.*, 11 C. B., N. S. 850; 31 Law J., C. P. 220. *Howard v. Farr*, 18 N. H. 457.

owner. If, therefore, he parts with the possession of the chattel, and places it under the dominion and control of a stranger, the bailment is determined, and the owner has a right of action for the recovery of the thing bailed(*m*).

Where, after a bailment of chattels, the bailor has transferred all his interest in the chattels to another, the bailee is entitled, as we have seen, to have an order or authority from the bailor to deliver them to his transferee, or a reasonable time to make inquiry and ascertain the validity of the new title of the claimant before he can be made responsible in damages for the non-delivery of the chattels to the latter(*n*). Where, for example, goods have been bailed by the owner to a warehouse-keeper, to be kept, and the owner has subsequently sold the goods to a purchaser, the warehouse-keeper is not responsible for refusing to deliver the goods to the purchaser without the production of a delivery-order from the bailor, or some documentary evidence of title to the goods on the part of the stranger who demands them; but he may, if he pleases, at once attorn to the purchaser, and rely upon the title of the latter(*o*).

If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorized by him to receive them, a *bonâ fide* purchaser or mortgagee, who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and in case of the refusal of the latter to deliver them to him within a reasonable time after the demand (*ante*, p. 401), may maintain an action for the conversion or detention of the property(*p*), the bill of sale or mortgage signed by the bailor, being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee; but if there be a mere oral agreement of sale, and no warrant, or authority, or direction from the bailor for the delivery of the goods, the refusal of the bailee to deliver them to the stranger would be no proof of a conversion, or of a wrongful detainer. It is to a case of this sort, where there has been a mere oral transfer of chattels by a bailor, without any warrant or authority from the latter to the bailee to deliver them to the transferee,

(*m*) *Cooper v. Willomat*, 1 C. B. 682.

(*n*) *Ante*, pp. 401, 402. *Lee v. Bayes*, 18 C. B. 607; 25 Law J., C. P. 249. *Solomons v. Dawes*, 1 Esp. 82.

(*o*) *Ogle v. Atkinson*, 5 Taunt. 762. *Cheesman v. Exall*, 6 Exch. 344; *ante*, p. 402.

(*p*) *Franklin v. Neate*, 13 M. & W. 484; 1 Roll. Abr. DETINUE, C. 2, 3.

that the dictum of Holt, C.J., must be taken to apply, that if *A* bail goods to *C*, and after give his whole right to them to *B*, *B* cannot maintain detinue for them against *C*, because the special property that *C* acquires by the bailment is not thereby transferred to *B*(*q*). If the right of property in the subject-matter of the bailment has been transferred by devise, the devisee may sue for the detention or loss of the property, and it is no answer to the action to show that the subject-matter of the bailment was lost in the lifetime of the devisor, and has not been in the possession of the bailee since the accrual of the title of the devisee(*r*). So, if the right of property in title-deeds, or an heirloom, comes to the heir-at-law by descent, the heir is the proper person to sue for their detention(*s*).

If the bailor is not himself the owner of the goods, but has some special property therein, or is himself a bailee of them, and answerable over to the real owner, he is entitled to maintain an action for damage done to them, or for the loss of them(*t*).

632 Joint and separate rights of action.—If a chattel has been deposited by two or more joint-owners of it in the hands of a bailee, who has agreed to keep it for them, it is not in the power of one of them to take it out of his hands without the consent of the others(*u*). If that were not so, each might demand the chattel, and have an action for its non-delivery, and so the bailee might be harassed with as many actions as there were joint owners(*x*). But if the bailee thinks fit to deliver up the goods to one of the joint-bailors, a joint-action by all of them cannot afterwards be maintained against him, for the one who has got the goods cannot join with the others in suing for the non-delivery of them(*y*). And if the defendant is a mere wrong-doer, having got into his hands the property of several joint-owners, none of whom have authorized him to detain it, any one of such joint-owners may bring an action of detinue against him(*z*). If several joint-owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom

(*q*) *Rich v. Aldred*, 6 Mod. 216.

(*r*) *Goodman v. Boycott*, 2 B. & S. 1; 31 Law J., Q. B. 69.

(*s*) Bro. Abr. DETINUE, pl. 30, 45.

(*t*) *Freeman v. Birch*, 1 N. & M. 420. *Nicolls v. Bastard*, 2 C. M. & R. 660; *ante*, pp. 443-446. See *Peoria, etc., R. R. Co. v. McIntire*, 39 Ill. 298.

(*u*) Lord Ellenborough, C.J., in *May v. Harvey*, 13 East, 199. *Nathan v. Buckland*, 2 Moore, 153. *Harper v. Godsell*, L. R., 5 Q. B. 422; *ante*, p. 446. *Stachely v. Peirce*, 28 Texas, 328.

(*x*) *Attwood v. Ernest*, 13 C. B. 889; 22 Law J., C. P. 225.

(*y*) *Brandon v. Scott*, 7 Ell. & Bl. 237; 26 Law J., Q. B. 163. See *Brizendine v. Frankfort Bridge Co.*, 2 B. Mon. 32.

(*z*) *Broadbent v. Ledward*, 11 Ad. & E. 209.

he deals(a), "as if a charter be made to four and one of them bails the charter to keep, he alone, without the others, may bring detainee; or all the owners may be joined as plaintiffs, except in the case of deposits of money in the hands of bankers"(b). Where two persons were severally entitled to separate portions of the contents of a box delivered by their agent to a railway company, to be carried for both of them, and the box was lost, it was held that they might sue jointly for damages(c).

633 *Power to compel rival claimants to establish their title by garnishment and by interpleader.*—By the common law, whenever one person had deposited goods in the hands of another, to be re-delivered to the bailor, and a third party came and claimed the goods of the depositary, and brought an action of detainee for their recovery, the bailee might pray garnishment, *i.e.*, that the bailor might be garnished or warned of the claim, made by the stranger upon the depositary, and summoned to show to the court whether the goods were his property or not; and upon this prayer of garnishment a *scire facias* issued against the depositor to appear and plead with the plaintiff, and the latter thus became the defendant to the suit under the name of the garnishee, the first defendant, the depositary, being considered out of court by the garnishment(d). By the 1 & 2 Wm. 4, c. 58, s. 1, it is enacted, that all depositaries or stakeholders who are sued in the superior courts, or the courts of pleas of Lancaster or Durham, for the recovery of deposits held by them, there being at the time other claimants thereon besides the plaintiff in such action, may apply to the court after declaration, and before plea, by affidavit or otherwise, showing that the defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed, or is supposed to belong to some third party, who has sued, or is expected to sue, for the same; and that the defendant does not collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as the court, or any judge thereof, may direct; and the court, or any judge thereof, after such application has been made, may make a rule or order calling upon such third party to appear and state the nature and particulars of his claim, and maintain or relinquish it, and in the meantime stay the proceedings in the action, and, finally, order such third party to make himself

(a) *Martin, B., Walshe v. Provan*, 8 Exch. 852.

(b) *Thel. Dig. lib. ii., cap. 47, s. 8. Broadbent v. Ledward*, 11 Ad. & E. 211.

(c) *Metcalfe v. Lond. and Brighton Rail. Co.*, 4 C. B., N. S. 319; 27 Law J., C. P. 333.

(d) 3 *Reeves*, 448; *Com. Dig. Pleader*, 2 x. 8. *Rich v. Aldred*, 6 Mod. 216.

defendant in the same, or some other action, and generally dispose of the claims, and make such rules or orders as may appear just and reasonable(e); and the powers and authorities of this statute are, by 23 & 24 Vict. c. 126. s. 12, made to extend to cases where the titles of the claimants have no common origin, but are adverse to, and independent of, each other(f).

634 *Declarations against bailees for loss of chattels*.—If the plaintiff complains of the loss of chattels delivered by him to the defendant to be safely kept, or to be mended or repaired, or to be dealt with by the defendant in the way of his trade, it is sufficient for the plaintiff to set forth the delivery by him of the chattels to the defendant (describing them), and stating the purpose for which they were delivered, and to allege generally that the defendant, having received possession of the chattels from the plaintiff, did not take due and proper care of them, and by reason thereof they became wholly lost to the plaintiff(g); but it is not now necessary to show on the face of the declaration how the chattels got into the hands of the defendant, or to allege that they were lost or destroyed through his negligence. If the chattels have been delivered by the plaintiff to the defendant, and the defendant is unable to return them, from any cause whatever, the ordinary declaration in detinue will suffice(h).

In actions of detinue, the declaration formerly alleged that the plaintiff delivered the chattels to the defendant, to be re-delivered on request; but this allegation of a bailment was wholly immaterial, and not traversable, the gist of the action being the detainer of the property(i); and the form given by the Common Law Procedure Act simply alleges that the defendant detains from the plaintiff his goods and chattels (describing them), or his title-deeds of land called — in the county of —, (describing the deeds), and that the plaintiff claims a return of the goods and chattels, or deeds, or their value, and £— for their detention(k). If any special damage has resulted to the plaintiff from the detention, the nature of it should be set forth on the face of the declaration. If, for example, by reason of the detention by the defendant of the title-deeds to an estate, the plaintiff has been prevented from selling or letting property to advantage, or

(e) *Coggs v. Bernard*, 2 Ld. Raym. 909.

(f) *Meynell v. Angell*, 8 Jur., N. S. 1211; 11 W. R. 122. *Best v. Hayes*, 32 Law J., Exch. 129. *Tanner v. European Bank*, L. R., 1 Exch. 261.

(g) *Doorman v. Jenkins*, 2 Ad. & E. 256. z

(n) *Reeve v. Palmer*, 5 C. B., N. S. 84. *Jones v. Dowle*, 9 M. & W. 19.

(e) *Clossman v. White*, 7 C. B. 56.

(k) 15 & 16 Vict. c. 76, s. 59; and Sched. B. 29. See *Schofield v. Whitelegge*, 49 N. Y. 259

from receiving money, the fact should be stated and relied upon in aggravation of the damages(*l*).

635 *Declarations against bailees for damage to chattels*.—Where the plaintiff's declaration alleged that the defendant undertook, safely and securely, to raise up several hogsheads of brandy of the plaintiff then in a certain cellar, and to lay them down again in a certain other cellar, and that the defendant and his servants, so negligently and carelessly put down the hogsheads in the said other cellar that, through want of care on their part, the casks were staved, and a great quantity of brandy was spilt, it was held that the declaration disclosed a good cause of action, though it did not allege that the defendant was a common porter, or that he was to have any reward for his pains(*m*).

If the plaintiff complains of an injury done to a horse lent by him to the defendant, it is sufficient to set forth the plaintiff's possession of the horse, the delivery of it by the plaintiff to the defendant for a certain specified purpose, or to be ridden in a moderate, careful, and proper manner, and to aver that the defendant used the horse for a different purpose from that for which it was lent, showing in what way it was used, and that the defendant did not take due and proper care of the horse, but used and managed it so carelessly and imprudently that the horse was, through the carelessness and negligence of the defendant, greatly injured and lessened in value.

636 *Plea of not guilty*.—In actions for loss of, or damage to, goods, the plea of not guilty operates, as we have seen, as a denial only of the wrongful act alleged to have been committed by the defendant. Thus, in an action against a bailee for the loss of, or damage to, goods delivered to him to keep, or to be carried, or otherwise dealt with, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant for the purpose set forth in the declaration, or of the plaintiff's property in the goods(*n*).

637 *Plea of non-detinet*.—The plea of non-detinet, alleging that the defendant does not detain the goods and chattels in the declaration mentioned, operates as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial is admissible under that plea(*o*). If, therefore, the defence be that the defendant was justified in detaining the

(*l*) *Goodman v. Boycott*, *ante*, p. 555. See *Stevens v. Smith*, 28 Cal. 102.

(*m*) *Coggs v. Bernard*, 2 Ld. Raym. 909.

(*n*) Reg. Gen. Hil. Term, 16 Vict. R. 16; 1 Ell. & Bl. App. lxxxii. lxxxiii.

(*o*) Reg. Gen. Hil. Term, 16 Vict. R. 15; 1 Ell. & Bl. App. lxxxii. The defence of the statute of limitations is available under the plea of *non-detinet*. *Traum v. Keiffer*, 31 Ala. 136.

goods, in respect of some special property in them, or as having a lien upon them, he must set forth such right specially on the record. He cannot give in evidence, under the plea of non-detinet, that the goods were pawned to him for money which had not been paid; neither can he give in evidence a gift from the plaintiff, for that proves that he does not detain the plaintiff's goods, and must be put in issue by a plea denying the plaintiff's right of property in the goods(*p*). If the defendant claims a right to retain possession of the goods on the ground that he is himself joint-owner of them with the plaintiff, or that he is tenant in common of them with him, his interest should be specially pleaded and set forth upon the record(*q*). But under the general issue the defendant may show that the goods belonged to a firm in partnership, and were placed in the defendant's hands by a solvent partner, to be sold for the purpose of paying the partnership debts, and that they had been sold for that purpose(*r*), or that they were delivered to a third person with the plaintiff's consent(*s*).

638 *Pleas of delivery to one of several joint plaintiffs.*—We have already seen that it is a good defence to an action brought by several joint plaintiffs against a defendant, for the recovery of chattels deposited in his hands by a joint bailment from all of them, to plead that, before the commencement of the action, the chattels mentioned in the declaration were delivered by the defendant to one of the plaintiffs (*ante*, *p*. 451).

639 *Pleas denying the plaintiff's property.*—Under a plea alleging that the goods and chattels in the declaration mentioned were not, nor are they, the goods and chattels of the plaintiff, the defendant may set up a *jus tertii*, and show that the goods were not the goods of the plaintiff at the time they were delivered to the defendant; that the defendant had no notice thereof until the true owner afterwards gave notice of his title, and forbade the defendant to deliver up the goods to the plaintiff(*t*). It has been held by the Court of Queen's Bench that the defendant, under a plea denying that the goods detained were the goods of the plaintiff, may show that he had a lien upon them(*u*); but the Court of Exchequer has come to a different decision, and holds,

(*p*) *Richards v. Frankum*, 6 M. & W. 420.

(*q*) *Mason v. Farnell*, 12 M. & W. 648.

(*r*) *Morgan v. Marquis*, 23 Law J., Exch. 21; 9 Exch. 145.

(*s*) *Anderson v. Smith*, 29 Law J., Exch. 460.

(*t*) See *Biddle v. Bond*, 34 Law J., Q. B. 137; *Davis v. Nest*, 6 C. & P. 169. See *Tanner v. Allison*, 3 Dana, 422; *McCarrey v. Hooper*, 12 Ala. 823; *Slaughter v. Cunningham*, 24 Ala. 260; *Hall v. Chapman*, 35 Ala. 553.

(*u*) *Lane v. Tewson*, 12 Ad. & E. 116.

that if the defendant sets up a right to detain on the ground of lien, he must plead such right specially on the record. "We are aware," observes Alderson, B., "that this is contrary to an opinion of the Court of Queen's Bench in the case of *Lane v. Tewson*; but we cannot agree with that decision. The case was not fully argued before the court, nor were the authorities, which we think have decided that question, fully laid before them"(x).

640 *Pleas justifying detention under a claim of lien(y)* usually allege, that the chattels mentioned in the declaration were delivered by the plaintiff to the defendant, to be worked up, repaired, or mended, by the defendant for hire in the way of his trade; and that the defendant worked up, repaired or mended, the chattels, and that a certain specified sum of money became due to the defendant in respect of such work and labor, and that the plaintiff has not paid or tendered to the defendant the said sum so due to him, and that the defendant detained the chattels as security for the payment thereof. If the defendant wishes to set up a general lien for work done on other goods of the plaintiff, the defendant should show on the face of his plea whether he founds his claim on custom or contract. If he claims a general lien by the custom of trade, he should show the nature of the trade he carries on; the existence of the custom; the delivery to him of goods, from time to time, to be worked upon or dealt with by him for hire in the way of his trade, subject to such custom; the dealing with the goods by him, so as to entitle him to hire; the amount due to him at the time he received the goods; the work done by him thereon, and his claim to detain them until he has been paid the general balance due to him(z).

641 *Pleas of payment of money into court.*—By the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 25, the defendant, in any action for detaining the goods of the plaintiff, may, by leave of the court or a judge, and upon such terms as they or he shall think fit, pay into court a sum of money to answer the claim of the plaintiff in respect of the goods alleged to be detained, the payment to be pleaded according to the provisions of the Common Law Procedure Act, 1852, and the like proceedings may be had and taken thereupon as to costs and otherwise.

(x) *Mason v. Farnell*, 12 M. & W. 684.

(y) *Barnewall v. Williams*, 7 M. & Gr. 403; *ante*, pp. 536-551. This plea cannot be interposed unless the defendant insisted on his lien when the demand for the return of the goods was made. *Spence McMillan*, 10 Ala. 583.

(z) *Coombs v. Noad*, 10 M. & W. 127. *Cumpston v. Haigh*, 2 B. N. C. 449. *Leuckhart v. Cooper*, 3 Ib. 99.

642 *Evidence—Proof on the part of the plaintiff.*—Although the only plea on the record be a plea of not guilty, or non-detinet, the plaintiff must nevertheless give some general evidence of a right on his part to have the chattels delivered up to him. If he proves that the goods were at one time in his possession, and that they were taken away by the defendant; or if the plaintiff shows that he himself delivered the goods to the defendant, and afterwards demanded them back again, and that the defendant refused to deliver them, he establishes a *prima facie* right to the possession of the goods, and will be entitled to a verdict under the plea of not guilty. But if the goods were not delivered by the plaintiff to the defendant, or taken out of the possession of the plaintiff, there is nothing to show that he has any right to have them(a). If it appears, on the plaintiff's own showing, that he and the defendant are joint-owners of the goods, or tenants in common of them, he does not establish any right to take them out of the hands of the defendant, nor does he prove that the defendant detains the goods from the plaintiff, for one of several-joint owners, or tenants in common of a chattel, who has got possession of the chattel, has a right, as we have seen, to retain such possession(b).

Where a testator, two years before his death, gave some railway debentures to the defendant, intending to transfer the money secured by them to the defendant, and delivered the debentures to the defendant, who took possession of them, and locked them up in his own desk, but no transfer of the debts secured by the debentures was ever made, in accordance with the Act of Parliament regulating the transfer of such securities, and after the testator's death his executors sued the defendant for detaining the debentures, it was held that they were not entitled to recover them(c).

The charters and evidences of title to realty belong to the persons in whom the legal interest in the property is vested(d); but the right to the possession of bonds and securities for money remains vested in the parties beneficially interested, who have got possession of the security and claim to hold it(e).

The detention necessary to support an action of detinue is an adverse or wrongful detention. It must be proved that the defendant

(a) *Land v. North*, 4 Doug. 266; *ante*, pp. 452, 453.

(b) *Foster v. Crabb*, 12 C. B. 151; *ante*, pp. 405, 406, 552. See *Bell v. Hogan*, 1 Stew. 536.

(c) *Barton v. Gainer*, 3 H. & N. 389; 27 Law J., Exch. 890. *Kelsack v. Nicholson*, Cro. Eliz. 496.

(d) *Ante*, pp. 415, 416. *Searle v. Law*, 15 Sim. 390.

(e) *Oliver v. Oliver*, *ante*, p. 416.

withholds the goods, and prevents the plaintiff from having the possession of them(*ee*). There should be evidence of a request on the part of the plaintiff to have the goods delivered to him, and a refusal to deliver on the part of the defendant. A defendant, having the goods in his possession, is not by reason thereof, bound to seek out the plaintiff and send them to him. The plaintiff must come for them(*f*). It may be that the goods are the plaintiff's, and yet the detention of them by the defendant may be perfectly lawful(*g*).

If the plaintiff makes out a *prima facie* right to the possession of the chattels, and shows that he has demanded them, and that the defendant detains them from him, the title or right of property in the goods cannot be investigated unless it has been put in issue by a plea traversing the plaintiff's right of property.

643 *Evidence for the defence*.—As the authorities show that it is no answer to an action of detinue, when a demand is made for the re-delivery of a chattel, to say that the defendant is unable to comply with the demand, by reason of his own negligence or breach of duty, it is clearly no answer to say that he has lost the chattel, and is consequently unable to re-deliver it to the plaintiff(*h*).

If the defendant relies upon a plea denying the plaintiff's right of property in, or right of possession of, the goods, the defendant must prove his title to them. A bailee is not estopped, as we have seen, from showing that the bailor had a defeasible title, and that his title has been defeated by matter subsequent to the bailment or to the recognition of the title by the defendant(*i*). He may refuse to re-deliver the goods to the bailor on the ground that they are the property of another person who has demanded and received them, or who has forbidden the bailee to part with the possession of them(*k*); but the bailee cannot, if the possession of the bailor was a lawful possession, and the bailment was not founded in fraud, of his own accord set up the *jus tertii*(*l*). He can set up the title of another only "if he defends upon the right and title and by the authority of that person"(*m*). But if the bailor was a trespasser or a thief in possessing himself of the

(*ee*) See *Latter v. White*, L. R., 5 Engl. & Ir. App. 578.

(*f*) *Clement v. Flight*, 16 M. & W. 42; *Fitz. Nat. Brev.* 138 A.

(*g*) *Clossman v. White*, 7 C. B. 55.

(*h*) *Reeve v. Palmer*, 5 C. B., N. S. 90, 92. *Goodman v. Boycott*, *ante*, p. 555.

(*i*) *Thorne v. Tilbury*, 3 H. & N. 534; 27 Law J., Exch. 407; *ante*, pp. 452, 453.

(*k*) *Shelbury v. Scotsford*, Yelv. 22. *Biddle v. Bond*, *ante*, pp. 402, 559.

(*l*) *Armory v. Delamirie*, 1 Str. 505. See *Tanner v. Allison*, 3 Dana, 422; *McCurrey v. Hooper*, 12 Ala. 823.

(*m*) *Pollock*, C.B., *Thorne v. Tilbury*, *Blackburn*, J., *Biddle v. Bond*, *ut sup.* *Bourne v. Fosbrooke*, 34 Law J., C. P. 164. *McGuire v. Shelby*, 20 Ala. 456.

goods, or the bailment was made with intent to defraud, the bailee may justify his refusal to deliver them up to the bailor, whether the true owner has or has not interposed to prevent delivery(*mm*).

Where the plaintiff in an action for the detention of plate proved that he had pawned the plate with the defendant, and afterwards sought to redeem it, and tendered the amount due upon it, but the defendant refused to deliver it up, it was held that the defendant might, under a plea alleging that the plate was not the property of the plaintiff, show that the plaintiff had, prior to the deposit of the plate with the defendant, transferred it by a bill of sale to a purchaser, who, nevertheless, allowed the plaintiff to continue in possession of it; that the plate had been deposited with the defendant in fraud of such purchaser, and that the defendant detained the plate by the order and under the authority of the latter(*n*).

644 *Proof of abandonment of possession before commencement of action.*—

It is no answer to an action for detaining goods to show that the defendant abandoned possession of the goods before action, by delivering them over to some third person. The evidence of the detention is, that the defendant, having taken possession of the plaintiff's chattel, does not return it when demanded(*o*). But if the defendant has parted with the possession of the property before the plaintiff's title to it accrued, he has not then detained it as against the plaintiff, and is not liable in detinue. Thus, where the defendant took possession of goods to which he conceived himself to be entitled under a will, which turned out to be invalid from want of due execution, and before letters of administration were taken out, and before there was any legal representative appointed with authority to demand and receive the goods, the defendant delivered them back to the person from whom he received them, and then the plaintiff took out administration and demanded the property of the defendant, it was held that he could not recover, as the defendant had never detained the goods as against him(*p*). But where title-deeds were deposited with the defendant by the testator, and lost by the bailee during the lifetime of the testator, and the plaintiff became entitled to the possession of the deeds by devise, it was held that in such a case the loss thereof by the defendant was no answer to the plaintiff's claim to the deeds(*q*).

(*mm*) *Stratton v. Minnis*, 2 Munf. 329. But see *McGuire v. Shelby*, 20 Ala. 456.

(*n*) *Cheesman v. Exall*, 6 Exch. 344.

(*o*) *Jones v. Dowle*, 9 M. & W. 19.

(*p*) *Crossfield v. Such*, 8 Exch. 828.

(*q*) *Goodman v. Boycott*, 2 B. & S. 1; 31 Law J., Q. B. 69. Per Wightman, J., diss. Blackburn, J.

645 *Damages recoverable—Orders for delivery of the specific thing detained.*

—In the old action of detinue, the defendant had the option of retaining possession of the chattel detained, paying to the plaintiff the sum at which the jury thought proper to assess its value^(r). “The judgment,” observes Frowike, C.J., “is, that the plaintiff shall recover the goods or their value; then shall issue a writ to the sheriff to distrain the defendant to deliver the goods, and if he will not, then the value as it is taxed by the inquisition. And so it is in the election of the defendant to deliver to the plaintiff the goods or the value”^(s). This option on the part of the defendant being felt to operate as a hardship upon the plaintiff in many cases, it has been taken away by the Common Law Procedure Act, 1854, which enacts, s. 78, that the court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and if the chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the sheriff’s bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant’s goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant’s goods the damages, costs, and interest in such action.

The jurisdiction of the judge, under s. 78 of this statute, is solely applicable to a case where the value is found, so that no order can be made where such value has not been found^(t). The regular and legal finding of the jury, under s. 78, is a finding of so much for the value of the thing detained, and so much by way of damages for its detention. If the value of the chattel is not assessed by the jury, the course provided by s. 78 is not applicable. The Court of Chancery has also jurisdiction to order a specific chattel to be delivered up to the person seeking to enforce his right to it, where the latter has not fixed the price of the article, or assessed its value, and thereby furnished the measure of his own damages^(u).

646 *Assessment of value.*—The value of the thing detained should be assessed at the highest price it bore in the market at any time during

(r) *Phillips v. Jones*, 15 Q. B. 867.

(s) *Keilw.* 64 b; *Yelv.* 71.

(t) *Chilton v. Carrington*, 15 C. B. 780; 24 Law J., C. P. 78.

(u) *Dowling v. Betjemann*, 2 Johns. & H. 544.

the period of its detention(*x*) ; and where the value is doubtful, and the defendant might have returned it if he had thought fit, every fair presumption and inference should be made in favor of the owner of the property seeking its restitution, and against the wrong-doer who has detained it from him. But where the value of the article lies peculiarly within the knowledge of the plaintiff, he should prove the value of it, in order to enable the jury to make a correct assessment of the damages. Thus, when he sues for the detention of letters and documents, he should prove the nature of the letters, and of what use they were to him(*y*). If he sues for the detaining of title-deeds, he should prove the value of the property to which they refer, and that the deeds are essential to the establishment of the title, and he will then be entitled to have the damages assessed at the value of the estate(*z*).

Having assessed the value of the thing detained, the jury should then assess a certain sum by way of damages for the detention of it. Those who take upon themselves to detain the property of another are answerable for all the consequences that naturally result, in the ordinary course of things, from the wrongful act(*a*).

647 *Assessment of damages where the whole, or part, of the goods have been delivered up after action.*—The object of an action for detaining goods is to recover the goods in specie, or their value to be assessed by a jury, and also damages occasioned by their detention. This object is only partially answered by the delivery of the goods to the plaintiff, and their acceptance by him after the commencement of the suit: the plaintiff having a right to recover by the verdict of the jury the damage he has sustained by reason of the goods having been improperly detained. If all or any of the goods have been delivered up after suit, the plaintiff can have no judgment to recover them or their value, but he may have judgment to recover damages for their detention if the plaintiff has sustained any; and for the residue not delivered up, the plaintiff may have the usual judgment to recover them or their value, and damages for their detention(*b*). In an action of detinue for several goods, which were collectively valued at one sum in the declaration and by the jury, it was held that if all the goods were not given up—if one article was withheld—the defendant was liable for the value of all; but in detinue for two things, the defendant may before

(*x*) *Archer v. Williams*, 2 C. & K. 27. *Barrow v. Arnaud*, 8 Q. B. 600.

(*y*) *Anderson v. Passman*, 7 C. & P. 197.

(*z*) Roll. Abr. DETINUE, E.

(*a*) *Davis v. London and North-West. Rail. Co.*, 7 W. R. 105.

(*b*) *Crossfield v. Such*, 8 Exch. 165; 22 Law J., Exch. 65.

verdict give up one, and plead as to the other(c). If there is a good defence to part of the goods, by reason that the defendant was always ready to deliver them, the jury must assess the value of the residue of the goods, and damages for the detention, but none as to the goods delivered up. If there was no defence as to them, then the jury must assess the value of the residue of the goods, and damages for the prior detention of those that were delivered up(d).

The jury may find the fact of the return or re-delivery of the chattel specially, and confine themselves to an assessment of damages for the detention of it. In an action for detaining railway-scrip, which had been delivered up to the plaintiff after the commencement of the action, under a judge's order, it was held that the judge was warranted in directing the jury at the trial, that in estimating the damages they might take into consideration the difference in the value of the scrip at the time of the demand and the time of its delivery to the plaintiff under the judge's order(e).

Where railway-scrip shares or stock have been unlawfully detained after demand, and given up after the commencement of the action, the measure of damages is the highest sum the scrip could have been sold for during the period of its detention, deducting the value of it at the time it was received back by the plaintiff. The wrong-doer cannot get off with less than that, and may have to pay greater damages(f).

Whenever the defendant has wrongfully detained the plaintiff's chattels, or has wrongfully withheld from him the means of obtaining possession of them, he is answerable for all the loss naturally resulting in the ordinary course of things from his wrongful act, provided the special damage is specified and claimed in the plaintiff's declaration(g).

648 *Evidence in mitigation of damages.*—A defendant who has wrongfully detained the plaintiff's horse cannot make the expense of the horse's keep, whilst he was wrongfully detained, a ground for reduction of the damages(h).

(c) Bro. Abr. TENDER, pl. 39.

(d) Crossfield v. Such, *ut sup.* Pawly v. Holly, 2 W. Bl. 853.

(e) Williams v. Archer, 5 C. B. 318. Barrow v. Arnaud, 8 Q. B. 609.

(f) Archer v. Williams, 2 C. & K. 27. See Brewster v. Silliman, 33 N. Y. 423.

(g) Barrow v. Arnaud, 8 Q. B. 610.

(h) Wormer v. Biggs, 2 C. & K. 36.

CHAPTER X.

OF NEGLIGENCE OF BAILORS AND BAILEES—LIABILITIES OF COMMON CARRIERS, COMMON FERRYMEN, COMMON INNKEEPERS AND LODGING-HOUSE KEEPERS(a).

SECTION I.—*Of negligence and breach of duty on the part of common carriers.*—Of the duties and responsibilities of common carriers—Who may be said to be a common carrier—Of the public profession of railway companies made through the medium of their time-tables—Of the duty of railway and canal companies to afford all reasonable facilities for the carriage of passengers, merchandise, and chattels—Loss of goods by common carriers—Concealment of risk by consignors—Contributory negligence of consignors—Inability of the common carrier to rid himself of the public duties of his profession and calling—Statutory exemption of common carriers from liability in respect of the loss of gold and silver, and valuables, when the value has not been declared—By whom the declaration of value is to be made and the increased rate of carriage paid—Articles to which the statute extends—Loss of goods from theft by common carrier's servants—Notices, conditions, and special contracts by railway companies—What are just and reasonable conditions—Commencement and duration of the liability of the common carrier—Delivery of goods at the place of destination—Delivery of luggage at railway stations—Acceptance of goods to be carried beyond the limits of a particular line of railway—Loss of luggage by railway companies—Loss of merchandise carried as luggage—Effect of the refusal of the consignee to receive the goods—Land-ing of goods by shipowners—Lien of common carriers—Railway charges—Packed parcels—Passenger fares—Right to alight at intermediate stations—Negligence of common ferrymen.

SECTION II.—*Negligence and breach of duty on the part of common innkeepers and lodging-house keepers.*—Who may be said to be a common innkeeper—Loss of goods by common innkeepers—Limitation of the liability of innkeepers—Deposit of property with innkeepers—Losses occasioned by the misconduct of the guest—Lien of innkeepers—Liability of lodging-house keepers.

SECTION III.—*Remedies against common carriers and common innkeepers.*—Summary proceedings against railway companies for not receiving and forwarding traffic—Parties to actions against common carriers and common innkeepers—Pleadings—Defences—Evidence—Damages recoverable—Injunction to enforce compliance with the Railway and Canal Traffic Act.

(a) See further as to common carriers, Addison on Contracts, ch. 13; innkeepers and lodging-house keepers, ch. 10, s. 2, 6th ed.

SECTION I.

ON NEGLIGENCE AND BREACH OF DUTY ON THE PART OF COMMON CARRIERS.

649 *Duties and responsibilities of common carriers.*—Every common carrier is bound to accept and carry all such things as he publicly professes to carry for all persons who are ready and willing to pay him his customary hire, provided he has room in his cart or carriage for their conveyance, and has declared his intention to set out on his accustomed journey(*b*). He is bound to carry them to and from the places to which he professes to carry, although one of those places may be without the realm(*c*); for whenever a man undertakes the public office or profession of a common carrier of goods he undertakes a public trust for the benefit of the rest of his fellow-subjects, and is bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him(*d*). By the 29 & 30 Vict. c. 69, however, s. 6, no warehouse-owner or carrier is bound to receive or carry any goods which have been declared, by Order in Council, to be “specially dangerous,” such as petroleum(*e*), nitro-glycerine(*f*), etc.; and no person shall deliver such goods to any warehouseman or carrier without marking upon them their name and description, etc.; and also giving a notice in writing to such warehouseman or carrier, under a penalty of 500*l.* (s. 3). A carrier is not bound to carry goods by the shortest route, but only by the route by which he usually carries them, and which he professes to go(*g*).

The nature and extent of the employment or business which the common carrier expressly or impliedly holds himself out as undertaking will regulate the extent of his rights, duties, and responsibilities.

(*b*) *Bac. Abr. CARRIERS, B. Pickford v. Grand Junction Rail. Co.*, 8 M. & W. 372. *Saltonstall v. Stocton*, Taney, 11. *East Tennessee, etc., R. R. Co. v. Nelson*, 1 Cold. (Tenn.) 272. *Bennett v. Dutton*, 10 N. H. 481.

A common carrier may refuse to receive goods offered him for transportation if he has reasonable grounds therefor. *Porcher v. North Eastern R. R. Co.*, 14 Rich. (S. C.) L. 181.

(*c*) *Crouch v. Lond. and North-West. Rail. Co.*, 14 C. B. 290; 23 Law J., C. P. 73.

(*d*) *Keilway*, 50, pl. 4.

(*e*) See further as to the carriage and storage of petroleum, 34 & 35 Vict. c. 105.

(*f*) By 32 & 33 Vict. c. 113, nitro-glycerine cannot be manufactured, sold, stored, or carried, except under a license from a Secretary of State. But a carrier who carries it in ignorance is exempt from penalty, s. 4.

(*g*) *Per Willes, J., Myers v. Lond. and South-West. Rwy., L. R.*, 5 C. P. 3.

If he selects a particular line or description of business, he cannot, so long as he adheres to it with good faith, be compelled to go beyond it. A common carrier of merchandise, for example, cannot be compelled to carry coals, marble, money, or bank-notes, dogs, pigs, horses, or live animals. A common carrier of passengers only cannot be compelled to carry merchandise, and a common carrier of merchandise and parcels cannot be compelled to carry passengers(*h*). But he may, if he pleases, carry, under a special acceptance or a special contract, any article which he does not profess to carry, and does not commonly carry, and by this special contract he may define the nature and extent of his engagement, and the degree of risk he will incur, stipulating that in the particular transaction he is not to be regarded as being in the exercise of his public employment, but as carrying in a private capacity, and incurring no responsibility beyond that of an ordinary bailee for hire, answerable only for his own misconduct and negligence, and that of the servants and workmen he employs for executing the work(*i*).

Every steamboat, railway, or other company, or person carrying animals for hire, is bound to cleanse and disinfect the vessels, pens, carriages, trucks, etc., used for such purpose(*k*). Every railway company is also bound, on the written request of the consignor or person in charge of any animals carried by them, to provide the animals with food and water at such stations as the Privy Council may direct, and will have a lien for the reasonable expense of supplying such food and water on the animals so supplied, and also on any other animals carried for the same consignor(*l*).

Every common carrier of passengers with luggage is bound to take the customary quantity of luggage with each passenger, consisting of articles of clothing, and such things as a traveller, according to the habits or wants of the particular class to which he belongs, usually carries with him for his own personal use or convenience, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, but he is not bound to carry merchandise or articles wholly unconnected with luggage, unless he professes to carry merchandise, or unless the traveller tenders or is ready to pay the

(*h*) *Johnson v. Mid. Rail. Co.*, 4 Exch. 373. See *Michigan Southern etc., R. R. Co. v. McDonough*, 21 Mich. 165; *Farmers & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186, 206. 2 Redf. on Railw. 116.

(*i*) See *post*, p. 589. *Martin v. Great Indian Peninsular Rail. Co.*, L. R., 3 Exch. 9. *Lake Shore, etc., R. R. Co. v. Perkins*, 25 Mich. 329.

(*k*) 32 & 33 Vict. c. 70, s. 62. See *Cox v. Gt. East. Rwy.*, *post*, p. 602.

(*l*) 32 & 33 Vict. c. 70, s. 64. See *Harris v. Northern Indiana R. R. Co.*, 20 N. Y. 232.

customary hire for merchandise(*m*). Deeds and money carried by an attorney in his portmanteau for use in the causes in which he may be engaged are not "ordinary luggage" for which a railway company is responsible(*n*), nor is a child's rocking-horse(*o*), nor sheets and blankets intended for the use of the passenger's household when permanently settled(*p*), but a chronometer is, it seems, luggage for a master mariner(*q*).

(*m*) *Great Northern Rail. Co. v. Shepherd*, 8 Exch. 30; 21 Law J., Exch. 114. *Merrill v. Grinnell*, 30 N. Y. 594. *Smith v. Boston, etc.*, R. R. Co., 44 N. H. 325. *Glasco v. New York, etc.*, R. R. Co., 36 Barb. (N. Y.) 557. *Hutchings v. Western, etc.*, R. R., 25 Ga. 61. *The Elvira Harbeck*, 2 Blatch. Ct. Ct. 336. *Dibble v. Brown*, 12 Ga. 217.

(*n*) *Phelps v. Lond. and North-West. Rail. Co.*, 34 Law J., C. P. 259.

(*o*) *Hudston v. Midland Rwy.*, 38 L. J., Q. B. 213; L. R., 4 Q. B. 366

(*p*) *Macrow v. Gt. Western Rwy.*, L. R., 6 Q. B. 612.

(*q*) *Le Conteur v. Lond. and South-West. Rail. Co.*, L. R., 1 Q. B. 54. A gold watch deposited in a trunk by a traveller on a railroad is baggage for the loss of which the carrier is liable. *American Contract Co. v. Cross*, 8 Bush (Ky.), 472. *McCormick v. Hudson River R. R. Co.*, 4 E. D. Smith (N. Y. C. P.), 181. *Jones v. Voorhees*, 10 Ohio. 145.

So is a proper sum of money for travelling expenses. *Merrill v. Grinnell*, 30 N. Y. 594. *Whitmore v. Steamboat Caroline*, 20 Mo. 513. *Dunlap v. International, etc.*, R. R. Co., 98 Mass. 371. *Doyle v. Kiser*, 6 Ind. 242.

An opera glass. *Toledo, Wabash & Western R. R. Co. v. Hammond*, 33 Ind. 379.

Manuscripts, carried by a student, author or professional man, for the purpose of the studies or business upon which he is travelling. *Hopkins v. Westcott*, 6 Blatch. 64.

A revolver. *Chicago, etc.*, R. R. Co. *v. Collins*, 56 Ill. 212. *Davis v. Michigan, etc.*, R. R. Co., 22 Ill. 278.

Laces, carried by a lady in her trunk. *Traloff v. New York Central, etc.*, R. R. Co., 10 Blatchf. 16.

A bed and bed-coverings, belonging to a poor man who is moving with his wife and family. *Onimit v. Henshaw*, 35 Vt. 605. But see *Connolly v. Warren*, 166 Mass. 146. Or to a steerage passenger on a vessel. *Hirschson v. Hamburg Packet Co.*, 34 N. Y. Sup. Ct. 521. Linen cut into shirt bosoms. *Duffy v. Thompson*, 4 E. D. Smith (N. Y. C. P.), 178. And also such articles of wearing apparel or other articles generally as are designed for the personal use of the traveller or the members of his family, and are of the kind customarily carried by travellers as baggage, although they are not intended to be used, and are not necessary for the use, comfort or convenience of the traveller on the journey. *Dexter v. Syracuse, Binghamton and New York R. R. Co.*, 42 N. Y. 326. *Dunlap v. International, etc.*, Co., 98 Mass. 371.

The liability of the carrier for money contained in the trunk of a passenger and carried as personal baggage, is limited to money taken for travelling expenses properly so called. *Merrill v. Grinnell*, 30 N. Y. 594. *Bell v. Drew*, 4 E. D. Smith (N. Y.), 59. *Davis v. Michigan, etc.*, R. R. Co., 22 Ill. 278. *Whitmore v. Steamboat Caroline*, 20 Mo. 513.

The amount for which the carrier will be liable must depend upon the character of the journey and the special circumstances of the case; and must be measured by the requirements of the transit over the whole contemplated journey, including such an allowance for accidents or sickness and for sojourning by the way as a reasonably prudent man would deem it necessary to make. *Merrill v. Grinnell*, 30 N. Y. 594.

A common carrier will not be liable for the loss of articles which the passenger has purchased for persons not members of his family and packed with his baggage. *Dexter v. Syracuse, Binghamton and New York R. R. Co.*, 42 N. Y. 326. *Nevins v. Bay State, etc.*, Co., 4 Bosw. (N. Y.) 225. *The Tonic*, 5 Blatchf. Ct. Ct. 538.

Nor for masquerade costumes furnished for use at a ball and carried in a trunk. *Michigan, etc.*, R. R. Co. *v. Oehm*, 56 Ill. 293. Nor for more than one revolver. *Chicago, etc.*, R. R. Co. *v. Collins*, 56 Ill. 212. Nor for baggage which the passenger has in charge. *The R. E. Lee*, 2 Abb. (U. S.) 49. But see *Gore v. Norwich, etc.*, Transportation Co., 2 Daly (N. Y. C. P.), 254.

Nor for masonic regalia. *Nevins v. Bay State, etc.*, Co., 4 Bosw. (N. Y.) 225. Nor for engravings. *Id.*

But if a carrier knows or has notice of the character of the goods taken as baggage, and

650 *Who may be said to be a common carrier.*—Every person who plies with a carriage by land, or a boat or vessel by water, between different places, and professes openly to carry passengers and goods for hire, is a *common carrier*(qq). Such are railway companies, who profess to carry passengers, parcels, and merchandise from one place to another(r), stage-coach and stage-wagon proprietors(rr), lightermen, hoymen, barge-owners, canal boatmen, and the owners and masters of ships and steamboats employed as general ships for the transportation of all persons offering themselves or their goods to be conveyed for hire to the port of destination(s). The owner of a cart or carriage who does not ply regularly for hire to a particular destination, but merely lets out a private carriage, with horses and driver, by the hour, day, or job, to proceed to any destination ordered by the hirer, is not a common carrier. A London cab-driver, or hackney coachman, for example, is not a common carrier(ss).

651 *Public profession of railway companies through their time-tables and toll-tables.*—If a railway company publishes, or authorizes the publication of a time-table, representing that a train will start at a particular hour to a particular place, and no train is prepared, the company is responsible in damages to all persons who have acted upon the faith of the representation, and have been deceived and put to expense, and have sustained damage thereby(t). The company make a continuous representation whilst they continue to hold out written or printed papers as being their time-tables, and they thereby make a public profession that they will exercise their vocation of common carriers,

still undertakes to transport them, he is liable for their loss although they are not traveller's baggage. *Stoneman v. Erie Railway Co.*, 52 N. Y. 429; 2 Redf. on Railw. 149, 151, note.

(qq) *Dwight v. Brewster*, 1 Pick. 50. *Orange Bank v. Brown*, 3 Wend. 161. *Allen v. Sackrider*, 37 N. Y. 341. *Self v. Dunn*, 42 Ga. 523.

(r) *Ryland v. Peters*, 5 Pa. Law G. Rep. 126. *Virginia, etc. v. Sanger*, 15 Gratt. 230. *Fuller v. Naugatuck, etc.*, 21 Conn. 557, 570. *Contra Costa, etc., R. R. Co. v. Moss*, 23 Cal. 323.

(rr) *Powell v. Mills*, 30 Miss. 231. *Hollister v. Nowlen*, 19 Wend. 234. *Cole v. Goodwin*, id. 251. *Jones v. Voorhees*, 10 Ohio, 145.

(s) *Bac. Ab. CARRIERS*, A. Lovett v. Hobbs, 2 Show. 127. *Ingate v. Christie*, 3 C. & K. 61. *Faulkner v. Wright*, 1 Rice, 107. *Chouteau v. Steamboat St. Anthony*, 16 Mo. 216. *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 539.

Express companies are also common carriers. *Stadhecker v. Combs*, 9 Rich. 193. *Belger v. Dinsmore*, 51 N. Y. 166. *Christenson v. American Express Co.*, 15 Minn. 270. *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264. *Southern Express Co. v. Newby*, 36 Ga. 635. *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189. *Baldwin v. American Express Co.*, 23 Ill. 198. *Verrier v. Sweitzer*, 32 Penn. St. 203. *Sweet v. Barney*, 23 N. Y. 335. 2 Redf. on Railw. 19, 30.

So are tow-boats, used in towing barges or other water craft, loaded with freight, from one point to another on inland rivers. *Bussey v. Mississippi Valley Transportation Co.*, 24 La. An. 165. But see *Arctic, etc., Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559; *Leonard v. Hendrickson*, 18 Penn. 40; *Wells v. Steam Navigation Co.*, 2 N. Y. 204.

(ss) *Brind v. Dale*, 8 C. & P. 207. *Ross v. Hill*, 2 C. B. 887; 15 Law J., C. P. 182. *Liverpool Alkali Co. v. Johnson*, L. R., 7 Exch. 267.

(t) *Post*, ch. 18, s. 1.

and dispatch passengers or goods, as the case may be, to certain specified places(*u*) at or about the time named in such time-tables; and if they fail to do so they commit a breach of their duty as common carriers, and are responsible in damages to those who tender themselves or their goods for conveyance at the appointed time, and find that there is no train about to start(*v*). But the sticking up of a table of tolls at the different stations does not imply that the company carries all the things mentioned therein from each station(*x*). The mere taking of a ticket is not sufficient evidence of a contract to convey a passenger to a certain place within a given time; the time-bills must be produced to prove the contract(*y*).

652 *Duty of railway and canal companies to afford reasonable facilities for the carriage of passengers, merchandise, and chattels.*—By the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) it is enacted (s. 2), that every railway company and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever(*z*); and every

(*u*) Not necessarily, however, by the shortest route. *Myers v. L. & South-West. Rwy., L. R.*, 5 C. P. 1.

(*v*) *Denton v. Gt. Northern Rail. Co.*, 5 Ell. & Bl. 868; 25 Law J., Q. B. 129. *Oxlade, In re*, 1 C. B., N. S. 454.

(*x*) *Oxlade v. North-East. Rail. Co.*, 15 C. B., N. S. 680; 33 Law J., C. P. 171.

(*y*) *Hurst v. Gt. West. Rail. Co.*, 34 Law J., C. P. 265. And see *Robinson v. Gt. West. Rail. Co.*, 35 Law J., C. P. 123.

(*z*) *Sutton v. Gt. West. Co.*, 35 Law J., Exch. 18; *L. R.*, 4 Eng. & Ir. App. 226; 38 Law J., Exch. 177. See *post*, p. 603; *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 188; *McDuffie v. Railroad*, 52 N. H. 730.

Railroad companies are bound to provide the most ample accommodations for the public, and to discharge the duties imposed on them with the utmost fidelity. *Illinois Central R. R. Co. v. Waters*, 41 Ill. 73.

They are under obligation to receive and transport impartially, all merchandise and passengers offered to them on the terms prescribed by the grant through which they hold their franchises; and a railroad company cannot free itself from this obligation by an agreement between its directors and an express company which transfers the whole business of carriage of merchandise over its route to the latter, and under which the railroad company refused to carry for the general public, and the express company decline to carry subject to the liabilities of common carriers. *Rogers Locomotive, etc., Works v. Erie R. R. Co.*, 20 N. J. Eq. 349. *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 188.

But a railroad company is not obliged to become a common carrier of money under a clause

railway company and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one, near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals to the other, without any unreasonable delay, and without any such preference or advantage, or prejudice, or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public. It has been held, however, that the above section applies only to the "receiving," "forwarding," and "delivering" of traffic, and not to facilities for storing goods after they have been delivered to the consignees. Where, therefore, a railway company let the surplus land adjoining their station to one coal merchant to the exclusion of others, it was held that another coal merchant had no ground of complaint although the first named merchant did not require or use the whole of the surplus land for the purpose of storing his coals(a).

If railways are blocked up and impeded by snow, the company is bound to use all reasonable exertions to forward the passengers, though extra expense must be incurred by the company in so doing, which they have no means of recovering from their passengers; but the owners of goods and cattle have no right to complain that extraordinary efforts which are made to forward passengers are not used to for-

in the charter requiring it to transport "all merchandise and property" offered. *Kuter v. Michigan Central R. R. Co.*, 1 Biss. 35.

And when, by reason of an unusual pressure of business, the rolling stock of a railroad company becomes inadequate to transport the freight already received, the company may lawfully decline to receive other freight offered for transportation. *Faulkner v. South Pacific R. R. Co.*, 51 Mo. 311.

But in every case where a carrier has reasonable ground for refusing to receive and carry either persons or merchandise, he must make the objection at the time the application for carriage is made; for if he receives the person or property for transportation without objection, his liability is the same as though no ground for refusal existed. *Faulkner v. South Pacific R. R. Co.*, 51 Mo. 311. *Hannibal R. R. Co. v. Swift*, 12 Wall. 262. But see *Wibert v. New York & Erie R. R. Co.*, 12 N. Y. 245.

Even after the receipt of goods by the carrier for transportation, he may refuse to carry them if the freight thereon is not paid by the shipper as stipulated. *Stewart v. Bremer*, 63 Penn. St. 268.

If a common carrier in forwarding freight discriminates between two classes of shippers by deliberately delaying or stopping the property of one class in order to give preference to another, contrary to the usual course of business, he is guilty of a wrong, and liable therefor. *Keeney v. Grand Trunk R. R. Co.*, 59 Barb. (N. Y.) 104.

(a) *West v. L. & N.-W. Rwy.*, L. R., 5 C. P. 622, per Montague Smith and Brett, J.J., diss. Bovill, C.J., and Keating, J.

ward cattle and goods. "If a snow-storm occurs which makes it impossible to forward cattle except by extraordinary means, involving additional expense, the company are not bound to use such means and to incur such expense"(b). So if there be delay in delivering goods by reason of an accident occurring on the defendant's line, such accident being caused wholly by the negligence of another railway company, which had running powers over the defendants' line, the defendants, in the absence of a special contract to deliver within a certain time, are not responsible(c).

Whenever there has been an apparent preference in respect of the conveyance of goods conceded by a railway company to certain persons to the prejudice of a complainant, there is sufficient ground to call upon the company for an explanation and justification of their conduct in the matter(d).

653 *Loss of goods by common carriers*.—"The law," observes Holt, C.J., "charges every person exercising the public employment of a common carrier, common hoyman, master of a ship intrusted to carry goods, against all events but acts of God and enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sort of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, etc.; and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point"(e).

(b) *Briddon v. Gt. North. Rail. Co.*, 28 Law J., Exch. 51. *Ballentine v. North. Missouri R. Co.*, 40 Mo. 491. See *Penn. v. Buffalo & Erie R. R. Co.*, 49 N. Y. 204.

(c) *Taylor v. Gt. North. Rail. Co.*, L. R., 1 C. P. 385.

(d) *Garton v. Bristol & Exeter Rail. Co.*, 28 Law J., C. P. 306. *Baxendale v. Gt. West. Rail. Co.*, ib. 81. As to injunctions, see *post*, s. 3.

(e) *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith's L. Ca., 6th ed. 177. Where a railroad is in good order and well equipped, and as many trains are run as can be run with safety, the company, in the absence of an express contract to transport property within a limited time, will not be responsible for delays occasioned by an unusual quantity of freight being delivered to it, which was forwarded without preference in the order of its receipt. *Wibert v. New York & Erie R. R. Co.*, 12 N. Y. 245. *East Tennessee, etc., R. R. Co. v. Nelson*, 1 Cold. (Tenn.) 272. *Peet v. Chicago, etc., R. R. Co.*, 20 Wis. 594. But see *Faulkner v. South Pacific R. R. Co.*, 51 Mo. 811.

The fact that the company had not the proper appliances for transportation is no defence to an action for damages for delay in forwarding stock. *Tucker v. Pacific R. R. Co.*, 50 Mo. 385.

Nor is the fact that the employees of the company were on a strike excuse for the failure

By the term "act of God" is meant something in opposition to the act of man, such as storms, lightning, tempests, and inevitable accidents not resulting from human agency. If the danger or the accident, though unavoidable, has been occasioned by the act of man, the carrier cannot avail himself of it as an excuse for the non-delivery of the goods(*f*). Thus, where an action was brought against a common

of the company to transport freight within the usual time. *Blackstock v. New York & Erie R. R. Co.*, 20 N. Y. 48.

That a common carrier is an insurer against any loss not occasioned by the act of God or the public enemy, or the fault of the party suffering the loss, see *Kohannan v. Hammond*, 42 Cal. 227; *Goodwin v. Baltimore, etc., R. R. Co.*, 58 Barb. (N. Y.) 195; *Howe v. Oswego, etc., R. R. Co.*, 56 Barb. (N. Y.) 121; *The Maggie Hammond*, 9 Wall. 435; *Klauber v. American Express Co.*, 21 Wis. 21; *Southern Express Co. v. Newby*, 36 Ga. 635; *Porcher v. Northeastern R. R. Co.*, 14 Rich. (S. C.) L. 181; *Southern Express Co. v. Moon*, 39 Miss. 822; *Arnold v. Jones*, 26 Texas, 355; *Hooper v. Wells*, 27 Cal. 11; *Commander-in-chief*, 1 Wall. 43; *Ferguson v. Brent*, 12 Md. 9; *Powell v. Mills*, 30 Miss. 231; *Central R. & B. Co. v. Hines*, 19 Ga. 203; *New Brunswick Co. v. Tiers*, 4 Zabr. (N. J.) 697; *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, ib. 251; *Powell v. Myers*, 26 Wend. 591; *Reed v. Spaulding*, 30 N. Y. 630; *Merritt v. Earle*, 29 ib. 115.

Goods taken from a carrier by the military forces of a State in insurrection are to be deemed taken by the "public enemy," within the meaning of the exception to the rule. *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 368. So if taken by the United States forces while being transported within the Confederate lines. *Southern Express Co. v. Womack*, 1 Heisk. (Tenn.) 256. So where the goods were seized by Confederate soldiers. *Bland v. Adams Express Co.*, 1 Duvall (Ky.), 232. But a carrier within the limits, and recognizing the Confederate government, is estopped from alleging that the seizure of his goods by a Confederate officer was the act of a public enemy. *Patterson v. North Carolina R. R. Co.*, 64 N. C. 147.

(*f*) *Oakley v. Ports, etc., Steam Packet Co.*, 11 Exch. 622; 25 Law J., Exch. 99. *Merritt v. Earle*, 29 N. Y. 115. *Michaels v. New York Central R. R. Co.*, 30 ib. 564. *Read v. Spaulding*, ib. 630. *Williams v. Grant*, 1 Conn. 487. *Crosby v. Fitch*, 12 ib. 410.

"Under the term *act of God* are comprehended all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent; and in cases of this description, carriers may be liable for a loss arising from inevitable necessity existing at the time of the loss, if they had been guilty of a previous negligence or misconduct by which the loss may have been occasioned." "For though the immediate or proximate cause of a loss may have been what is termed the *act of God*, or inevitable accident, yet if the carrier unnecessarily exposes the property to such accident, by any culpable act or omission of his own, he is not excused." *Williams v. Grant*, 1 Conn. 487. *Crosby v. Fitch*, 12 ib. 410.

To excuse the carrier for loss or damage of goods intrusted to his care on the ground of inevitable accident or act of God, the loss or damage must result from the direct and immediate act of God without the intervention of any human agency. *Ferguson v. Brent*, 12 Md. 9. *Sprowl v. Kellar*, 4 Stew. & Port. 382. *Jones v. Pitcher*, 3 ib. 135. *Michaels v. New York Central R. R. Co.*, 30 N. Y. 564. *Merritt v. Earle*, 29 ib. 115.

But even to this rule there may be exceptions. Thus, where by reason of a violent storm a jettison becomes necessary for the preservation of the rest of the cargo, the loss is by the act of God, although occasioned through the immediate agency of men. *Price v. Hartshorn*, 44 N. Y. 94.

So where the proximate cause of the loss of goods intrusted to a common carrier is the act of God, such as a flood, the carrier will be excused, even though he may have contributed in a remote way to the loss of the goods by his own negligence or laches. *Railroad Co. v. Reeves*, 10 Wall. 176.

Thus where goods intrusted to a carrier by canal are lost by reason of the breaking of a dam in the canal in consequence of an extraordinary flood, the carrier will be excused on the ground of inevitable accident, although had it not been for the lameness of a horse the boat would not have been at the place of the flood when it occurred. *Morrison v. McFadden*, 5 Pa. Law J. Rep. 23.

But if the carrier is guilty of unreasonable delay in forwarding goods, and they are injured by a flood while lying in the depot awaiting shipment he will not be excused, as the goods

carrier for not safely carrying and delivering a quantity of hops, and it appeared that a fire broke out in a building adjoining a booth under which the carrier had placed the hops, and burnt with extinguishable violence, and extended itself to the hops, and consumed them, without any neglect or default on the part of the carrier himself, it was held that, inasmuch as the fire had not been occasioned by lightning, but by the act of man, the occurrence of the disaster constituted no answer to the action(*g*). If the goods have been destroyed or swept away by rains and floods, the circumstances attendant upon the loss must be regarded, in order to determine whether it has been occasioned by the act of God or the act of man. If the common carrier has neglected to provide proper coverings for the goods; if he has gone out of his way to meet the danger; if he has travelled by unusual roads, or crossed a plain subject to inundations when he might have kept the high ground and been safe, the loss occasioned thereby is a loss from the act or negligence of man, and the common carrier is consequently responsible therefor(*h*).

If a barge-owner who carries goods for hire on a canal accepts certain goods to be carried for hire, and rats gnaw a hole in the barge, and cause a leak, and the goods are injured, the barge-owner is responsible for the damage(*i*). He is not, of course, responsible for any deterioration in the value of the goods resulting from the negligence or want of care of the owner or the consignor, such as defective packing, nor for losses occasioned by an inherent defect in the article causing its

were exposed to the peril by his fault and neglect. *Dunson v. New York Central R. R. Co.*, 3 Lans. (N. Y.) 265. *Read v. Spaulding*, 30 N. Y. 630. *Michaels v. New York Central R. R. Co.*, *id.* 564.

So where goods carried by a steamboat are lost by the sinking of the vessel, and the immediate cause of the accident and loss is the contact of the boat with the mast of a sloop which had sunk some two days previously in a squall, leaving the mast fifteen feet out of water at low tide, the carrier will not be excused on the ground of inevitable accident or act of God, as the accident might have been avoided, and the squall which sunk the sloop was but the remote or secondary cause of the accident. *Merritt v. Earle*, 29 N. Y. 115. See *Pennewill v. Cullen*, 5 Harring. (Del.) 238.

So where a violent storm caused an unusually low tide, and a carrier's barge lying at a pier, was pierced by a projecting timber, covered at ordinary tides, and not known by the carrier to exist, the carrier was held liable for the injury of the goods upon the barge, notwithstanding that his negligence in leaving the barge there would not have resulted in the injury without the concurrence of the act of God and the negligence of the wharf-builder. *New Brunswick Co. v. Tiers*, 4 Zab. (N. J.) 697.

If divers causes concur in the loss of goods by a carrier, the act of God being one, but not the proximate cause, it does not discharge the carrier. The carrier is liable unless the act of God was the immediate cause of the loss, without which it would not have occurred. *Ferguson v. Buent*, 12 Md. 9. *New Brunswick Co. v. Tiers*, 4 Zab. (N. J.) 697.

(*g*) *Forward v. Pittard*, 1 T. R. 83. *Hyde v. Trent Nav. Co.*, 5 ib. 309.

(*h*) *Doct. & Stud. Dial.* 2, ch. 38; *Noy*, ch. 43. *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514. *Phillips v. Brigham*, 26 Ga. 617.

(*i*) *Dale v. Hall*, 1 Wills. 281.

destruction(ii). If, however, the defective packing of goods is patent and visible, and easily remedied, and he accepts the goods for conveyance, he is bound to take all reasonable means to provide against the defect, and secure their safety. Where a dog, with a string about his neck, was delivered to a common carrier to be carried, and was tied by the string in a watch-box, and shortly afterwards the dog slipped his head through the noose, and escaped, and was never seen afterwards, and an action was brought to recover the value of the dog, and it was contended that the owner ought to have taken care that the cord was properly secured round the dog's neck, it was held that as the common carrier had the means of seeing that the dog was insufficiently secured, he ought to have locked him up or taken other proper means to secure him, and that he was responsible for the loss(j). Where, however, a greyhound, secured in the way ordinarily adopted and obviously intended by the owner to be used, viz., by a collar and strap, was delivered to a railway company to be carried, and the greyhound during the journey slipped his head through the collar and was lost, it was held that the company was not responsible(k).

If a cargo or load of goods weighing a certain weight be delivered to a common carrier to be carried for hire, and the cargo on its arrival at its destination is deficient in weight, there is a *prima facie* presumption of negligence on the part of the carrier, which the latter must rebut by showing that the deficiency of weight arose from causes over which he had no control(l).

If the accident or casualty causing the loss of the goods is occasioned by the misconduct of a third person, and not by any fault or neglect on the part of the common carrier himself, the latter is, nevertheless, responsible to the owner for the loss, as he has himself a remedy over against the offending party. Thus, where the ship of a common carrier by water drove on an anchor in the river Humber, and was sunk, and the goods on board were injured, and the accident was occasioned by the neglect of a third person in not having his buoy out to mark the place where his anchor lay, it was held that the common carrier was nevertheless bound to make good the loss(m). But if the misconduct of the third person is caused by the orders of the owner of the goods, the carrier of course will not be responsible(n).

(ii) Rixford v. Smith, 52 N. H. 355. Klauber v. American Express Co., 21 Wis. 21.

(j) Stuart v. Crawley, 2 Stark. 324.

(k) Richardson v. North-East. Rwy., L. R., 7 C. P. 75.

(l) Hawkes v. Smith, Car. & M. 72.

(m) Trent Nav. Co. v. Ward, 3 Esp. 130. See Reaves v. Waterman, 2 Speers, 197.

(n) Butterworth v. Brownlow, 34 Law J., C. P. 267.

If a man professes to be a common carrier of passengers merely, and only receives occasionally, and at his own option, some trifling articles of luggage with such passengers, to be carried gratuitously for the accommodation of the latter, he cannot be charged as a common carrier of goods for the loss of them. He is, in such a case, a gratuitous bailee of the goods, and chargeable only with the liabilities and responsibilities of a person who gratuitously undertakes to carry goods for another. Such is an omnibus proprietor, who professes only to carry passengers and receives his hire solely therefor, but occasionally receives and carries gratuitously small bundles and parcels for the accommodation of his passengers. As he does not profess to carry goods for hire, he cannot be compelled to receive them as a common carrier of goods, neither can he be charged except as a gratuitous bailee for the loss of them. And if luggage is carried free, upon the express terms that the passenger shall himself take charge of it, and that it shall be taken at his risk, he cannot make the carrier responsible for the loss of it(o). If, however, the carrier or coach-proprietor professes to carry both passengers and luggage, he is clothed, as regards the conveyance of the luggage, with the obligations and responsibilities of a common carrier of goods for hire(p), whether the hire is paid by the passenger or by some other person on his behalf or for his benefit(q).

654 Concealment of risk by consignors.—A person who gives a carrier goods of a dangerous character to carry, and which require more caution in their carriage than ordinary merchandise; and which, without such caution, would be likely to injure the carrier and his servants, is bound in law to give notice of the dangerous character of such goods to the carrier, and if he fails so to do he is responsible to the carrier, or to his servants, for the injurious consequences of his neglect(r). See *ante*, p. 568.

655 Contributory negligence.—If goods delivered to be carried are lost or stolen by the way, and the conduct of the bailor or consignor himself has in any way conduced to the loss, he has no ground at common law for seeking compensation at the hands of the common carrier(s). If a

(o) *Stewart v. Lond. and North-West. Rail. Co.*, 33 Law J., Exch. 199.

(p) *Brooke v. Pickwick*, 4 Bing. 218.

(q) *Marshall v. York. and Newcastle Rail. Co.*, 11 C. B. 655; 21 Law J., C. P. 24.

(r) *Farrant v. Barnes*, 11 C. B., N. S. 553; 31 Law J., C. P. 139; *post*, ch. 17, s. 1, FRAUDULENT CONCEALMENT. *Boston & Albany R. R. Co. v. Shanly*, 107 Mass. 568. *Barney v. Burstebinder*, 7 Lans. (N. Y.) 210; 64 Barb. 212.

(s) *Butterworth v. Brownlow*, *supra*. *Congar v. Chicago & Northwestern R. R. Co.*, 24 Wis. 157. *Hellman v. Holladay*, 1 Woolw. 365. If goods are missent in consequence of the negligence of the owner in marking their destination upon them, the carrier will not be liable. Id

man, for example, sends bank-notes, sovereigns, or valuables, to a common carrier to be carried disguised as merchandise, or as a parcel of ordinary value, requiring no more than ordinary care, and the valuables are stolen, the common carrier is not responsible at common law for the loss, inasmuch as the neglect of the consignor in not apprising him of the extraordinary value of the parcel, in order that extraordinary care might have been taken of it, may have been the occasion of that loss (*ante*, p. 24); and "the holding out by the consignor as an ordinary risk what is in reality an extraordinary risk is a legal fraud—*dolus malus*,—and *ex dolo malo non oritur actio*"(*t*).

656 *Inability of the common carrier to rid himself of the public duties imposed upon him.*—It has been held that a person who undertakes the public employment of a common carrier of merchandise, or of passengers and luggage, has no more right to engraft upon his employment the terms that "all merchandise is carried at the risk of the owners," or that "all luggage is carried at the risk of the passengers," and that "he will not be responsible if it is lost or damaged by the way," than a common innkeeper has to refuse to receive guests except on the terms that he shall not be responsible for the safe-keeping of their goods and luggage deposited in his inn (*post*, s. 2). The consignor of merchandise or the passenger has a right to reject these terms, and to insist on the merchandise, or the customary allowance of luggage for a passenger, being taken at the common carrier's risk, provided he makes the declaration of value, and is ready to pay the premium of insurance in those cases where the declaration and payment are required by law (*post*, p. 582). "The traveller," justly observes an American judge, "is under a sort of moral duress, a necessity of employing the common carrier, and the latter shall not be allowed to throw off his legal liability. He shall not be privileged to make himself a common carrier for his own benefit and a mandatory or less to his employer. He is a public servant, with certain duties defined by law, and as Ashurst, J., said of the duties of innkeepers, they are *indelible*"(*u*).

(*t*) Bayley, J., *Batson v. Donovan*, 4 B. & Ald. 37. *Warner v. Western Transportation Co.*, 5 Rob. (N. Y.) 490. *American Express Co. v. Perkins*, 42 Ill. 458. *Cincinnati, etc., R. R. Co. v. Marcus*, 38 Ill. 219.

In the absence of circumstances amounting to a legal fraud, a carrier, who receives a box or package for transportation without inquiry as to its value, and is paid such price for transportation as is charged with reference to its bulk, weight or external appearance, will be responsible for its loss, whatever may be its value. *Gorham Manufacturing Co. v. Fargo*, 45 How. (N. Y.) 90. *Phillips v. Earle*, 8 Pick. 182. Compare *Greed v. Southern Express Co.*, 45 Ga. 305.

(*u*) Cowen, J., *Cole v. Goodwin*, 19 Wend. 281. *Hollister v. Nowlen*, *ib.* 234. Angell on Carriers, App. xviii. xxiii. See Doct. & Stud. Dial. 2, ch. 39; Noy's Maxims, ch. 43, 92;

657 *Statutory protection of common carriers in respect of the carriage of gold and silver, title-deeds, valuables, etc.*—By the 11 Geo. 4 and 1 Wm. 4, c. 68, commonly called the Carriers' Act, reciting that by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, and public conveyances by land, for hire, parcels and packages containing money, bills, notes, jewelry, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of common carriers for hire is greatly increased; and that through the frequent omission by persons sending such parcels to notify the value and nature of the contents thereof, so as to enable such common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses; it is enacted that no common carrier by land for hire shall be liable for the loss of, or injury to, any gold or silver coin, or any gold or silver in a manufactured state, or any precious stones, jewelry, watches, clocks, or time-pieces, trinkets, bills, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass(z), china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials(a), furs, or lace (i.e., lace made by hand(b)), contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any public conveyance, when the value of such articles or property contained in such parcel or package shall exceed the sum of *ten pounds*, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such common carrier, or to his bookkeeper, coachman or other servant, for the purpose of being carried, or of accompanying the person of any passenger, the *value* and *nature* of such articles or property shall have been *declared* by the per-

Stewart v. L. & N.-West Rwy., *ante*, p. 578. See Blumenthall v. Brainerd, 38 Vt. 402; Empire Transportation Co. v. Wamsutta Oil Co., 63 Penn. St. 14; Clark v. Faxon, 21 Wend. 153; Powell v. Myres, 26 Wend. 591; Camden Transportation Co. v. Belknap, 21 Wend. 354; Jones v. Voorhees, 10 Ohio, 145; Camden, etc., R. R. Co. v. Burk, 13 Wend. 611; Beekman v. Shouse, 5 Rawle, 179. See Dwight v. Brewster, 1 Pick. 53; Smith v. North Carolina R. R. Co., 64 N. C. 235.

(z) As to a glass frame, see Treadwin v. Gt. East. Rail. Co., L. R., 3 C. P. 308.

(a) See Brunt v. Mid. Rail. Co., *post*, p. 584.

(b) 28 & 29 Vict. c. 94. That a carrier may so limit his liability, see Hopkins v. Westcott, 6 Blatchf. 64.

son sending or delivering the same ; and the increased charge therein-after mentioned, or an engagement to pay the same, accepted by the person receiving such parcel or package.

658 *Of the fixing up of notices required by the statute.*—And (s. 2) that when any parcel or package containing any of the specified articles shall be delivered, and its value and contents declared, and such value shall exceed ten pounds, it shall be lawful for such common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or receiving-house where such parcels are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels containing such valuable articles at such office shall be bound by such notice, without further proof of the same having come to their knowledge. And (s. 3) that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, the person receiving such increased rate of charge, or accepting such engagement, shall, if required, sign a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty ; and if such receipt shall not be given when required, or such notice shall not have been affixed, the common carrier shall not be entitled to any benefit or advantage under the Act, but shall be responsible as at common law, and be liable to refund the increased rate of charge. No public notice or declaration is (s. 4) to limit, or in anywise affect the liability at common law of any such common carriers.

Every office, warehouse, or receiving-house, which shall be used or appointed by any common carrier, for the receiving of parcels to be conveyed, is (s. 5) to be deemed and taken to be the receiving-house, warehouse, or office of such common carrier. And where any parcel shall have been delivered at any such office, and the value and contents declared, and the increased rate of charge paid, and such parcel shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled (s. 7) to recover back such increased charges, in addition to the value of such parcel.

Nothing in the Act is (s. 6) to annul or affect any special contract between such common carriers and any other parties for the convey-

ance of goods and merchandise;—but this section only applies to contracts, the provisions of which are inconsistent with the exemption claimed by the carrier under the first section(c);—nor (s. 8) to protect any common carrier for hire from liability to answer for loss or injury to any goods or articles arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, etc., from liability for any loss or injury occasioned by his own personal neglect or misconduct.

659 *When a declaration of value is a condition precedent to any liability on the part of the common carrier.*—The Act, it will be observed, applies solely to common carries *by land*. Where, however, the contract for carriage is divisible, and applies to carriage partly by water and partly by land, and the loss occurs during the carriage by land, the carrier is entitled to the benefit of the statute(d); and where the contract is to carry by land and sea also, it is divisible, so as to afford a defence to the carrier if the loss in fact occurs during the carriage by land(e). The effect of the Act is to prevent the owner or consignor from recovering from the common carrier the value of any of the enumerated articles when the value of the contents of the parcel or package in which they are inclosed exceeds 10%, and the value has not been declared, and the increased rate of charge paid by the consignor pursuant to the statute. The declaration of value must be made by the consignor, whether the common carrier has or has not a notice or tariff of charges for the increased risk of conveyance of such articles stuck up in his office, and whether the articles are delivered at the office of the common carrier, at the sender's house, on the road, or anywhere else. The Act requires the person who sends the goods to take the first step, by giving that information which he alone can give, and if he does not take that first step, then he cannot maintain an action for the value of the lost article by reason of the first section of the statute, which expressly says that the common carrier shall not be liable unless the declaration is made(f). As soon, however, as this has been done, the common carrier is entitled to demand and to have an increased rate of remuneration, which is in the nature of a premium for insurance, provided he has a tariff or notice stuck up in his office of the sums he charges above the usual rate of charge for the carriage of the articles. If there is no tariff,

(c) *Baxendale v. Gt. Eastern Rail. Co.*, L. R., 4 Q. B. 244.

(d) *Baxendale v. Gt. Eastern Rail. Co.*, *supra*.

(e) *Le Conteur v. Lond. and South-West Rail. Co.*, L. R., 1 Q. B. 54.

(f) *Pianciani v. Lond. and South-West. Rail. Co.*, 18 C. B. 226.

he has then no right to charge the increased rate, and he loses (provided the declaration of value has been duly made by the consignor) the protection of the Act(*g*). The declaration of value having been made, the common carrier has no right to know the exact nature of the contents of the parcel, unless he has reasonable grounds for believing that it contains articles of a dangerous character(*h*). And if, after the declaration has been made, he receives the goods without demanding an increased rate of charge, he is not protected by the statute(*i*). However, the mention of the value incidentally is no declaration of value within the statute(*k*).

660 *By whom the declaration of value is to be made and the increased rate of carriage paid.*—In a case before Lord Ellenborough, before the passing of the Common Carriers Act, it was held that where a tradesman at Gosport received an order in writing for goods to be forwarded to Plymouth, he had an implied authority to do all that was necessary to be done to insure them a safe conveyance; and, therefore, that when it was necessary to declare their value, and pay an increased charge for insurance, it was his duty to make the declaration and the payment, so as to enable the consignee, in case of loss, to secure his indemnity from the common carrier(*l*); but the limitation of the liability of common carriers in respect of the carriage of glass, china, and the articles mentioned in the Carriers Act, being now established by Act of Parliament, must be taken to be known to consignees and consignors alike throughout the kingdom; and it is not the practice, nor, it is apprehended, is it in general the duty, of the consignor, to pay the carriage and insure articles directed to be forwarded by his customers, unless he receives express directions so to do(*m*). If, indeed, the articles are of an extremely fragile character, and likely to be damaged without great care, or if they are of unusual value, it would be the duty of the consignor to declare their nature and value to the common carrier, that proper care might be taken of them (*ante*, p. 578); and it would be prudent for the consignor, before forwarding goods of this description, to require instructions from the consignee as to the insurance of them

661 *Articles to which the statute extends.*—The statute extends to all the articles enumerated in the first section, although not within the words

(*g*) *Baxendale v. Hart*, 21 Law J., Exch. 123; 6 Exch. 789.

(*h*) *Crouch v. Lond. and North-West. Rail. Co.*, 14 C. B. 295; 23 Law J., C. P. 73. See *ante* p. 568.

(*i*) *Behrens v. Gt. North. Rail. Co.*, 31 Law J., Exch. 299; 30 ib. 153.

(*k*) *Robinson v. South-West. Rail. Co.*, 34 Law J., C. P. 234.

(*l*) *Clarke v. Hutchings*, 14 East, 476.

(*m*) *Coshay v. Tute*, 3 Campb. 129. *Bailey v. Sweeting*, 9 C. B., N. S. 857.

of the preamble, "an article of great value in a small compass." It is not sufficient for the owner to describe in writing on the outside of a parcel or box the nature of the contents. The carrier must have distinct information thereof, and an opportunity of demanding the increased rate of carriage(*n*). Hat bodies made of felt, which is a substance composed partly of the soft fur or down of the rabbit detached from the skin, and partly of the wool of sheep, have been held not to be "furs" within the Common Carriers Act(*o*), but dresses of silk made up for use are silks within the operation of the Act(*p*); and "silk web," which is composed one third of silk and two thirds of cotton and india-rubber, as being "wrought up with other materials," is also within it(*q*). By the term "writings" is meant writings of value, and therefore an instrument in writing in an imperfect state, intended to secure a large sum of money, but not being a valid and complete security at the time of the loss, is not within the statute(*r*). If the contents of a parcel or package exceeding 10% in value are of a miscellaneous character, consisting partly of enumerated articles and partly of things not mentioned or comprised in the Act, the common carrier is released from all liability in respect of the former, but, as regards the latter, his common-law liability remains the same as before the passing of the statute. Thus, if a trunk containing linen and wearing apparel, jewelery, and trinkets, exceeding 10% in value, be delivered to a carrier to be carried for the ordinary hire, or to accompany the person of a passenger, and such trunk is lost by the way, the carrier is not liable for the value of the jewelery and trinkets(*s*), but he remains responsible for the value of the trunk and linen and wearing apparel, as at common law before the passing of the Act. If, however, the contents of the parcel or package consist entirely of the enumerated articles, the common carrier is by the express terms of the Act freed from all responsibility and liability in respect of the loss thereof, if the consignee has not declared the nature and value of the article, and paid, or agreed to pay, the increased charge specified in the notice, although the loss may have been occasioned by the grossest negligence(*t*). If an uninsured parcel or package consists entirely of

(*n*) *Owen v. Burnett*, 2 C. & M. 353; 4 Tyr. 133. *Boys v. Fink*, 8 C. & P. 361.

(*o*) *Mayhew v. Nelson*, 6 C. & P. 58.

(*p*) *Bernstein v. Baxendale*, 6 C. B., N. S. 259; 28 Law J., C. P. 265, overruling *Davey v. Mason*, Car. & M. 50.

(*q*) *Brunt v. Mid. Rail. Co.*, 33 Law J., Exch. 187; 2 H. & C. 889.

(*r*) *Stoessiger v. South-East. Rail. Co.*, 23 Law J., Q. B. 293. As to pleading the Act, see *Smith v. Lond. & Brighton Rail. Co.*, 7 C. B. 789.

(*s*) *Bernstein v. Baxendale*, *supra*.

(*t*) *Hinton v. Dibbin*, 2 Q. B. 646.

enumerated articles, the plaintiff would not be entitled to recover even the value of the box or case in which they are contained(*u*), but if there are articles in it to which the statute does not apply, he would(*x*).

If the consignor, after he has made the declaration of value, objects to pay the *ad valorem* rate of carriage or premium of insurance, and wishes to have the parcel carried as a parcel of ordinary value, at the ordinary rate of carriage for parcels of similar bulk and weight, the carrier may, if he pleases, waive his right to the increased remuneration or premium of insurance, and agree to carry for a smaller sum upon the terms that he is not then to be responsible upon the customary liability of a common carrier, as an insurer against robbery and the dangers and accidents of the road. "This limitation," observes Parke, B., it is competent for a common carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own terms"(*y*). And if, after the declaration has been made, the carrier receives the parcel without demanding the increased rate or charge, he receives it as an insurer of its safe conveyance; and the same result follows if he has failed to notify his increased rate of charge in accordance with the terms of the statute(*z*).

662 *Losses covered by the statute.*—The term "loss" in the statute means loss of things by the carrier, or his servants, in the course of the carriage of them, either by losing them from their vehicles, or mislaying them, so that it was not known where to find them when they ought to have been delivered; and not the loss that may be sustained by an owner or consignee by reason of the non-delivery of the chattel in due time, or by reason of great delay in its delivery, whereby the use of the chattel, or the means of turning it to advantage, were lost(*a*).

663 *Loss of goods from theft by the common carrier's servants.*—Nothing contained in the Carriers Act is, as we have seen (s. 8), to protect any common carrier for hire from liability to answer for loss of, or injury to, any goods or articles arising from the felonious act of any servant in the carrier's employ. If, therefore, the common carrier relies upon

(*u*) Wyld v. Pickford, 8 M. & W. 462.

(*x*) Treadwin v. Gt. East. Rail. Co., L. R. 3 C. P. 308. A framed picture is one entire thing, and cannot be divided so as to charge the carrier for the loss of the frame. Henderson v. L. & N.-W. Rwy., L. R., 5 Exch. 90.

(*y*) Wyld v. Pickford, *supra*.

(*z*) Behrens v. Gt. North. Rail. Co., 6 H. & N. 366; 30 Law J., Exch. 153.

(*a*) Hearn v. Lond. and South-West. Rail. Co., 10 Exch. 801; 24 Law J., Exch. 180

the statute as a defence, contending that there ought to have been, and that there was not, any declaration of value on the part of the consignor, of the article alleged to have been lost, the defence is rebutted, and the case taken out of the operation of the statute, by showing that the loss arose from the felonious act of the carrier's servant(b).

When the goods have been accepted by a carrier under a special contract for the carriage of them, the statute does not apply. Where, therefore, a common carrier has given express notice to the consignor that he will not be responsible for parcels or packages above the value of 10*l.*, unless the value is declared, and an increased rate of remuneration paid according to a printed tariff or scale of charge, and the common carrier afterwards accepts a parcel to be carried, knowing it to be worth more than 10*l.*, without demanding or receiving the premium for insurance, and the parcel is purloined by his own servant, he is not necessarily responsible for the theft(c). Having received the goods under a special contract, and not upon his customary liability as an insurer of safe conveyance, he is chargeable only for negligence and want of ordinary care. The loss by theft indeed is *primâ facie* proof of negligent keeping, but it is not absolutely conclusive, and the carrier may exonerate himself from liability for the theft by proving his own care and watchfulness, and showing that there was no want of any proper precaution on his part to guard against theft by his servants. "If the consignor," observes Lord Tenterden, "has concealed the value of the parcel from the carrier, and has adopted a disguise for it likely to prevent the carrier from taking any particular care of the parcel, and yet not so completely concealing its nature as to prevent it from being selected for depredation by a dishonest servant, and the loss is the consequence of the means he has adopted, then he cannot maintain an action in respect of the loss"(d).

All persons who are actually, though casually and incidentally, employed by the common carrier in doing the work of carrying, are the servants of the latter, although they may be the regular servants of some other persons, receiving wages from them and not from the carrier(e).

664 *Inability of railway, canal, and steam-boat companies to exonerate themselves from liability for their own neglect, default, or breach of duty by*

(b) *Metcalf v. London and Brighton Rail. Co.*, 4 C. B., N. S. 307; 27 Law J., C. P. 205.

(c) *Butt v. Gt. West. Rail. Co.*, 11 C. B. 140. *Gt. West. Rail. Co. v. Rimell*, 27 Law J., C. P. 204.

(d) *Bradley v. Waterhouse, M. & M.* 154.

(e) *Machu v. Lond. and South-West. Rail. Co.*, 2 Exch. 426.

notice, condition, or declaration.—By s. 7(*f*) of the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31,—which by 31 & 32 Vict. c. 119, s. 16, extends, so far as its provisions are applicable, “to steam vessels and to the traffic carried on thereby,”—every railway company and canal company is made liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, and delivering thereof, occasioned by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration, being thereby declared to be null and void. But it is provided that nothing therein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable(*g*), and that they shall not be liable to a

(*f*) See *Baxendale v. Gt. Eastern Rail. Co.*, L. R., 4 Q. B. 254.

(*g*) As to the construction of this section, see *Peek v. North Staff. Rail. Co.*, *post*, p. 482. A common carrier may by special contract limit his common law liability as an insurer; but he cannot by such contract relieve himself from liability for loss or damage caused by his own negligence, or that of his servants. *The Pacific, Deady*, 17. Cin., Ham. & Dayton, and Dayton, etc., R. R. Co. *v. Pontius*, 19 Ohio St. 221. *Ashmore v. Penn. Central R. R. Co.*, 4 Dutch. 180. *Farnham v. Camden & Amboy R. R. Co.*, 55 Penn. St. 53. *American Express Co. v. Sands*, 55 Penn. St. 140. *Davidson v. Graham*, 2 Ohio St. 131. *Graham & Co. v. Davis*, 4 Ohio St. 362. *Evansville, etc., R. R. Co. v. Young*, 28 Ind. 516. *Ketchum v. American, etc., Express Co.*, 52 Mo. 390. *Colton v. Cleveland & Pittsburg R. R. Co.*, 67 Penn. St. 211. *Missouri Valley R. R. Co. v. Caldwell*, 8 Kan. 244. *Indianapolis, etc., R. R. Co. v. Allen*, 31 Ind. 394. *Michigan, etc., R. R. Co. v. Heaton*, 31 Ind. 397, *u.* *School District v. Boston, etc., R. R. Co.*, 102 Mass. 552. *Southern Express Co. v. Crook*, 44 Ala. 468. *Christenson v. American Express Co.*, 15 Minn. 270. *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St. 339. *Mobile, etc., R. R. Co. v. Hopkins*, 41 Ala. 486. *Baltimore, etc., R. R. Co. v. Skeels*, 3 W. Va. 556. *Purcell v. Southern Express Co.*, 34 Ga. 315. *Southern Express Co. v. Moon*, 39 Miss. 822. *Kallman v. United States Express Co.*, 3 Kan. 205. *Seller v. Pacific*, 1 Oregon, 409. But see *Cragin v. New York Central R. R. Co.*, 51 N. Y. 61.

But while the common law liability of a common carrier may be limited by express contract, it cannot be limited by a mere notice, even though such notice be brought to the knowledge of the persons whose property he carries. *Blossom v. Dodd*, 43 N. Y. 264. *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 485. *Hollister v. Nowlen*, 19 Wend. 234. *Cole v. Goodwin*, 19 Wend. 251. *Powell v. Myers*, 26 Wend. 594. *Clark v. Faxton*, 21 Wend. 153. *Cincinnati, Hamilton & Dayton, and Dayton & Michigan R. R. Co. v. Pontius*, 19 Ohio St. 221. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 319. *The Pacific, Deady*, 17. *Southern Express Co. v. Shea*, 38 Ga. 519. *Southern Express Co. v. Newby*, 36 Ga. 635. *Baltimore, etc., R. R. Co. v. Brady*, 32 Md. 333. *Plumenthal v. Brainerd*, 38 Vt. 402. *Steele v. Townsend*, 1 Ala. (S. C.) 201. *Western, etc., R. R. Co. v. Newhall*, 24 Ill. 468. *Michigan Central R. R. v. Hale*, 6 Mich. 243. *Moses v. Boston & Maine R. R. Co.*, 32 N. H. 523. *Davidson v. Graham*, 2 Ohio, N. S. 131. And see, *Southern Express Co. v. Crook*, 44 Ala. 468. But see *Hopkins v. Westcott*, 6 Blatchf. 64. These decisions rest on the ground that notice to the owner of the goods is no evidence of his assent thereto; and that the owner has a right to rely upon the common law liability of the carrier; and that the carrier cannot relieve himself of that liability by any mere act of his own.

Where a carrier has limited his common law liability by special contract, he is merely

greater extent than certain sums named in the section for injuries to horses, cattle, etc., unless the sender has declared them to be of greater value at the time of delivery and paid an increased charge accordingly. Under this provision no greater sum than 50% can be recovered in respect of a horse which is injured by the negligence of the company, while being led by the owner's servant through their yard for the purpose of being conveyed by their railway, unless his value had been declared previously to the injury(*h*).

This statute does not enable railway companies to frame such regulations and make such conditions with respect to the receiving and forwarding goods and chattels as will enable them substantially to escape from their common law or statute liability to carry passengers' luggage, and such things as they ordinarily profess to carry; but they may attach reasonable conditions to the receiving, forwarding, and delivering them; and then, if those reasonable conditions are not assented to and signed, they may refuse to carry(*i*).

Where an Act of Parliament authorized a railway company to make regulations respecting passengers' luggage, and the company by their regulations, required the passengers to see their luggage marked with the company's labels, and stated that the company would not be responsible for the loss or detention of any article of luggage not so marked and properly addressed, and the plaintiff, who was a passenger, required the company's porter to label and take into the luggage-van some wearing apparel wrapped in a shawl and properly addressed, and the porter refused, as the company had made it a rule not to label shawls, it was held that the company was responsible for the porter's refusal to receive the shawl; and that the company could not make regulations having the effect of divesting them of their common-law liability to receive and carry the article as luggage(*k*). But in the case of excursion trains started for the carriage of passengers only, where the railway company does not receive luggage for conveyance, but allows the passenger to carry a small quantity under his own care and at his own risk, the railway company is not responsible for the loss of it(*l*).

released from liability as insurer, and is still responsible, as a bailee for hire, for ordinary negligence. *Missouri Valley R. R. Co. v. Caldwell*, 8 Kan. 244.

(*h*) *Hodgman v. West Midland Rail. Co.*, 33 Law J., Q. B. 233; 35 *ibid.* 85.

(*i*) As to what is a reasonable condition, see *Aldridge v. Gt. Western Rail. Co.*, 33 Law J., C. P. 161; *post*, p. 595; what an unreasonable one, *Rooth v. North-Eastern Rail. Co.*, L. R., 2 Exch. 173, and *post*, p. 590. See *Mobile, etc. R. R. Co. v. Hopkins*, 41 Ala. 486.

(*k*) *Munster v. South-Eastern Rail. Co.*, 4 C. B., N. S. 676; 27 Law J., C. P. 312.

(*l*) *Stewart v. Lond. and North-West. Rail. Co.*, *ante*, p. 578.

In cases where railway companies under the Carriers Act, or the Railway Traffic Act, are entitled to demand an increased rate of charge for insuring the safe conveyance of particular articles, and the consignor objects to the increased rate of charge, and it is agreed that the company shall receive and forward certain articles uninsured, this may be taken as doing away with their common-law liability as insurers of the safe conveyance of the articles, but does not exempt them from responsibility for losses by negligence through their own default(*m*), *e.g.*, for delay in not forwarding the articles(*n*).

If goods are accepted for conveyance under a special contract, whereby the carrier exempts himself from liability for loss or damage of a particular character, such as leakage or breakage, this will not exempt him from responsibility if the leakage or breakage has been caused by his own negligence, or the negligence of his servants in storing the goods(*o*). And the rule is the same, where the suit is brought in the Court of Admiralty, against the vessel(*p*). It makes no difference that the contract was made with another person, if the plaintiff's goods were lawfully in the possession of the defendants, and were lost or injured through their negligence(*q*). Where the plaintiff's goods on board ship were injured by oil during the voyage, and it was shown that there was no oil amongst the cargo, but that there were two donkey engines on board in which oil was used, and which were near the plaintiff's goods, it was held that this raised a presumption of negligence against the owners of the vessel(*r*).

665 *Signature of notices, conditions, declarations and special contracts.*—By s. 7 of the Railway and Canal Traffic Act it is further enacted, that no special contract between a railway and canal company and any other parties, respecting the receiving, forwarding, or delivering of any animals, articles, goods or things, as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively, for carriage.

(*m*) *Peek v. North Staff. Rail. Co.*, 10 H. L. C. 473; 32 Law J., Q. B. 241.

(*n*) *Robinson v. Gt. Western Rail. Co.*, 35 L. J., C. P. 123.

(*o*) *Phillips v. Clark*, 26 Law J., C. P. 168; 2 C. B., N. S. 163. *M'Manus v. Lanc. & Yorkshire Rail. Co.*, *infra*. *Missouri Valley R. R. v. Caldwell*, 8 Kan. 244. *Ketchum v. American Express Co.*, 52 Mo. 390.

(*p*) *Ohrloff v. Briscall*, L. R., 1 P. C. Ca. 231.

(*q*) *Martin v. Gt. Indian Peninsular Rail. Co.*, L. R., 3 Exch. 9.

(*r*) *Czech v. Gen. Steam. Nav. Co.*, L. R., 3 C. P. 14.

By the statutes of Michigan it is provided "That no railroad company shall be permitted to change or limit its common-law liability as a common carrier by any contract, or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods or property to be carried." Sess. Laws of 1867, p. 165.

Before the statute, every case in which a special limited liability was substituted for the general common-law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law; so that every notice, condition and declaration, under the statute, however reasonable, must be made in writing, and be signed in the mode prescribed by the statute, in order to be binding in law upon the person sought to be affected by it(s). If a man has an opportunity of reading the conditions, and chooses to sign them without reading them, he is nevertheless bound by them, if they are reasonable(t). But the Act does not apply to traffic beyond the company's own lines or canals, so that a condition printed on a passenger's through ticket from London to Paris, that the company would not be responsible for loss, etc., except on the company's own lines, is valid, although not signed by the passenger(u).

666 *What are just and reasonable conditions respecting the receiving, forwarding and delivering goods.*—The reasonableness or unreasonableness of the condition made by the company with respect to the receiving, forwarding, and delivering of goods and chattels, will materially depend upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company was bound by the common law, or by statute, to carry the articles on being paid the customary hire, or whether it was in its power to reject them altogether and refuse to carry them upon any terms(x).

Every stipulation or condition professing to exempt a railway company or canal company from liability for its own negligence or misconduct, or that of its servants and agents, is unjust and unreasonable. "It is impossible," justly observes Lord Ellenborough, "without outraging common sense, to allow carriers to say, 'We will receive your goods, but will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious'"(y).

(s) *M'Manus v. Lanc. & York. Rail. Co.*, *post*, p. 592. *Peek v. North Staff. Rail. Co.*, *ut sup.* *Simmons v. Gt. West. Rail. Co.*, 18 C. B. 826; 26 Law J., C. P. 25. *Beal v. South Dev. Rail. Co.*, 5 H. & N. 886. See *Southern Express Co. v. Crook*, 44 Ala. 468.

(t) *Lewis v. Gt. West. Rail. Co.*, 5 H. & N. 874; 29 Law J., Exch. 425. *Hopkins v. Westcott*, 6 Blatchf. 64.

(u) *Zunz v. South-East. Rwy., L. R.*, 4 Q. B. 539.

(x) *Pardington v. South Wales Rail. Co.*, 1 H. & N. 396. *Simons v. Gt. West. Rail. Co.*, 18 C. B. 805. *Garton v. Brist. and Ex. Rail. Co.*, El., B. & El. 112; 30 Law J., Q. B. 273. *Ante*, p. 588, *in notis*. As to what is a reasonable percentage charge on declared value, see *Harrison v. Lond., Brighton, and S. C. Rail. Co.*, 31 Law J., Q. B. 113.

(y) *Lyon v. Mells*, 5 East, 438. *Ld. Wensleydale in Peek v. North Staff. Rail. Co.*, 32 Law

Where horses were delivered to be forwarded by a cattle-truck from Liverpool to York for reward, and the owner was required to sign a ticket containing a memorandum to the effect that the ticket was issued subject to the owner's undertaking all risk of conveyance, loading and unloading, as the company would not be responsible for any injury or damage, however caused, occurring to live stock travelling upon the railway, or in their vehicles, and the defendant's servants provided a truck which, in external appearance, and so far as the defendant's servants knew, was sound, and sufficient for the conveyance of the horses, but it was in fact unsound, and of insufficient strength for the purpose, and a hole was made in the bottom of the truck during the journey, and one of the horses got his leg through the hole and was injured, it was held that the railway company was responsible for the damage done to the horse, notwithstanding the terms of the special contract signed by the owner of the horse. "We are of opinion," observes the court, "that the condition on special contract in this case is not just and reasonable. In order to bring the defendants within its protection, it is necessary to construe it as excluding responsibility for loss occasioned, not only by all risks of whatever kind directly incidental to the transit, but also for that caused by the insufficiency of the carriages provided by the defendants, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the companies are to carry is a matter, generally speaking, which they, and they alone, have the means of fully ascertaining; and it would be unreasonable and mischievous if they were to be allowed to absolve themselves from the consequences of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the company should stipulate for exemption from liability for the

J., Q. B. 274. *Allday v. Gt. West. Rail. Co.*, 5 B. & S. 903; 34 L. J., Q. B. 5; and see *ante*, pp. 579, 587.

In the State of New York it is well settled that a carrier may by express contract exempt himself from liability for damages resulting from any degree of negligence on the part of his servants, agents, and employees; and that so long as the freighter can insist that the carrier shall carry his property under the common law responsibility, there can be no reason founded in justice, convenience, or public policy why he may not voluntarily enter into a contract founded upon sufficient consideration exempting the carrier from all responsibility for any degree of negligence, whether it be gross or slight. *Cragin v. New York Central R. R. Co.*, 51 N. Y. 61. *Bissell v. New York Central R. R. Co.*, 25 N. Y. 442. *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 485. See *Betts v. Farmers' Loan, etc., Co.*, 21 Wis. 80.

But while it is competent for common carriers to provide by contract for such exemptions, it must be done in clear and unambiguous terms; and the rule that the language of contracts, if ambiguous, is to be construed against the party using it, should be rigidly applied to such contracts. No presumptions will be indulged in in favor of exemptions from common law liability. *Edsall v. Camden and Amboy R. R. and Transportation Co.*, 50 N. Y. 661.

consequences of their own negligence, however gross, or misconduct, however flagrant; and that is what the condition under consideration professes to do. That condition is therefore void, and the case stands simply upon the ground that the plaintiff has employed the defendants to carry his horses safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horses have been injured "(z).

The court is bound to look at the particular matter in each case to see whether the condition is reasonable or not; and it has been held that a condition which seeks to relieve a railway company from the consequences of the loss or non-delivery of goods, by reason of insufficient or improper packages, is not reasonable(a); and if the condition is framed without limitation or exception, so as to exempt the company from all responsibility for injury, however caused, it will be void, as being neither just nor reasonable(b). But a condition quali-

(z) *M'Manus v. Lanc. & Yorkshire Rail. Co.*, 4 H. & N. 327; 28 Law J., Exch. 353. *M'Cance v. Lond. & North-West Rail. Co.*, 7 H. & N. 477; 31 Law J., Exch. 65. See *Hawkins v. Great Western R. R. Co.*, 17 Mich. 57; *Great Western R. R. Co. v. Hawkins*, 18 ib. 427; *Peters v. New Orleans, etc., R. R. Co.*, 16 La. An. 222; *Welsh v. Pittsburg, etc., R. R. Co.*, 10 Ohio (N. S.), 64; *Harris v. Northern Indiana R. R. Co.*, 20 N. Y. 232.

A railroad company engaging in the transportation of live stock for hire, is bound to furnish cars sufficiently strong to resist their struggles; and for a breach of this obligation they will be liable even though the animals carried were vicious and unruly. *Smith v. New Haven, etc., R. R. Co.*, 12 Allen (Mass.), 531.

If the shipper of the stock has knowledge of defects in the cars in which the animals are carried, and does not inform the agent of the company, to whom the defect is unknown, the company will not be responsible for any damages to the stock arising therefrom. *Betts v. Farmers' Loan, etc., Co.*, 21 Wis. 80.

But if the shipper points out the defect to the agent of the company, who promises to have it remedied, but fails to do so, the company will be liable for the resulting damages, even though the shipper of the stock expressly undertakes all risk from the identical defect. *Welsh v. Pittsburg, etc., R. R. Co.*, 10 Ohio (N. S.), 64. See *Powell v. Pennsylvania R. R. Co.*, 32 Penn. St. 414.

If the owner of property to be transported makes his own selection of the cars in which it is to be carried, under circumstances which charge him with full knowledge of their defects, and an injury results exclusively from such defects, the carrier will not be liable. But it is the duty of the carrier to see that the owner has such knowledge. *Harris v. Northern Indiana R. R. Co.*, 20 N. Y. 232.

Acceptance of a defective car for the transportation of goods, with full knowledge of the defect, will not exempt a carrier from his common law liabilities for the destruction of the goods through such defect while in transit, without proof of a distinct agreement on the part of the owner arising from the risk. *Pratt v. Ogdensburgh, etc., R. R. Co.*, 102 Mass. 557.

But the common law rule making a carrier responsible for the safe carriage and delivery of property intrusted to his care, unless prevented by the act of God or the public enemy, does not apply in its full extent to the carriage of live stock. *Cragin v. New York Central R. R. Co.*, 51 N. Y. 61. *Michigan Southern & Northern Indiana R. R. Co. v. McDonough*, 21 Mich. 165. *Lake Shore & Michigan Southern R. R. Co. v. Perkins*, 25 ib. 329. But see *Kansas Pacific R. R. Co. v. Nichols*, 9 Kans. 235.

(a) *Simons v. Gt. West. Rail. Co.*, 18 C. B. 830; 26 Law J., C. P. 25. *Ld. Wensleydale, Peek v. North Staff. Rail. Co.*, ante, p. 589.

(b) *Peek v. North Staff. Rail. Co.*, ante, p. 589. *Gregory v. West. Mid. Rail. Co.*, 53 Law J., Exch. 155. A stipulation contained in a receipt given by a common carrier to the effect that

fying their liability only, for instance, one annexed to the carriage of meat, that the company will not be responsible for the loss of a market, is a reasonable one(c).

667 *Commencement and duration of the liability—Damage or loss of goods in warehouses.*—When the common carrier of goods carries on the business both of warehouseman and a common carrier, the nature and extent of his liability will depend upon the character in which he holds the goods at the time of the loss. If they are received into his warehouse to await the future orders of the owner or consignor as to their destination, he is clothed only with the ordinary duties and responsibilities of a warehouseman or bailee for hire(d). Goods received at the cloak-room of a railway company, therefore, are not received by the company in their capacity of common carriers, but simply as bailees for hire(e). But if the destination is marked out, and he has nothing to do but to forward the goods on the earliest opportunity to the place indicated, he is responsible as a common carrier for any loss or damage that may occur to the goods in the warehouse, as they are then *in transitu* in contemplation of law(f). Whenever the common carrier receives goods to keep until called for, or until he has orders from the consignee to forward them, he holds them as a bailee for hire and not as a gratuitous bailee, although he does not charge warehouse rent(g).

668 *Delivery of goods at the place of destination.*—The common carrier of goods is bound, in common with all carriers for hire, to carry the goods intrusted to him for conveyance to their place of destination with reasonable expedition(h), and deliver them into the hands of the consignee, or of some person expressly or impliedly authorized by him to receive them; and he must, of course, in all cases, take especial care

he will not be liable for the loss of a package unless a claim is made for the loss within thirty days from the date of the receipt, is unreasonable and void. *Southern Express Co. v. Crook*, 44 Ala. 468.

(c) *Lord v. Midland Rail. Co.*, L. R., 2 C. P. 339.

(d) *Cairns v. Robins*, 8 M. & W. 263. *Garside v. Trent Navigation Co.*, 4 T. R. 582. *Wade v. Wheeler*, 3 Lans. (N. Y.) 201. *Rogers v. Wheeler*, 52 N. Y. 262. *Barron v. Eldredge*, 100 Mass. 455. *St. Louis, etc., R. R. Co. v. Montgomery*, 39 Ill. 335. *Judson v. Western R. R. Co.*, 4 Allen (Mass.), 520.

(e) *Van Toll v. South-East. Rail. Co.*, 31 Law J., C. P. 241.

(f) *Forward v. Pittard*, 1 T. R. 27; *Buller, J.*, in *Hyde v. Trent and Mersey Nav. Co.*, 5 T. R. 398. *Ladue v. Griffith*, 25 N. Y. 364. *Blossom v. Griffin*, 13 N. Y. 569. *Southern Express Co. v. Newby*, 36 Ga. 635. As to accidental fires in warehouses, see *ante*, p. 303, *et seq.*

(g) *White v. Humphrey*, 11 Q. B. 43. But see *Michigan, etc., R. R. Co. v. Shurtz*, 7 Mich. 515.

(h) *Raphael v. Pickford*, 6 Sc. N. R. 478; 2 Dowl. N. S. 916. *Black v. Baxendale*, 1 Exch. 410; 17 Law J., Exch. 50. *East Tennessee, etc., R. R. Co. v. Nelson*, 1 Cold. (Tenn.) 272. *Galena & Chicago Union R. R. Co. v. Rae*, 18 Ill. 488.

that they are delivered into the hands of the right person(i). If, however, they are imposed upon by a fictitious order, they will not be responsible, if they act according to the usual custom of business, and in accordance with their instructions(k). When the carriage is by land, the goods must be sent to the residence of the consignee, for the common carrier is not released from responsibility by leaving them at the coach office, or at an inn by the road-side at which the coach usually stops, unless he has received directions from the consignee so to do(l). If he tenders them at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid he is not bound, as we have already seen, to part with the possession of the goods: but he may lawfully take them back to his own warehouse, or place of business; and he holds them thenceforward not as a common carrier, but as a bailee for hire, or (if he is not entitled to charge, or does not charge, warehouse rent) as a gratuitous bailee(m), and is only liable, therefore, to act with reasonable care and caution with respect to the goods(n). And if the consignee, having no warehouse of his own, asks him to keep the goods till he can conveniently send

(i) *Golden v. Manning*, 3 Wils. 433; 2 W. Bl. 916. *Birket v. Willan*, 2 B. & Ald. 356. *Duff v. Budd*, 6 Moore, 469. *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 476. *American Express Co. v. Stack*, 29 Ind. 27. *Ela v. American M. U. Express Co.* 29 Wis. 611. *Winslow v. Vermont & Massachusetts R. R. Co.*, 42 Vt. 700. *Sweet v. Barney*, 23 N. Y. 335. *Guillaume v. Hamburg & American Packet Co.* 42 N. Y. 212. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34. *Price v. Oswego & Syracuse R. R. Co.*, 50 N. Y. 213.

(k) If they are imposed upon by a fictitious order, see *McKean v. McIvor*, L. R. 6 Exch. 36.

(l) *Lond. and North-West. Rail. Co. v. Bartlett*, 7 H. & N. 400; 31 Law J., Exch. 92. "Carriers by land are bound to deliver or tender the goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. 2 Kent's Com. 605. *Angel on Carriers*, s. 295. *Gibson v. Culver*, 17 Wend. 305. *Fisk v. Newton*, 1 Denio, 45. But when goods are safely conveyed to the place of destination, and the consignee cannot after reasonable effort be found, the carrier may discharge himself from further responsibility by depositing the property in a suitable place for the owner. *Fisk v. Newton*, 1 Denio, 45. Carriers by vessels, boats and railways are exempt from the duty of personal delivery. *Redfield on Railw.* s. 127. *Thomas v. Boston R. R. Co.*, 10 Metc. 472. Such carriers discharge themselves from responsibility as such, by transporting the goods to their nearest business station to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station after the lapse of a reasonable time for him to receive them. But this exemption does not extend to express companies although availing themselves of carriage by rail. *Redfield on Railw.* s. 127. These were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail." *Witbeck v. Holland*, 45 N. Y. 13, 17. *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505. But, where an express company receives goods marked in the care of its agent at a specified place, the company will be relieved of responsibility by delivering the goods to such agent. *Fitzsimmons v. Southern Express Co.*, 40 Ga. 330. But see *Russell & Annis v. Livingston & Wells*, 16 N. Y. 515; 2 *Redfield on Railw.* 65.

(m) *Storr v. Crowley*, M'Clel. & Y. 136.

(n) *Heugh v. Lond. and North-West. Rwy.*, L. R., 5 Exch. 51. *Weed v. Barney*, 45 N. Y. 344. *Kruner v. Southern Express Co.*, 6 Coldw. (Tenn.) 356. *Hathorn v. Ely*, 28 N. Y. 78.

for them, the common carrier thenceforth holds the goods only as a warehouseman for hire, or a gratuitous bailee, according as he may or may not be paid for his care and custody of them(o). When the carriage is by water, the delivery at a wharf is not a delivery to the consignee, unless it is made so by the usage and practice of the port where the delivery takes place; but the master is bound to give the consignee notice of the arrival of the goods, and is not released from his responsibility for their safety until a reasonable time has elapsed after the giving of the notice for the consignee to come and fetch them. He cannot escape from his liability as a common carrier by immediately landing the goods at a public wharf, without giving notice to the consignee, and giving him an opportunity of receiving them from the ship's side; and if he does so land them, and they are destroyed upon the wharf by an accidental fire before the consignee has had an opportunity of taking them away, the shipowners will be responsible for the loss(p).

669 *Delivery of luggage at railway stations.*—In the case of the carriage of passengers with luggage by railway, if it is the usual course for the luggage to be taken from the train by the company's servants and delivered to the passengers on the platform, the company is bound to deliver it there. And if the company choose to provide a more convenient mode of delivering luggage to passengers by employing porters to carry it across the platform to the vehicles by which it is to be taken away, their liability as common carriers continues until the porters have discharged their duty(q).

670 *Acceptance of goods and passengers to be carried beyond the limits of the ordinary destination.*—When a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance(r), that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry

(o) *In re Webb*, 3 Taunt. 449; 6 Moore, 500. See *Shepard v. Bristol and Exeter Rail. Co.*, L. R., 3 Exch. 189; *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505.

(p) *Bourne v. Gatcliffe*, 3 Sc. N. R. 1; 8 ib. 604; 7 M. & Gr. 850. *Syeds v. Hay*, 4 T. R. 260. *Wardell v. Mourillyan*, 2 Esp. 693. See *McAndrew v. Whitlock*, 52 N. Y. 40; *Russell Manufacturing Co. v. New-Haven Steamboat Co.*, 50 N. Y. 121; 52 N. Y. 657; *Redmond v. Liverpool, New York and Philadelphia Steamship Co.*, 46 N. Y. 578; *Maignan v. New Orleans, etc. R. R. Co.* 24 La. An. 333.

(q) *Richards v. Lond. and Brighton, etc., Rail. Co.*, 7 C. B. 839; 18 Law J., C. P. 251. *Butcher v. Lond. and South-Western Rail. Co.* 16 C. B. 13. *Fisher v. Geddes*, 15 La. An. 14.

(r) That such a limitation is a reasonable one, see *Aldridge v. Gt. Western Rail. Co.*, 33 Law J., C. P. 161.

tract limited its liability to loss and damage occurring on its own line of railway(*u*).

In the absence of special circumstances, the responsibility of a railway company in and about the conveyance of goods accepted by them for delivery at a particular destination is the same, whether their own line extends the whole distance or stops at an intermediate point, and the railway companies carrying the goods beyond the limits of the first line of railway are, in respect of the conveyance and delivery of such goods, to be regarded as the agents of the railway company which originally received the goods(*x*). The same principle applies to the conveyance of passengers(*y*), who are injured during the journey, although the negligence be that of the company over whose line the defendant company have running powers, and not of the defendants themselves(*z*). And it applies to the commencement of the journey as well as its termination. Where, therefore, the contract was to carry the plaintiff from the shore to a hulk, and there wait until a vessel came to carry him to his destination, and he was injured while on board the hulk, it was held that the defendants were responsible, though the hulk did not belong to them, and they had only acquired by agreement the right to use it for the purpose of embarking passengers on board their vessels(*a*).

By the 31 & 32 Vict. c. 119, it is provided (s. 14), that where a railway or canal company, or the lessees, owners, or managers of such company, by through booking, contract to carry any animals, luggage, or goods partly by railway and partly by sea or canal, a condition exempting the company from liability for any loss or damage arising

sive carriers, the carrier in whose possession they are when destroyed or injured, is liable for the loss.

In *Laughlin v. Chicago, etc., R. R. Co.*, 28 Wis. 204, it was held that where a box so shipped had been opened before delivery to the consignee, and goods taken therefrom, without any external indication of the fact, the presumption was, in the absence of evidence to the contrary, that the box came into the possession of the last carrier, and that the loss occurred through his fault.

(*u*) *Fowles v. Gt. Western Rail. Co.*, 7 Exch. 699; 22 Law J., Exch. 76. *Aldridge v. Gt. Western Rail. Co.*, *supra*. See *Zunz v. South-East. Rwy.*, *ante*, p. 590; *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill. 88.

(*x*) *Crouch v. Gt. West. Rail. Co.*, 26 Law J., Exch. 345. *Seothorn v. South Staff. Rail. Co.*, 8 Ex. 345.

(*y*) *Blake v. Gt. Western Rail. Co.*, 7 H. & N. 987; 31 Law J., Exch. 346. *Buxton v. North-Eastern Rail. Co.*, L. R., 3 Q. B. 549.

(*z*) *Thomas v. Rhymney Rwy. Co.*, L. R., 5 Q. B. 226; 6 *ibid.* 266. See *Kessler v. New York Central R. R. Co.*, 7 Lans. (N. Y.) 63; *Railroad Co. v. Harris*, 12 Wall. 65; *Check v. Little Miami R. R. Co.*, 2 Disney (Ohio), 237; *Candee v. Pennsylvania R. R. Co.*, 21 Wis. 582; *Bissell v. Michigan Southern & Northern Indiana R. R. Companies*, 22 N. Y. 258; *Railroad Co. v. Barrow*, 5 Wall. 90; *Sprague v. Smith*, 29 Vt. 421; *Schopman v. Boston & Worcester R. R. Co.*, 9 Cush. (Mass.) 24.

(*a*) *John v. Bacon*, L. R., 5 C. P. 437.

during the carriage by sea from the act of God, the king's enemies, fire, accidents from machinery, boilers, or steam, and all other accidents of seas, rivers, and navigation of whatever kind, shall, if published in a conspicuous manner in the office where the through booking is effected, and legibly printed on the receipt or freight note, be valid as part of the contract between the consignor and the company.

By the 34 & 35 Vict. c. 78, it is provided (s. 12), that where a railway company under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages, in respect of loss of life, or personal injury, or in respect of loss of or damage to animals or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company, provided that such loss of life, or personal injury, or loss, or damage to animals or goods, happens to the persons, animals, or goods (as the case may be), during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company.

671 *Loss of passengers' luggage by railway companies.*—Most of the Railway Acts provide that, without extra charge, it shall be lawful for every passenger by railway to take with him ordinary luggage or articles of clothing of a certain weight and dimensions, and that the company shall not be responsible for the safe carriage or custody of, or for any loss of or injury to, articles carried upon the railway with, or accompanying the person of, or belonging to, any passenger, or delivered for the purpose of being carried, other than such passenger's articles of clothing. But these enactments do not prevent railway companies from running excursion trains for passengers only, without luggage(b), or from making a special contract that luggage, if carried by such a train, shall be at the passenger's own risk(c). Articles of clothing or ordinary luggage, in an Act of Parliament mean such things as a man generally requires and takes with him, and are ordinarily used by travellers, and may extend to a dressing-case, but not to title-deeds, law papers, and bank notes(d). A railway company

(b) *Rumsey v. North-Eastern Rail. Co.*, 14 C. B., N. S. 461; 32 Law J., C. P. 244.

(c) *Stewart v. Lond. & North-West. Rail. Co.*, 33 Law J., Exch. 199.

(d) *Phelps v. Lond. & North-Western Rail. Co.*, 34 Law J., C. P. 259. See *ante*, p. 570. It is well settled that common carriers of passengers, with their ordinary baggage, for hire, are liable for losses occurring from any accident to the baggage while it is in their keeping as carriers, except those arising from the act of God or the public enemy. *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548. *Hollister v. Nowlen*, 19 Wend. 234. *Cole v. Goodwin*, 19 Wend. 251. *Powell v. Myres*, 26 Wend. 591.

This liability, once commenced, does not necessarily terminate with the transit, but con

has no power to make a by-law abridging the rights of passengers in respect of their luggage; and, therefore, where the Great Western Railway Company made a by-law to the effect that they would "not be responsible for the care of luggage unless booked and paid for," it was held that the by-law was null and void(e).

Railway companies are responsible for the acts and omissions of their porters in the management and delivery of passengers' luggage, and are responsible for its safe delivery into the hands of the passenger, or into those of his appointed agent or servant, on the termination of the journey. If it is the usual course to deliver the luggage of passengers at a particular part of the platform, the company is bound to deliver it there. If a railway porter, at the request of a passenger calls a cab, and places the passenger's luggage on a cab, and there leaves it, and comes away without having the means of identifying the vehicle, and the cab-driver goes off with the luggage before the passenger has taken his seat in the vehicle, the railway company will be responsible for the loss(f). If the luggage of a passenger is, with the knowledge of the servants of the company and with their assent, placed in the carriage in which the passenger sits, the luggage is, in point of law, in the custody of the company, so as to render them responsible for its loss, unless the loss appears to have been occasioned by some misconduct or carelessness of the passenger himself in dealing with such luggage(g).

672 *Loss of merchandise carried as luggage.*—If a person packs merchandise in carpet-bags and portmanteaus, and passes it off upon a rail-

tinues until the owner of the baggage has a reasonable time to remove it. *Dinny v. New York & New Haven R. R. Co.*, 49 N. Y. 546. *Roth v. Buffalo & State Line R. R. Co.*, 34 N. Y. 548. *Louisville, etc., R. R. Co. v. Mahan*, 8 Bush (Ky.), 135. *Quimit v. Henshaw*, 35 Vt. 605.

The carrier's liability for loss of a passenger's baggage is the same whether the baggage is carried with the passenger or without him. *Wilson v. Chesapeake, etc., R. R. Co.*, 21 Gratt. (Va.) 654. *Warner v. Burlington, etc., R. R. Co.*, 22 Iowa, 166.

In order to relieve the carrier from liability for the safe custody of baggage carried by him, it is his duty to have a baggage master ready to deliver baggage for a reasonable time after its arrival, and at reasonable hours thereafter. *Dinny v. New York & New Haven R. R. Co.*, 49 N. Y. 546.

As to what is reasonable time, see *Burnell v. New York Central R. R. Co.*, 45 N. Y. 184.

(e) *Williams v. Gt. Western Rail. Co.*, 10 Exch. 15. *Gt. Western Rail. Co. v. Goodman*, 12 C. B. 313; 21 Law J., C. P. 197. *Monster v. South-Eastern Rail. Co.*, 4 C. B., N. S. 698; 27 Law J., C. P. 312. *Mobile, etc. R. R. Co. v. Hopkins*, 41 Ala. 486; *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212.

(f) *Butcher v. Lond. & South-West Rail. Co.*, 16 C. B. 13; 24 Law J., C. P. 137. *Richards v. Lond., Brighton and South Coast Rail. Co.*, 7 C. B. 839. See *Perkins v. Wright*, 37 Ind. 27.

(g) *Gt. Northern Rail. Co. v. Sheperd*, 8 Exch. 30; 21 Law J., Exch. 114. *Robinson v. Dunmore*, 2 B. & P. 416. *Talley v. Gt. Western Rwy., L. R.*, 6 C. P. 44. See *Gore v. Norwich, etc. Transp. Co.*, 2 Daly (N. Y.), 254. Some of the special Acts of Parliament incorporating railway companies, appear to contain the unreasonable provision, that every passenger travelling the railway shall take his luggage at his own risk. *Mytton v. Midland Rail. Co.*, 4 H. & N. 621.

way company as personal luggage which he is entitled to have carried gratis, he commits a fraud upon the company, and cannot recover for the loss of it; but if the company have express notice that what the passenger takes with him is merchandise, and the company think fit to carry it without demanding any extra remuneration, they will be responsible for the loss of it(*h*):

673 *Limitation of the liability of ship owners.*—The Merchant Shipping Acts limit the liability of shipowners in respect of loss of or damage to goods by fire, and in respect to the loss of gold, silver, watches, or jewels, by robbery or embezzlement,* unless their value has been declared(*i*).

674 *Refusal of the consignee to receive the goods—Liability of the carrier as bailee.*—If the consignee refuses to receive the goods, or cannot be found, the carrier is not thereby exonerated from the duty of taking reasonable care of them, and doing what is reasonable in the matter for the benefit of the consignor, or the owner of them. If the person to whom they are addressed is not ready to receive them at the place of delivery, the carrier must keep them a reasonable time, if he has a convenient place of deposit there, and if he has no place of deposit he must deal with them as any reasonably prudent person might be expected to deal with his own property. If the consignor or owner of the goods is known to him, it would be reasonable to expect that he would give him notice of the refusal of the consignee to receive them, and seek instructions for the disposal of the property. If the consignor or owner is unknown to him, no such notice can, of course, be given, or be reasonably expected(*j*); but he should deposit the goods in some place of safety, and ought not at once to send back the goods to the place from whence they came(*k*).

675 *Landing of goods by shipowners where the consignee fails to take them*

(*h*) *Gt. Northern Rail. Co. v. Shepherd*, *ut sup.* *Cahill v. Lond. & North-West. Rail. Co.*, 13 C. B., N. S. 818; 31 Law J., C. P. 271; 30 ib. 289. *Belfast and Ballymena Rail. Co. v. Keys*, 9 H. L. Ca. 556. See *ante*, p. 569; *Hellman v. Holladay*, 1 Woolw. 365; *Mississippi Central R. R. Co. v. Kennedy*, 41 Miss. 671; *Cincinnati, etc., R. R. Co. v. Marcus*, 38 Ill. 219; *Stimson v. Connecticut, etc., R. R. Co.*, 98 Mass. 83; *Smith v. Boston, etc., R. R. Co.*, 44 N. H. 325; *Hutchings v. Western, etc., R. R. Co.*, 25 Ga. 61.

(*i*) See *ante*, p. 536; see also, *ante*, pp. 482, 486. See *Chamberlain v. Western Transportation Co.*, 44 N. Y. 305.

(*j*) *Hudson v. Baxendale*, 27 Law J., Exch. 93. See *McAndrew v. Whitlock*, 52 N. Y. 40; *Weed v. Barney*, 45 N. Y. 344; *Kremer v. Southern Express Co.*, 6 Coldw. (Tenn.) 356; *Hirsch v. Quaker City*, 2 Disney (Ohio), 144; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442; *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505; *Goodwin v. Baltimore & Ohio Railroad Co.*, 50 N. Y. 154.

(*k*) *Gt. Western Rail. Co. v. Crouch*, 3 H. & N. 169; 27 Law J., Exch. 345. *Heugh v. L. & N.-W. Rwy., L. R.*, 5 Exch. 51.

away, is provided for by the Merchant Shipping Act, in cases where the goods are imported from foreign parts(l).

676 *Lien of common carriers.*—The common law accords to common carriers, who are bound, as we have seen, to receive and carry the goods of persons who tender them for conveyance, and are ready and willing to pay the customary hire, a right to retain the goods and chattels of such persons until they have received the customary remuneration for the services they have been compelled to render them, whether the goods are the property of the persons who have tendered them for conveyance, or the property of third parties from whom they have been fraudulently taken or stolen. Thus, where goods were stolen and delivered to a carrier to be carried to Exeter, and the owner finding them in the possession of the carrier demanded them of him, and the carrier refused to deliver them without being paid the price of their carriage, it was held that he was justified in so doing, “for when the robber brought them to him he was obliged to receive them and carry them, and, therefore, since the law compelled him to carry them, it will give him remedy by retainer for the price of the carriage”(m).

But the carrier has no right of lien by the common law for anything beyond the price of the carriage of the goods conveyed. He cannot detain them until he has received payment of a general balance due to him from the owners of such goods. Common carriers have oftentimes attempted to obtain a lien of this description, and to secure the payment of debts due to them for the previous conveyance of goods, by giving notices to the effect that all goods delivered to them for conveyance will be held as security for the payment of such debts, as well as for the payment of the price of their own carriage(n). But the common carrier has no right to make any such bargain or stipulation. He is bound,

(l) 25 & 26 Vict. c. 63, s. 67.

(m) Exeter Carriers' case, cited 2 Ld. Raym. 867. A common carrier has a lien on the goods carried for his freight. *Wilson v. Grand Trunk R. R. Co.*, 56 Me. 60. *Langworthy v. New York & Harlem R. R. Co.*, 2 E. D. Smith, 195. *Galena & Chicago Union R. R. Co. v. Rae*, 18 Ill. 488. And also for sums paid for freight earned by preceding carriers of the same goods. *Briggs v. Boston, etc.*, R. R. Co., 6 Allen (Mass.), 246. *Travis v. Thompson*, 37 Barb. (N. Y.) 236. *Bissel v. Price*, 16 Ill. 408.

But if he received the goods from a wrongdoer, he has no lien thereon against the rightful owner, even for freight paid to a previous carrier by whom the owner had ordered them carried. *Stevens v. Boston, etc.*, R. R. Co., 8 Gray (Mass.), 262. *Clark v. Lowell, etc.*, R. R. Co., 9 Gray (Mass.), 231.

Nor has he a lien for services voluntarily rendered, and not within the scope of his duty as a carrier. Thus a carrier by water can create no lien for cartage by voluntarily delivering goods at the place of business of the consignee. *Richards v. Rich*, 104 Mass. 156.

Nor can he have a lien on the property of the United States. *Dufolt v. German*, 1 Minn. 301. *Leonard v. Winslow*, 2 Grant's Cas. (Penn.) 139. See *Lane v. Old Colony, etc.*, R. R. Co., 14 Gray (Mass.), 143.

(n) *Wright v. Snell*, 5 B. & Ald. 353.

as we have already seen, so long as he has room in his cart or carriage, to convey the goods of all persons on being tendered his hire for the carriage of the particular goods sought to be conveyed; and if he does obtain a promise from the consignor to the effect that he shall, if he carries the goods, have a right to retain them in his hands as a security for the payment of an antecedent debt, such promise is a mere *nudum pactum*, of no force or effect in the eye of the law(o). Where an Order in Council under an act of Parliament(p), directed that every cattle-truck should be disinfected once in every twenty-four hours during its use, it was held that the railway company had no lien for the expense of such cleansing upon the person sending cattle by the truck, as it was not a service done for such person individually as distinguished from the rest of the public(q).

The 97th section of the 8 Vict. c. 20, gives no lien upon goods for tolls or charges due to a railway company for other goods previously conveyed by them as carriers, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages(r).

If a person goes to a coach-office, and orders a place to be booked for him by a particular coach, and that be done, and he then leaves his portmanteau at the coach-office, the coach-proprietor will, it seems, have a lien upon the portmanteau for his reasonable and customary remuneration and charge for booking; but if the person merely leaves his portmanteau, and no place is booked, the coach-proprietor has no lien upon the portmanteau at all(s). When goods delivered to be carried are received from the wagon of the common carrier by the consignee, and are merely carried into the warehouse to be weighed, the carrier has no right to charge for warehouse room; and if the goods are taken up on the road, and have never been booked, he has no right to charge for the booking of them; and if, after tender of the price of the carriage, he detains them for these small charges, the detention is unlawful, and an action may be brought against him in respect thereof(t). A common carrier of passengers and luggage has a right of lien upon the luggage for the payment of the fare of the passenger as well as for the carriage of his effects, but he has of course no

(o) *Butler v. Woolcott*, 2 B. & P. N. R. 64. *Oppenheim v. Russell*, 3 B. & P. 47. *Rushforth v. Hadfield*, 6 East, 527; 7 ib. 227. See 32 & 33 Vict. c. 70, s. 64, *ante*, p. 569.

(p) 11 & 12 Vict. c. 107. This Act is repealed by the 32 & 33 Vict. c. 70, by which, however, ss. 62 and 63, similar in provisions are made.

(q) *Cox v. Gt. Eastern Rail. Co., L. R.*, 4 C. P. 181.

(r) *Wallis v. L. & S.-W. Rwy., L. R.*, 5 Exch. 62.

(s) *Higgins v. Bretherton*, 5 C. & P. 2. Whether, if the place be booked, the coach-proprietor would also have a lien for the full amount of the fare, *quære*, *S. C.*

(t) *Lambert v. Robinson*, 1 Esp. 119.

right to detain the person of the passenger or the clothes he is actually wearing(*u*). And if the carrier once parts with the possession of the goods he loses his lien, as in other cases. But if he loses the possession by fraud, the lien revives if possession is recovered(*x*).

377 *Railway charges* must be equal and reasonable, and no undue preference given to one person or class of persons over another(*y*). If overcharges are made they may be recovered back(*z*). Therefore, where a railway company charged a certain rate upon the *aggregate* weight of several packages, if addressed to the same consignee at the same place, it was held that they could not charge a common carrier *separately* upon the weight of the packages consigned to him, although, in addition to the carrier's address on the packages, there was also labelled the address of the person to whom the carrier (through his agent) intended to deliver them(*a*). However, this will not prevent a railway company from charging through rates to places beyond their termini, at a rate lower in proportion than that charged for part of the distance, although such part is the whole of their line, and a common carrier is not, therefore, entitled to have his packages carried over the line for such lower rate(*b*).

The 31 & 32 Vict. c. 119, provides (s. 16) for equal charges to passengers, where a railway company is authorized to maintain and work steam vessels in communication with their railway, and prohibits any reduction or advance in the fare in consequence of the persons using the steamboat having travelled, or being about to travel, by the rail-

(*u*) *Wolf v. Summers*, 2 Campb. 631.

(*x*) *Wallace v. Woodgate*, Ry. & M. 194. A delivery of a portion of the goods carried is not necessarily a waiver of the lien upon the residue. *Boggs v. Martin*, 13 B. Mon. 239. See *Lane v. Old Colony*, etc., R. R. Co., 14 Gray (Mass.), 143.

(*y*) See *Ransome v. East. Co. Rail. Co.*, 26 Law J., C. P. 91. See *post*, p. 513, *et seq.* It seems that the convenience of the public is an element in the consideration of what may constitute an "undue" preference. See *Palmer v. Lond. & Brighton Rwy. Co.*, L. R., 6 C. P. 194. Railroad corporations have power to divide passengers and freight passing over their roads into classes. The rule merely requires that their charges shall be uniform for the carriage of all persons and freight within the several classes. *Chicago, Burlington & Quincy R. R. Co. v. Parks*, 18 Ill. 460.

(*z*) *Pegler v. Monmouth*, etc., Rail. Co., 6 H. & N. 644. *Garton v. Bristol and Exeter Rail. Co.*, 30 Law J., Q. B. 273. *Ante*, p. 574. *Chicago*, etc., R. R. Co. *v. Herring*, 57 Ill. 59.

As to the liability of railroad companies to penalties for charging excessive fares in the State of New York. See *Laws of 1857*, ch. 185; *Fisher v. New York Central & Hudson R. R. Co.*, 46 N. Y. 644.

As to the right to charge additional fare where the passenger fails to procure a ticket. See *Porter v. New York Central R. R. Co.*, 34 Barb. 353; *Chase v. New York Central R. R. Co.*, 26 N. Y. 523; *Nellis v. New York Central R. R. Co.*, 30 N. Y. 505; *Crocker v. New London, Willimantic & Palmer R. R. Co.*, 24 Conn. 249; *Chicago, Burlington & Quincy R. R. Co. v. Parks*, 18 Ill. 464; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 33; *Du Laurans v. First Division of the St. Paul & Pacific R. R. Co.*, 15 Minn. 49.

(*a*) *Baxendale v. Lond. & South.-West. Rail. Co.*, L. R., 1 Exch. 137.

(*b*) *S. C.*

way or not. Where an aggregate sum for the fare by boat and rail is charged, the ticket must distinguish the amount charged for each (Ibid.). Where two railways are worked by one company the calculation of charges by distance must be reckoned as if it was one railway (s. 18).

678 *Charges for packed parcels.*—It is unreasonable to make different rates of charge to different persons for parcels, whether they be packed parcels or not(c). In some cases deciding that an extra charge may be made for packed parcels, the company claimed to charge extra to carriers for packed parcels, and not to charge extra to customers who were not carriers, for what they called inclosures, which were in reality packed parcels, and the courts have held that an extra charge for a packed parcel to a carrier was against the statutes, imposing upon railway companies the duty of charging equally to all persons in respect of all goods of a like description(d); but the company has a right to divide goods into classes by descriptions appropriate to the different classes it chooses to make, and to make different charges for the different classes(e). By 31 & 32 Vict. c. 119, s. 17, it is provided that, on application by writing to the secretary of the company, by any person who has paid for the conveyance of goods, the company shall render an account to the applicant distinguishing how much of the charge is for conveyance—including tolls for the use of the railway, the use of carriages, and for locomotive power—and how much for loading and unloading, covering collection, delivery, and other expenses, but without particularizing the items of such last-mentioned charge.

679 *Passenger fares—Right of a passenger to alight at intermediate stations.*—Where a railway company, under the influence of competition, charged a low rate of fare to a distant locality, and sought to prevent passengers from getting down at intermediate stations, to which a higher fare was charged, on the ground that they had not paid the fare to such intermediate station, and were answerable to a by-law, subjecting to a penalty any person who should enter a carriage without having previously paid his fare, it was held that the by-law was wholly inapplicable; that the passenger had paid his fare; and that

(c) *Garton v. Bristol and Exeter Rail. Co.*, 4 H. & N. 49; 28 Law J., Exch. 169. *Baxendale v. Gt. Western Rail. Co.*, 14 C. B., N. S. 1.

(d) *Parker v. Gt. Western Rail. Co.*, 11 C. B. 545. *Crouch v. Gt. Northern Rail Co.*, 11 Exch. 742; 25 Law J., Exch. 137. *Gt. West. Rwy. v. Sutton*, L. R., 4 Eng. & Ir. App. 226. And see *Addison on Contracts*, 6th ed. p. 487. See *Chamblos v. Philadelphia, etc., R. R. Co.*, 4 Brews. (Pa.) 563.

(e) *Erle, J., Branly v. South-Eastern Rail. Co.*, 12 C. B., N. S. 63; 31 Law J., C. P. 290.

the company had no right to prevent him from getting down at any intermediate station(*f*).

680 Duties and responsibilities of common ferrymen.—A common ferryman is a common carrier, and is bound to provide safe and secure ferry-boats, and safe slips and landing-stages, and all proper means and appliances for the safe transit of persons who may have occasion to use the ferry for themselves, or for the transit of their horses and carriages, luggage and merchandise(*f*). Where, therefore, the defendants, as ferrymen, used steam-boats for transit across the river Mersey, from which passengers and animals could not safely land without landing-stages and slips, and they provided an insecure hand-rail to a landing-stage, which broke and caused the death of the plaintiff's mare, it was held that they were bound to make good the loss(*g*).

681 Loss of goods by common ferrymen and common hoymen.—Common ferrymen and common hoymen, being common carriers, are responsible for the safe delivery of goods intrusted to them for conveyance, unless they have been prevented by storm, lightning, tempest, or inevitable accident(*h*). In *Mouse's case* it was resolved, "that if the

(*f*) *Reg. v. Frere*, 4 Ell. & Bl. 598. As to the construction of this by-law, see *Jennings v. Gt. Northern Rail. Co.*, L. R., 1 Q. B. 7; *Dearden v. Townsend*, *ibid.*, 10.

(*f*) *Jabine v. Midgett*, 25 Ark. 475; *Shinmer v. Merry*, 23 Iowa, 90; *Whitmore v. Bowman*, 4 Greene (Iowa), 148; *Sanders v. Young*, 1 Head (Tenn.), 219; *May v. Hanson*, 5 Cal. 360; *Richards v. Fugua*, 28 Miss. 792; *Osborn v. Union Ferry Co.*, 53 Barb. (N. Y.) 629. Not only must a ferry company provide safe and secure boats, slips and landing bridges, and all other necessary appliances for the safe transit of the public, but they must use the utmost care, vigilance and skill in the management of the same; and for any neglect or failure to exercise such care which results in injury to a person carried, the company will be liable. *Hazman v. Hoboken Land and Improvement Co.*, 50 N. Y. 53.

A miller who keeps a ferry for his own use and the convenience of his customers, charging no ferriage, is not a common carrier, and is not liable as such. *Self v. Dunn*, 42 Ga. 528. But a private ferryman may incur all the liabilities of a common carrier by undertaking to transport for hire, all persons indifferently, with their carriages and goods. *Hall v. Renfro*, 3 Met. (Ky.) 51.

(*g*) *Willoughby v. Horridge*, 12 C. B. 751; 22 Law J., C. P. 90. See *Clarke v. Union Ferry Co.*, 35 N. Y. 485.

(*h*) *Amies v. Stevens*, 1 Str. 128; Bac. Abr. CARRIERS, B. *Oakley v. Portsmouth*, etc., Steam Packet Co., *ante*, p. 575. "Ferrymen, like all other common carriers, are regarded in law as insurers of the property committed to their care, and are responsible for all losses or damage to it, which do not come within the excepted cases of the acts of God or the public enemy. As a common carrier a public ferryman is compelled to receive all goods and property offered to him for transportation, and when he has received property for that purpose the presumption is that it is in his charge as a common carrier, and the burden is upon him of showing that he has not had such control over it as invests him with the character of a common carrier in respect to it. His responsibility is not modified or diminished by the fact that it was accompanied by the owner, unless it affirmatively appears that the owner did not trust the care of the same to him, but retained the exclusive management and control of it himself. When the care and control of the property has not been intrusted to him, but retained by the owner, he is not, if loss occurs, chargeable as a common carrier or an insurer, but is only answerable for actual negligence; and if, in such case, the owner, by his negligence or wilful wrong, contributed to the loss so that but for it the loss would not have happened, he will not be entitled to recover except where the direct cause of the loss is the

ferryman surcharge the barge, it is lawful for any of the passengers in time of accident and necessity to cast the things out of the barge for safety of the lives of the passengers; and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no fault being in the ferryman, every one ought to bear his loss for the safeguard and life of a man, for 'interest republicæ quod homines conserventur'”(i).

SECTION II.

NEGLIGENCE OF COMMON INNKEEPERS AND LODGING-HOUSE KEEPERS.

682 *Of the duty of common innkeepers to provide food and shelter for travellers and wayfarers.*—Every man who opens an inn by the wayside, and professes to exercise the business and employment of a common innkeeper, is, by the custom of the realm, bound to afford such shelter and accommodation as he possesses to all travellers(k) who apply for it and tender, or are able and ready to pay, the customary hire, and are not drunk or disorderly, or laboring under contagious or infectious diseases; and if he neglects or refuses so to do, he is liable to an action for the recovery of any damages that may have been sustained by reason of such refusal; and also to an indictment at common law(l). The innkeeper is bound, moreover, to receive and

omission of the ferryman, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequences of such negligence.” *Harvey v. Rose*, 26 Ark. 3. *Shearman and Redf. on Neg.*, ss. 25, 26. *White v. Winisimmet Co.*, 7 Cush. (Mass.) 155. *Willet's admr. v. Buffalo & Rochester R. R. Co.*, 14 Barb. (N. Y.) 585. *Smith v. Smith*, 3 Pick. 621. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

There are a class of cases which hold that the ferryman is chargeable as a common carrier for the absolute safety of the property retained by the passenger in his own custody and under his control while being transported by the former; and that the owner, in taking care of the property during the passage of the boat, may be regarded as a mere agent of the ferryman. *Fisher v. Clisbee*, 12 Ill. 344. *Powell v. Mills*, 37 Miss. 691. *Wilson v. Hamilton*, 4 Ohio St. 722. And see *Albright v. Penn.*, 14 Texas, 290. This doctrine has been expressly disapproved by the court of last resort in the State of New York. See *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32, 34.

(i) *Mouse's case*, 12 Co. 63.

(k) *Taylor v. Humphreys*, 30 Law J., M. C. 242. See *Copley v. Burton*, L. R., 5 C. P. 489. See *Pinkerton v. Woodward*, 33 Cal. 557.

(l) *Hawthorn v. Hammond*, 1 C. & K. 404. *Howell v. Jackson*, 6 C. & P. 725. *Rex v. Ivens*, 7 C. & P. 219.

provide for the horses of all travellers who alight at his inn, if he has room in his stables; even, it is said, of those who choose only to put up their horses, resorting elsewhere for lodging and entertainment. But he is not bound to receive the goods of a person who professes to merely make use of the inn as a place of deposit, and not to lodge there as a guest(*m*). Neither is he bound to provide for his guest the precise room that the latter may choose to select, nor provide him with a bedroom, if he declares it to be his intention to sit up all night. All that he is required to do is to find reasonable and proper accommodation for his guests; and if he tenders such accommodation, and the guest refuses it, he may compel the latter to quit the inn, and seek for accommodation and lodging elsewhere(*n*).

The extent of the public duty and obligation of the innkeeper depends mainly upon the nature of his public profession. If he has only a stable for a horse he is not bound to receive a carriage. If he professes only to receive ordinary luggage accompanying the person of a traveller, he is not bound to take in articles of unusual, extraordinary, and inconvenient bulk, nor goods which do not accompany the person of the guest(*o*).

The innkeeper cannot discharge himself of the duty and burthen imposed upon him by the common law by express notice to his guests(*p*), or under pretence of sickness, want of understanding or absence from home(*q*); but if an infant keeps a common inn, an action upon the custom of inns will not lie against him, for his privilege of infancy shall be preferred, and take place of the custom(*r*).

683 *Who may be said to be a common innkeeper.*—"Every person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses, and attendants, is a common innkeeper; and it is in no way material whether he have any sign before his door or not"(*s*). A London "coffee-house," where beds and provisions are furnished by the day or for the night, or for a longer period, to persons in certain stations of life,

(*m*) *Saunders v. Plummer*, Orl. Bridg. 227.

(*n*) *Fell v. Knight*, 8 M. & W. 276.

(*o*) *Broadwood v. Granara*, 10 Exch. 423; 24 Law J., Exch. 1.

(*p*) *Morgan v. Ravey*, 6 H. & N. 265; 30 Law J., Exch. 131. *Bodwell v. Bragg*, 29 Iowa, 232.

(*q*) *Bac. Abr. INNS*, C. 4.

(*r*) *Cross v. Androes*, Roll. Abr. 2; Carth. 161.

(*s*) *Bac. Abr. INNS*, B. *Parker v. Flint*, 12 Mod. 255. *Dickerson v. Rodgers*, 4 Humph. 179. *Overseers of Crown Point v. Warner*, 3 Hill, 150. See *Commonwealth v. Weatherbee*, 101 Mass. 214; *Walling v. Potter*, 35 Conn. 183; *People v. Jones*, 54 Barb. (N. Y.) 311; *Cromwell v. Stephens*, 2 Daly (N. Y. C. P.), 15; *Krohn v. Sweeny*, id. 200.

who may think fit to apply for them, is a common inn(*t*). But if a man merely opens a house for the sale of provisions and refreshments, and does not profess to furnish beds and lodging for the night, he is not a common innkeeper(*u*). And if he professes to let only private lodgings, and does not offer his house to the public as a place of reception, and entertainment, and lodging, for all comers who are able and willing to pay for the accommodation offered, he cannot be said to keep a common inn(*uu*).

684 *Duty of the innkeeper to protect his guest from robbery and theft.*—It has been justly observed by the civilians, that the common wants and necessities of mankind compel men to trust valuable property to the keepers of public inns, who have frequent opportunities of combining and colluding with thieves, to the prejudice of those who trust them; and it was thought right in the Roman law to deprive such persons of the temptation to do wrong, and to compel them to be honest by making them responsible for the safety of the goods intrusted to their keeping. By a public edict of the Roman prætor it was ordained, that if shipmasters and carriers, innkeepers and stablekeepers, did not restore what they had received to keep *safe*, he would give judgment against them(*x*).

The construction put upon this edict was, not that the shipmaster, carrier, or innkeeper was bound to deliver the goods safe at all events; but that he was bound to deliver them, unless prevented by a *fatale damnum*, or a loss by what was termed the decree of fate, or order of destiny, such as a loss by lightning, or an earthquake, or a sudden inundation that could not have been foreseen, and that no human care or skill could have provided against or avoided; or an irresistible attack by pirates and hostile forces, the enemies of the state. The spirit of this edict has been universally adopted by the jurisprudence of continental Europe, and was introduced at an early period into our common law.

(*t*) *Thompson v. Lacy*, 3 B. & Ald. 283.

(*u*) *Doe v. Laming*, 4 Campb. 77. *Carpenter v. Taylor*, 1 Hilt. N. Y. C. P.) 193. *People v. Jones*, 54 Barb. (N. Y.) 31.

(*uu*) One who merely keeps a lodging house for a season, as at a watering place, is not an innkeeper. *Southwood v. Myers*, 3 Bush (Ky.), 681.

Nor is one who entertains travellers occasionally for pay, an innkeeper, if he does not hold himself out as such. *Lyon v. Smith*, 1 Morris, 184. But see *Howth v. Franklin*, 20 Tex. 798.

(*x*) "Ait Prætor Nautæ, cauponæ, stabularii, quod cujusque saluum fore receperint nisi restituant in eos iudicium dabo."—Dig. lib. 4, tit. 9. "Maxima est utilitas hujus edicti; quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere . . . et nisi hoc esset statutum materia daretur cum furibus adversus eos, quos recipiunt, coeundi."—Dig. lib. 4, tit. 9, s. 1.

The original writ against an hostler or innkeeper for the loss of the goods of his guest declares that "secundem legem et consuetudinem regni nostri Angliæ hospitatores qui hospitia communia tenent ad hospitandos homines, per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque subtractione, seu amissione, custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientum suorum hospitibus hujusmodi damnum non eveniat ullo modo"(y).

From the terms of this writ, which is the foundation of the common law concerning hostlers, it was resolved in *Calye's case*(z):—

"1. That the lodging ought to be a common inn: for if a man be lodged, at his request, with another who is not an innholder, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it, for the words are, 'hospitatores qui communia hospitia tenent.' And so are the books, etc. And the plaintiff ought to declare that the defendant keeps 'commune hospitium.'

"2. That it appears from the words of the writ, that common inns are instituted for passengers and wayfaring men, and therefore if a neighbor, who is no traveller, as a friend, at the request of the innholder, lodges there, and his goods be stolen, etc., he shall not have an action, for the writ is 'ad hospitandos homines,' etc., 'transeuntes, et in eisdem hospitantes,' etc.

"3. That the words 'eorum bona et catalla infra hospitia illa existentia' show that the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are 'infra hospitium,' and the books agree that the innholder is bound to answer for himself and for his family of the chambers and stables, for they are 'infra hospitium;' and that if an innholder lodges a man and his horse, and the owner requires the horse to be put to pasture, and there

(y) Reg. Br. F. N. B. 94, a, b.

(z) 8 Co. 32; 1 Smith's L. C., 6th ed. 105. An innkeeper is liable for all injuries to the goods of his guests happening in his inn, unless caused by the act of God, the public enemy, or the fault, direct or implied, of the guest himself. *Sibley v. Aldrich*, 33 N. H. 553. *Hulett v. Swift*, 33 N. Y. 571. *Packard v. Northcraft*, 2 Met. (Ky.) 439. *Shaw v. Berry*, 31 Me. 478. *Sasseeen v. Clark*, 37 Ga. 242. *Ramaley v. Leland*, 43 N. Y. 539. *Purvis v. Coleman*, 21 N. Y. 111, 112, 117. *Wells v. Steam Navigation Co.*, 2 N. Y. 204, 209. *Berkshire Woolen Co. v. Proctor*, 7 Cush. 427. *Mason v. Thompson*, 9 Pick. 280. *Towson v. Havre de Grace Bank*, 6 Harr. & Johns. 47. *Thickston v. Howard*, 8 Blackf. 535, 537. *Kiston v. Hildebrand*, 9 B. Mon. 72. *Clute v. Wiggins*, 14 Johns. 175. *Grinnell v. Cook*, 3 Hill, 488.

The innkeeper's common-law liability as an insurer extends to wearing apparel, jewelry, money, and even to the horses, wheat, butter and other articles of bulk belonging to the guest, if received into his care and within his place of entertainment. *Wilkins v. Earle*, 44 N. Y. 172.

he is stolen, the innholder shall not answer for him; but that if the owner doth not require it, but the innholder, of his own head, puts his guest's horse to grass, he shall answer for him if he be stolen.

"4 That the words 'pro defectu hospitatorum seu servientum suorum' show that the innholder shall not be charged, unless there be a default in him, or his servants, in the well and safe-keeping and custody of their guest's goods and chattels within his common inn, for the innkeeper is bound in law to keep them safe, without any stealing or purloining; and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber-door open, but he ought to keep the goods and chattels of his guest there in safety. And although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away or stolen the innkeeper shall be charged, although they who stole or carried away the goods be unknown. But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged, for there the fault is in the guest to have such a companion or servant. But if the innkeeper appoints one to lodge with him, he shall answer for him^(zz). If the innkeeper requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, and the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest.

"5. That although the words 'bona et catalla' do not of their proper nature extend to charters and evidences concerning freehold, or inheritance, or obligations, or other deeds or specialties, being things in action, yet in this case it is expounded by the latter words to extend to them; and, therefore, if one brings a bag or chest, etc., of evidences into the inn, or obligations, deeds, or other specialties, and, by default of the innkeeper, they are taken away, the innkeeper shall answer for them; but the words, 'bona et catalla' extend only to moveables, and, therefore, if the guest be beaten in the inn, the innkeeper shall not answer for it. These words aforesaid extend to all moveable goods, although of them felony cannot be committed"^(a).

Where a guest laid a reticule containing money on her bed, and afterwards went into her sitting-room, the door of which was opposite

(zz) See *Gill v. Libby*, 35 Barb. (N. Y.) 70.

(a) *Calye's case*, 8 Co. 32. See *Wilkins v. Earle*, 44 N. Y. 172, 186.

the bedroom, and remained there about five minutes, and then sent her companion for the reticule, which was missing, and could not afterwards be found, it was held that the innkeeper was bound to make good the loss(*b*).

A traveller went to an inn, taking with him divers packages of silk, some of which were taken up-stairs to his bedroom, and others were, by his directions, carried into the commercial room, into which he was shown. After remaining for some days therein, and after having been several times taken out and brought back again by the traveller, the goods were stolen, and an action having been brought against the innkeeper to recover the value of the property, it was shown to be the practice of the inn to take all the luggage of the guests into their bedrooms, unless orders to the contrary were given; and it was contended that the traveller, by ordering the goods to be taken into the commercial room, which was a place of common resort for all the guests indiscriminately, had taken the goods under his own protection, and could not therefore make the innkeeper responsible for the loss; but the court held, that if the innkeeper had intended not to be responsible for goods deposited by the guests in the commercial room, he should have declared his intention to them at the time the goods were placed there(*c*). But if the guest is guilty of gross negligence in leaving a box containing money or bank-notes in the commercial room, after having opened it and exposed the contents to the bystanders, he cannot, if the money is stolen, charge the innkeeper with the loss(*d*).

A servant having been sent with goods to market, and being unable to sell them, went to an inn, and asked if he could leave the goods there until next market-day. The innkeeper's wife said they were very full of parcels, and declined to take charge of them. The servant then sat down in the inn, ordered something to drink, and put the goods on the floor immediately behind him. When he got up again the goods were gone, and were never afterwards seen or heard of, and it was held that the innkeeper was responsible for the loss(*e*). But "if a guest come to a common innkeeper to harbor there, and he say that his house is full of guests, and do not admit him, etc., and the party say he will make shift among the other guests, and be there

(*b*) *Kent v. Shuckard*, 2 B. & Ad. 803. See *Wilkins v. Earle*, 44 N. Y. 187.

(*c*) *Richmond v. Smith*, 8 B. & C. 9.

(*d*) *Armistead v. White*, 20 Law J., Q. B. 524. *S. C. nom. Armistead v. Wilde*, 17 Q. B. 261.

(*e*) *Bennett v. Mellor*, 5 T. R. 276. See *Wilkins v. Earle*, 44 N. Y. 172, 187.

robbed of his goods, the innkeeper shall not be charged"(f). And if a guest takes upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss(g). "I agree," observes Lord Ellenborough, "in what is stated in *Calye's case*, that the mere delivery of the key of a room will not dispense with the care and attention due from the landlord, and that he cannot exonerate himself by merely handing a key over to his guest; but if the guest take the key, it is a very proper question for a jury, whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability, or whether he takes it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room"(h). And where a guest, having the key delivered to him, omits to use it, and a thief comes into his room by the door and steals his goods, that is, or may be, evidence for the jury of contributory negligence, which will disentitle him to recover against the innkeeper. The question is, whether the loss would or would not have happened, if the guest had used the ordinary care that a prudent man might be reasonably expected to take under the circumstances(i); "what would be prudent in a small hotel in a small town might be the extreme of imprudence in a large hotel in a large city, where, probably, three hundred bedrooms are occupied by people of all sorts"(k).

Whenever the goods and chattels of the guest have been actually delivered to the innkeeper or his servants the latter cannot, of course, discharge himself from the strict common-law responsibility by showing that the goods were stolen outside the inn, if he has himself placed them in the spot from whence they have been taken(kk). Where the

(f) *White's case*, Dyer, 158 b.

(g) *Farnworth v. Packwood*, 1 Stark. 249. See *Packard v. Northcraft*, 2 Met. (Ky.) 439; *Vance v. Throckmorton*, 5 Bush (Ky.), 41. But an innkeeper will be held liable for loss by robbery of pocket-money retained by the guest in his own possession. *Weisenger v. Taylor*, 1 Bush (Ky.), 275.

(h) *Burgess v. Clements*, 4 M. & S. 310; 1 Stark. 252, n. See *Classen v. Leopold*, 2 Sweeney (N. Y.), 705.

(i) *Oppenheim v. White Lion Hotel Co.*, L. R., 6 C. P. 515. See *Hadley v. Upshaw*, 27 Tex. 547.

(k) Per Montague Smith, J., *S. C.*

(kk) The test of an innkeeper's liability for the loss of the goods of his guest, is not the place where the goods were deposited, but whether they were in the custody of the innkeeper or at the risk of the guest. *Centlivre v. Ryder*, 1 Edm. Sel. Cas. 273. Generally speaking it is not necessary to fix the liability of the innkeeper that the lost goods were in his special keeping; but it will be sufficient if they were in the inn and under his implied care. *Packard v. Northcraft*, 2 Met. (Ky.) 439. Nor does the liability of the innkeeper cease in all cases with the departure of the guest. If the servant of the innkeeper takes charge of the goods or baggage of a guest to deliver for the latter at the cars, the liability of the innkeeper will con-

plaintiff, a farmer, drove his horse and gig to an inn on a market-day, and the hostler took the horse out of the gig and put him into a stable, and then placed the gig outside of the inn-yard, in a part of the open street where the innkeeper was in the habit of placing the carriages of his guests on fair-days, and the gig was stolen therefrom by some person unknown, it was held that the innkeeper was responsible for the loss(*l*). And the innkeeper is liable, although sick at the time, and incapable of attending to his affairs, for he is bound to retain trusty servants to secure the goods of his guests when incapable of doing so himself(*n*). This extended responsibility of the innkeeper, which makes him an insurer of the goods against loss by robbery, does not extend to losses occasioned by an accidental fire (*ante*, p. 249, *et seq.*), nor to damage or injury to the goods which is the result of accident. The innkeeper is not responsible for injuries which the horses of guests inflict upon each other in the stables of the inn, provided he has taken all due care to prevent the introduction into the stables of vicious and kicking horses(*n*).

685 *Limitation by statute of the liability of innkeepers.*—By 26 & 27 Vict. c. 41, s. 1, it is enacted, that no innkeeper shall be liable to make good to any guest any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of *thirty pounds*; except where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ, or where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

If any innkeeper refuses to receive for safe custody any goods or property of his guest, or if any guest, through any default of such innkeeper, is unable to deposit such goods or property as are mentioned in the Act, the innkeeper will not be entitled to the benefit of the Act in respect of such goods or property (s. 2). In the case of a deposit for safe custody, the innkeeper may require, as a condition of his liability, that the goods or property be deposited in a box or other

tinne until such delivery. *Sasseen v. Clark*, 37 Ga. 242. *Giles v. Fauntleroy*, 13 Md. 126. *Dickinson v. Winchester*, 4 Cush. 114.

^(l) *Jones v. Tyler*, 1 Ad. & E. 522; 3 N. & M. 576. See *Albin v. Presley*, 8 N. H. 408; *Piper v. Manny*, 21 Wend. 282.

^(m) *Cross v. Andrews*, Cro. Eliz. 622. *Houser v. Tully*, 62 Pa. 92.

⁽ⁿ⁾ *Dawson v. Chamney*, 5 Q. B. 105, explained and qualified by *Morgan v. Ravey*, 30 Law J., Exch. 134. See *Seymour v. Cook*, 53 Barb. (N. Y.) 451.

receptacle, fastened and sealed by the person depositing the same (s. 1)(*nn*).

Every innkeeper is required to cause at least one copy of the first section of the Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he is entitled to the benefit of the Act in respect of such goods or property only as shall be brought to his inn while such copy shall be exhibited (s. 3). By the interpretation clause (s. 4) it is declared, "that the word inn shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests, and the word 'innkeeper' shall mean the keeper of any such place."

686 *Losses occasioned by the misconduct of the guest.*—If a guest at an inn asks for a private room for the purpose of exhibiting goods for sale, and receives customers, and invites the admission of strangers into the inn, upon whose ingress and egress the innkeeper has no check, the latter is not responsible for the safety of the goods in the room so used(*o*). And if the guest is himself guilty of negligence in leaving money and valuables about in rooms of common resort, he cannot, if the money and valuables are stolen, charge the innkeeper with the loss(*p*).

(*nn*) In the State of New York it is provided by statute that "whenever the proprietor or proprietors of any hotel shall provide a safe in the office of such hotel or other convenient place, for the safe keeping of any money, jewels or ornaments belonging to the guests of such hotel, and shall notify the guests thereof by posting a notice (stating the fact that such is provided, in which such money, jewels or ornaments may be deposited) in the room or rooms occupied by such guest in a conspicuous manner, and if such guest shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments, sustained by such guest by theft or otherwise." Laws of 1855, ch. 421.

A similar act was passed in the State of New Jersey in 1865. See *Hyatt v. Taylor*, 42 N. Y. 258.

And an act containing somewhat the same general provisions was passed in Wisconsin in 1864. See Laws of 1864, ch. 318. *Stewart v. Parsons*, 24 Wis. 241.

The effect of the New York statute limiting the liability of the innkeeper is merely to relieve him from losses arising from a neglect to deposit money, jewels or ornaments in the safe provided for that purpose, and does not relieve him from losses happening at a time when such valuables, if once deposited, would have been returned to the guest to be packed prior to departure. *Bendetson v. French*, 46 N. Y. 266. *Wilkins v. Earle*, 44 N. Y. 172.

The statutory exemption of the innkeeper from the application of the common-law rule making him liable as an insurer for the safe keeping of the goods of his guests, is limited to the particular species of property named and being in derogation of the common law, cannot be extended in its operation and effect by doubtful implication, so as to include property not fairly within the terms of the statute. *Ramaley v. Leland*, 43 N. Y. 539.

Personal notice to a guest at an inn that a safe is provided for keeping money, jewels, etc., and that the innkeeper will not be liable for their loss if not deposited therein, is equivalent to posting up a written or printed notice. *Parvis v. Coleman*, 21 N. Y. 111.

(*o*) *Burgess v. Clements*, 1 Stark. 251; 4 M. & S. 306.

(*p*) *Armistead v. White*, *ante*, p. 611. *Sanders v. Spencer, Dyer*, 266a; and *ante*, p. 609.

The rule of law resulting from all the authorities is, that the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable for a breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened, if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances(*q*).

687 *Who are guests and travellers.*—He who seeks to charge another as an innkeeper for the loss of goods must show that he was a traveller and guest at the inn(*qq*). If a man who has been a guest gives up his room and quits the inn for a few days, intending to return, and asks for permission to leave his goods at the inn, and the innkeeper takes charge of them, the latter is clothed only with the ordinary duties and responsibilities of a bailee, for a man does not become a guest at an inn by the mere delivery of goods to the landlord to keep(*r*). It has been said, however, that a man may become “a guest by leaving his horse as much as if he had staid himself, because the horse must be fed, by which the innkeeper has gain, otherwise than if he had left a trunk or a dead thing”(s). “If an host invite one to supper, and, the night being far spent, invites him to stay all night, if he is afterwards robbed, yet shall not the host be charged (as an innkeeper), for this guest was no traveller”(t).

The length of time that a man may remain at an inn does not affect or alter his character as a traveller, or in any way qualify or vary the common-law liability of the innkeeper. Thus, “If A comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be *transeuns* according to the writ in the register(u). But if a man takes apartments in an inn for a term, by the week, month, or year, for example, or if he resides in the inn under a special contract for his bed and board, he is not in contemplation of law sojourning at the inn as a traveller, but rather in the character of a lodger at a private boarding-house. If, therefore, he is robbed in the

(q) *Cashill v. Wright*, 6 Ell. & Bl. 900. See *ante*, p. 612.

(qq) *Mateer v. Brown*, 1 Cal. 221. *Ingallsbee v. Wood*, 33 N. Y. 577.

(r) *Gelley v. Clerk*, Cro. Jac. 138. *Smith v. Dearlove*, 6 C. B. 132. *Adams v. Clem*, 41 Ga. 65.

(s) *York v. Grindstone*, 1 Salk. 388. *Bather v. Day*, 32 Law J., Exch. 171. See *McDaniels v. Robinson*, 26 Vt. 316.

(t) *Bac. Abr. Inns*, C. 5. Any one away from home, receiving accommodations at an inn as a traveller, is a guest though he be a townsman or neighbor. *Walling v. Potter*, 35 Conn. 183.

(u) *Ibid*.

house, he cannot charge the landlord as an innkeeper(x). Holt, C.J., is reported to have held, "that if one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such he is not under the innkeeper's protection; but if he eat and drink there it is otherwise, or if he pay for his diet there, though he do not take it there"(y).

688 *Lien of innkeepers*.—As the law imposes upon the common innkeeper the burthen of receiving and taking care of the goods and chattels of all travellers and guests who alight at, and take up their abode within the inn, it gives him a right to retain such goods and chattels as a pledge for the payment of the reckoning of the guest. If a horse or carriage is put up in the stables of the inn by a guest, the innkeeper has a lien on the horse for its keep, and on the carriage for its standing-room, whether the horse or the carriage be the property of the guest or of some third person from whom it has been fraudulently taken or stolen, unless the innkeeper knew at the time he received the guest that he was not the true owner of the horse or the carriage(z). But if the property does not accompany the person of the guest when he comes to the inn, but is afterwards brought there for the use of the guest, and is known by the innkeeper to be the property of another at the time it is brought to the inn, the innkeeper cannot set up any lien upon it for the debt due from his guest(a). He has no lien upon an animal put into his stable unless it be brought by a guest(b). The innkeeper has no right to take a parcel or other property out of the hands of the guest, nor can he detain the property of the guest if he

(x) Warburton J., *Watbroke v. Griffith*, Moore, 877. *Grimston v. Innkeeper*, Hetl. 49. *Johnson v. Reynolds*, 3 Kansas, 275. But see *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Shoecraft v. Bailey*, 25 Iowa, 553.

(y) *Parker v. Flint*, 12 Mod. 255. Purchasing liquor at an inn will make the purchaser a guest. *McDonald v. Edgerton*, 5 Barb. 560. *Manning v. Hollenbeck*, 27 Wis. 202. *Dunlap v. Thorne*, 1 Rich. 213. But see *Carlisle v. Quattlebaum*, 2 Bailey, 452.

The innkeeper has a lien on the baggage of an infant guest for the price of his entertainment, if furnished in good faith, and also for money furnished the infant and expended for necessities. *Watson v. Cross*, 2 Duvall (Ky.), 147.

(z) *York v. Grenough*, 2 Ld. Raym. 866. *Skipwith v. —*, 1 Bulst. 170. *Johnson v. Hill*, 3 Stark. 172. *Turrill v. Crawley*, 13 Q. B. 197; 18 Law J., Q. B. 155. *Snead v. Watkins*, 1 C. B., N. S. 267; 26 Law J., C. P. 57. *Ency. du Dr. (AUBERGE)* 25. *Trefall v. Borwick*, L. R., 7 Q. B. 711. See *Manning v. Hollenbeck*, 27 Wis. 202.

(a) *Broadwood v. Granara*, 10 Exch. 422; 24 Law J., Exch. 1.

(b) *Binns v. Pigot*, 9 C. & P. 209. An innkeeper's lien does not exist, unless as against the goods of one actually or constructively the guest of the inn. *Grindell v. Cook*, 3 Hill, 485. He has no lien upon goods of one boarding with him under a special contract. *Hursh v. Byers*, 29 Mo. 469. But this distinction is valueless in States where, by statute, the keeper of a boarding-house has a lien upon the baggage and effects of a boarder, of the same character and extent as that which an innkeeper has at common law. *Nichols v. Holliday*, 27 Wis. 406. *Laws of Wis. 1863*, ch. 89.

If several persons travel together, and become guests at an inn, the goods of one cannot be detained for the board of all. *Clayton v. Butterfield*, 10 Rich. Law (S. C.), 300.

has previously agreed to give the latter credit for his entertainment; nor can the innkeeper detain goods as a security for the payment of the reckoning for beer and ale drunk by a guest, unless the requirements of the 11 & 12 Wm. 3, c. 15, as to selling beer in stamped vessels, and rendering an account of the number of quarts and pints drunk, have been complied with; nor can he detain any goods not received by him in his character of innkeeper, and not brought to the inn by a person who is received and lodged in the inn as a guest(c).

The innkeeper holds the chattels detained by him in the nature of a pledge, so that if he once permits his guest to take them away, and so relinquishes his pledge, he cannot afterwards retake them. Therefore, if the innkeeper allows his guest to remove his horses after a debt has been incurred for keeping them, and they are afterwards brought to the inn, and a new debt contracted, the innkeeper can detain them for the latter portion of the debt, but not for the former(d). And it said that if several horses are brought to an inn by the guest, each is a pledge for his own keep, but not for the keep of the others; so that if the hostler permit him to take away all but one, he cannot retain that one until the expense of the whole is paid(e). If the guest takes the chattel away without the hostler's consent, the latter may take it on a fresh pursuit as a distress rescued, if he follow promptly, but not otherwise(f). However long horses may remain at an inn, the relative duties and obligations of innkeeper and guest continue until some fresh contract or arrangement is made(g).

689 *Detention of the person of the guest.*—It was thought at one time that the law accorded to the common innkeeper the right or privilege of detaining the person of a guest who had eaten food in the inn, until he had received payment of his reckoning(h); but this is said to have been a vulgar error, founded on the dictum of a single judge, and has been overruled, as it would arm the innkeeper with the power of detaining a man perhaps for life, without any legal process or adjudication in the matter(i).

690 *Liability of lodging-house keepers.*—We have seen, by the first resolution in *Calye's case* (ante, p. 609), it was held, “that if a man be lodged with another who is not an innholder, if he be robbed in his house by

(c) *Sunbolt v. Alford*, 3 M. & W. 248. *Smith v. Dearlove*, 6 C. B. 132; 17 Law J., C. P. 219.

(d) *Jones v. Thurloe*, 8 Mod. 173. *Jones v. Pearle*, 1 Str. 556, 557.

(e) *Moss v. Townsend*, 1 Bulstr. 207. See *Clayton v. Butterfield*, 10 Rich. Law (S. C.), 300.

(f) *Rosse v. Bramsted*, 2 Roll. 438.

(g) *Allen v. Smith*, 12 C. B., N. S. 638; 31 Law J., C. P. 306.

(h) Bac. Abr. INNS, D.

(i) *Sunbolt v. Alford*, 3 M. & W. 254.

the servants of him who lodged him or any other, he shall not answer for it." But it is the duty of every lodging-house keeper to take such care of his house as every prudent householder might be expected to take, and to be careful in the choice of his servants. If articles belonging to the lodger are actually placed in his hands, he will be responsible, like any other bailee (*ante*, p. 522), for the loss of them; but he is not a bailee of them merely by reason of their having accompanied the person of the lodger and been placed in his house by the latter. The law is, that the lodger must take care of his own goods in his lodgings(*k*).

SECTION III.

REMEDIES AGAINST COMMON CARRIERS AND COMMON INNKEEPERS FOR NEGLIGENCE AND BREACH OF DUTY.

691 *Summary proceedings against railway and canal companies.*—Persons complaining against railway or canal companies for not affording reasonable facilities for receiving, forwarding and delivering traffic upon and from the several railways and canals belonging to and worked by such companies, or of anything done, or omitted to be done, in contravention of the Railway and Canal Traffic Act (*ante*, p. 586, *et seq.*), may obtain relief by summary application to the Court of Common Pleas, or to any judge of such court, by motion or summons(*l*).

692 *Parties to be made plaintiffs in actions against carriers.*—The action against a carrier for the loss of goods intrusted to him for conveyance should, in the absence of an express contract for the carriage of them, be brought by the owner of the goods, as the party damnified.

Where goods have been delivered to a carrier to be carried to a person designated by the consignor, the consignee is *prima facie* the owner of the goods, and the person to whom the carrier is responsible for their safe conveyance(*m*). This is generally the case when goods are delivered to a carrier to be conveyed to a purchaser in fulfilment

(*k*) *Holder v. Soulby*, 8 C. B., N. S. 254; 29 Law J., C. P. 246. *Dansey v. Richardson*, 3 ELL. & BL. 144; 23 Law J., Q. B. 223.

(*l*) 17 & 18 Vict. c. 31, ss. 3-6.

(*m*) *Krulder v. Ellison*, 47 N. Y. 36. *Sweet v. Barney*, 23 N. J. 235. *Price v. Powell*, 3 N. Y. 322. *Everett v. Saltus*, 15 Wend. 474. *Ang. on Carriers*, s. 497. *Southern Express Co. v. Caperton*, 44 Ala. 101. *Thompson v. Fargo*, 49 N. Y. 188. *Green v. Clarke*, 12 N. Y. 343.

of a contract of sale, for as soon as the goods are delivered to the carrier they become the property of the purchaser; so that if they are lost, the purchaser, and not the vendor, must sue for the loss of them^(m). But if they are not delivered to the carrier in execution of a contract of sale, but by the consignor and owner to be conveyed to his servant in the country, then the consignor, and not the consignee, would be the proper person to sue for the loss of them. So, if from fraud or non-compliance with the Statute of Frauds, no actual sale has taken place, and no interest in the goods has vested in the consignee by reason of the delivery to the carrier, then the consignor is the proper person to sue for the loss of the goods⁽ⁿ⁾.

Where the consignor had delivered goods to a carrier, in obedience to a fictitious order, which professed to come from a well-known tradesman of respectability, but had in reality been sent by a swindler, it was held that as no *bonâ fide* sale had taken place, the consignor had not been divested of his property in the goods, and that he was, therefore, the proper person to sue the carrier for neglect of duty in delivering them to the swindler, who applied for them at the carrier's office, instead of delivering them at the residence of the tradesman to whom they were addressed^(o). But when the carrier, in consideration of a sum of money paid, or agreed to be paid, by the consignor, as the price of the carriage of goods, agrees with him to convey them to the consignee, it is no answer to an action brought by the consignor against the carrier, upon such special contract, to say that he is not

(m) *Dawes v. Peck*, 8 T. R. 332. *Coombs v. Bristol and Exeter Rail. Co.*, 27 Law J., Exch. 269, 402; 3 H. & N. 510. To sustain an action against a common carrier for failing to deliver goods, the plaintiff must be the owner, or have some special interest in them. *Thompson v. Fargo*, 49 N. Y. 188. *Green v. Clarke*, 12 N. Y. 343. *Krulder v. Ellison*, 47 N. Y. 36.

Where goods are delivered to a carrier pursuant to a written order from a purchaser, in which the mode of conveyance is stated, the title to the goods passes to the purchaser, subject only to the right of stoppage in transitu, and the consignee only can maintain an action for their loss. *Krulder v. Ellison*, 47 N. Y. 36.

But where goods are delivered to a carrier pursuant to an order from the purchaser, in which the mode of conveyance is not stated, but only the place where they are to be sent, the consignor may maintain an action for their loss, as the title to the goods would not pass by mere delivery to the carrier. *Thompson v. Fargo*, 49 N. Y. 188. But see *Magruder and Brother v. Gage*, 33 Md. 344.

One who has a beneficial interest in the performance by a carrier of the contract for the safe carriage of goods, or who has a special property or interest in the subject-matter of the agreement, may maintain an action against the carrier for the loss of the goods. *Southern Express Co. v. Caperton*, 44 Ala. 101.

And a shipper named in a bill of lading may maintain an action against a carrier for an injury to the goods carried, although he has no property general or special therein: the shipper's right of action in such case, arises by force of the original contract for safe carriage, made by the carrier with him. *Blanchard v. Page*, 8 Gray, 281; *Hooper v. Chicago & Northwestern R. R. Co.*, 27 Wis. 81.

(n) *Coats v. Chaplin*, 3 Q. B. 489. *Addison on Contracts*, 6th ed., p. 488, *et seq.*

(o) *Dun v. Budd*, 6 Moore, 469. *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 476.

the owner of the goods. In such a case the action may be brought either by the consignor or by the consignee(*p*). Thus, where a laundress, residing at Hammersmith, was in the habit of employing a carrier to convey the linen she washed from Hammersmith to the owner in London, and the carrier was paid by the laundress, it was held that the latter was entitled to maintain an action against the carrier for the loss of the goods by the way, although they belonged to the consignee(*q*). In these cases, the bailee of the goods, who has a special property in them, may enforce the express contract entered into with the carrier, unless his principal interferes to prevent him. "The rule is, that either the bailor or the bailee may sue, and whichever first obtains damages it is a full satisfaction"(*r*).

Every person who has been injured by the negligent performance of the work of carrying may maintain an action for damages against the carrier, although the work was done under a special contract to which he is no party. A servant, for example, may maintain an action against a railway company, or other carrier, for injuries sustained by him from the negligent management of a train by which he was a passenger, or from the negligent execution of the work of carrying, although the contract for his conveyance was made, and the hire or fare paid, by his master, the duty of carrying carefully being a duty which arises independently of the contract(*s*). So, where a railway company was bound by statute to carry the mails, and the officers of the post-office who accompanied them, it was held that the company must exercise a reasonable care in performing the duty cast upon them by the statute, and were bound to carry safely; so that if any officer of the post-office was injured by the negligent management of their trains, he was entitled to maintain an action against them for damages, although the contract for his conveyance had been entered into between the company and the Postmaster-General(*t*).

693 *Parties to be made defendants.*—When goods have been delivered to the driver of a stage-coach to be carried, and have been lost by the way, an action *ex contractu* for negligence should be brought against the coach-proprietor, and not the mere servant or agent(*u*). But as all who participate in a wrongful act are responsible *ex delicto* for the inju-

(*p*) *Davis v. James*, 5 Burr. 2680. *Bell v. Chaplain*, Hard. 321. *Moore v. Wilson*, 1 T. R. 659. *Dunlop v. Lambert*, 6 Cl. & Fin. 600.

(*q*) *Freeman v. Birch*, 1 N. & M. 420.

(*r*) *Nicolls v. Bastard*, 2 C. M. & R. 660.

(*s*) *Marshall v. York, Newcastle, and Berwick Rail. Co.*, 11 C. B. 655.

(*t*) *Collett v. Lond. & North-Western Rail. Co.*, 16 Q. B. 969.

(*u*) *Williams v. Cranston*, 2 Stark. 82.

rious consequences of it, the servant may be sued for the breach of duty as well as the master or the employer. The 8th section of the Carriers Act (*ante*, pp. 582-3) provides that the Act shall not protect the coachman, guard, book-keeper, or other servants of the common carrier from liability for losses or injuries occasioned by their own personal neglect or misconduct.

Every railway company is responsible for the detention or conversion, by its officers and servants, of the property which has come into the hands of such servants and agents in the course of their employment in the business of the company. There must be some one authorized on the part of the company at every station to receive and deliver out goods, and to do things promptly that require immediate attention, and whoever is permitted by the company to have dominion over their stations, and to exercise authority over their property, and over their porters and servants, will be presumed to be clothed with the necessary authority, and his acts, done within the scope of his ordinary employment, will be binding on the company. Thus, where some young quicks were forwarded by railway to the plaintiff, and the general superintendent of the company, at the request of the plaintiff, in order to keep the quicks alive, permitted them to be put into the company's ground at the railway station, where they remained under the control and charge of the superintendent, and the latter subsequently refused to deliver them up to the plaintiff, it was held that the railway company was responsible for the unlawful detention of the property by their servant(x).

The common carrier cannot qualify or limit his liability in respect of the negligence, want of skill, or carelessness of his servants and agents, in and about the carrying of the goods, by any private arrangement as to remuneration out of the profits of the business or otherwise, between himself and such servants or agents. "If a common carrier should allow his driver of the carriages some small things as perquisites, the master would, without all doubt, be still liable; and that is only a private agreement between master and servant, and only a different way of paying his servant's wages"(y).

When goods have been delivered to a railway company, to be carried to a particular destination beyond the limits of their own line of railway, and the goods are lost by the negligence of the servants employed upon an intermediate line, the railway company to whom the

(x) *Taff Vale Rail. Co. v. Giles*, 23 Law J., Q. B. 43.

(y) *Page, J., Cas. temp. Hard.* 90. And see *Hyde v. Trent & Mersey Nav. Co.*, 5 T. R. 397.

goods were first delivered, and with whom the contract for their conveyance was made, is the proper party to be sued for the loss, and not the company on whose line the loss actually took place^(z). But every railway company which allows its railway to remain open for public traffic, and takes toll for the use of it by other lines, is responsible to persons who sustain injury from the line being unsafe and dangerous, although such persons are conveyed along it in the carriages of some other company^(a). See *ante*, p. 219.

694 *Declarations against a common carrier for refusing to carry* should show that the defendant is a common carrier of goods plying for hire between the place where the goods were tendered to him for conveyance and the place to which they were addressed; that the plaintiff tendered to the defendant certain goods to be carried from the one place to the other; that the defendant had room and means of receiving and carrying them, and the plaintiffs were ready and willing to pay him his customary hire, yet the defendant would not receive and carry the goods, whereby the plaintiffs were put to great loss and inconvenience, setting forth any special damage that may have been sustained, and concluding with a claim for damages^(b).

695 *Declarations against an innkeeper for the loss of chattels deposited within the precincts of the inn* need not set out the general custom of the realm making the innkeeper responsible for the safety of the goods of his guests, as the general custom is part of the common law^(c), and need not be proved at the trial; but the declaration should allege that the defendant kept a common inn for the reception, lodging and entertainment of travellers, that the plaintiff being a traveller came to the said common inn of the defendant, and was received and lodged therein, and that the plaintiff brought into the said common inn certain articles (describing them), and that the defendant, whilst the plaintiff abided in the said common inn as a guest, and the said articles remained within the inn, did not keep the said articles, etc., safely, but so negligently conducted himself in the matter, that they were through the negligence of the defendant taken and carried away, and have become wholly lost to the plaintiff; concluding with a claim of damages^(d).

696 *Plea of not guilty*.—The plea of not guilty in actions for negligence

(z) *Mytton v. Mid. Rail. Co.*, 4 H. & N. 621; 28 Law J., Exch. 385. See *ante*, pp. 595-6.

(a) *Birkett v. Whitehaven, etc., Rail. Co.*, 4 H. & N. 738.

(b) *Pickford v. Grand Junction Rail. Co.*, 8 M. & W. 372.

(c) *Dale v. Hall*, 1 Wils. 281.

(d) *Jones v. Tyler*, 1 Ad. & E. 522.

operates as we have seen, as a denial only of the wrongful act alleged to have been committed by the defendant, and no defence other than such denial is admissible under that plea. Thus, in actions against a carrier for loss of, or damage to, goods, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received, or of the plaintiff's property in the goods(e).

697 *Special pleas.*—If, therefore, the defendant denies the receipt of the goods to be conveyed by him as a common carrier, or denies his receipt of them altogether, he must, by special plea or traverse, allege that he did not receive the goods to be carried as in the declaration mentioned. If the plaintiff has declared against him upon his liability as a common carrier, insuring the safe conveyance of the things he carries, and it appears that the things were delivered to him under a special contract, the cause of action will be disproved under this plea or traverse(f). If he denies the plaintiff's title or right to the possession of the property, he must plead a plea alleging that the property was not, at the time he received it to be carried, the property of the plaintiff(g); or, admitting that the plaintiff was the owner of the property at the time it was delivered to him, he may show that the plaintiff's right to the possession of it ceased, or had been determined, and that some third party had, since the bailment, become entitled to the property, and had demanded it of the defendant(h).

If the defendant relies upon the Common Carriers Act, he must by his plea show that the articles delivered to him for conveyance were of the description mentioned in the statute, and that at the time of the delivery of them to him to be carried, the value and nature of the goods were not declared by the plaintiff(i).

698 *Evidence at the trial—Proof of the bailment.*—To charge the common carrier for the loss of goods, however occasioned, it must of course be shown that the goods were either actually or constructively bailed to him or his servants to be carried. They must either have been delivered into his hands or into the hands of his servant or agent, or some

(e) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxi., lxxxii.

(f) *White v. Gt. Western Rail. Co.*, 2 C. B., N. S. 7.

(g) *Ante*, pp. 450-1. *Cheesman v. Exall*, 6 Exch. 341.

(h) *Sheridan v. New Quay Co.*, 4 C. B., N. S., 618. *Europ. and Austral. R. M. Co. v. R. M. St. P. Co.*, 30 Law J., C. P. 247.

(i) *Pianciani v. London and South-Western Rail. Co.*, 18 C. B. 229. *Hart v. Baxendale*, 6 Exch. 789; 21 L. J., Exch. 123.

person authorized by him to receive them⁽ⁱⁱ⁾. If they were merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or were placed in his cart, vessel, or carriage, without his knowledge and acceptance, or that of his servants or agents, there has of course been no bailment or delivery of the goods to him^(k), and he cannot consequently be made responsible for the loss of them. If the common carrier's servant has been induced by the consignor to depart from the usual course of dealing, and to receive goods which he was not bound to receive and carry, under circumstances of hazard known to the consignor, but not disclosed to the carrier's servant, or on terms different from those on which alone he was authorized to receive them, the carrier will either not be responsible for the loss of the goods, as never having been delivered to him, or, at all events, not on his common-law liability of an insurer^(l). If the consignor has made a private bargain with the driver of the cart or coach of the common carrier for the conveyance of a parcel for a gratuity which was not intended by the parties to find its way into the pocket of the carrier, there has been then no bailment to the latter, and he is not consequently liable in case the parcel is lost. The bailment in such a case is a bailment to the driver alone, and he alone is responsible for the loss^(m).

If the plaintiff has merely hired the cart or carriage of the common carrier, and has sent his own servants with the goods to take charge of them, and there has been no actual delivery or bailment of the goods to the carrier, the latter is not responsible for their safety⁽ⁿ⁾. If a passenger travelling on the outside of a stage-coach has kept a parcel or package in his own hands, and under his own care, or taken it with him into the interior of the vehicle, without the knowledge of the carrier or his servants, and the thing is lost, the carrier is not responsible for the loss, as the article was never delivered to him or to his servants, or in any way intrusted to his or their keeping⁽ⁿⁿ⁾. But if the thing has been tendered to the carrier for conveyance, and the latter

(ii) *Michigan Southern, etc., R. R. Co. v. McDonough*, 21 Mich. 165. *Grosvenor v. New York Central R. R. Co.*, 39 N. Y. 34. *Trowbridge v. Chapin*, 23 Conn. 595. *Wells v. Wilmington, etc., R. R. Co.*, 6 Jones' Law (N. C.), 47. *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388. *Cronkite v. Wells*, 32 N. Y. 247.

(k) See *Packard v. Getman*, 6 Cow. 757; *Selway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, 3 Campb. 414. *Lovett v. Hobbs*, 2 Show. 128.

(l) *Edwards v. Sherratt*, 1 East, 604. *Slim v. Gt. Northern Rail. Co.*, 23 Law J., C. P. 106

(m) *Butler v. Basing*, 2 C. & P. 613. *Bignold v. Waterhouse*, 1 M. & S. 259. *Middleton v. Fowler*, 1 Salk. 282. See *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388.

(n) *East India Co. v. Pullen*, 2 Str. 690.

(nn) *First National Bank of Greenfield v. Marietta & Cincinnati R. R. Co.*, 20 Ohio St. 259.

has directed the passenger to place it in or upon any portion of the vehicle, there has been a constructive bailment or delivery and acceptance of the goods, so as to charge the carrier for the loss of them. If luggage is placed, with the knowledge of the carrier or his servants, under the seat on which the passenger sits, the carrier will be responsible for its safe conveyance and delivery to the passenger at the place of destination(o). A delivery of goods to a person sent or appointed by the carrier to receive them, is, of course, a delivery to the carrier himself(p).

699 *Proof of a special contract.*—We have seen that every special contract, notice, or condition, respecting the acceptance and carriage of goods by railway and canal companies, must be signed by the party sought to be affected thereby (*ante*, p. 589); and the signature must be fairly obtained, for where a person who was unable to read was told by a clerk of the company that the paper was a mere matter of form and of no consequence, and he signed the paper relying upon this assurance, it was held that the paper so foisted upon him was not binding(q).

If the plaintiff has declared against the defendants as common carriers, alleging that they received the goods to be carried by them as common carriers, and it turns out that they were received under a special contract (*ante*, p. 589), the evidence will fail to support the declaration, unless it be shown that the special contract was unreasonable and void(r).

700 *Proof of felony by a carrier's servants.*—When, in consequence of the plaintiff's not having paid the extra price for lost articles of value, he is not entitled to recover, unless he shows that the things have been stolen by the carrier's servants, it is not enough for him to make out a probable case against one or more of the carrier's servants. He must show that the things were lost under circumstances wholly inconsistent with their having been stolen by a stranger(s).

701 *Proof of jus tertii by a common carrier.*—A carrier who has received goods from a consignor is not estopped from denying the title of the

(o) *Richards v. London, Brighton, etc., Rail. Co.*, 7 C. B. 848; 18 Law J., C. P. 251; *ante*, p. 599.

(p) *Syms v. Chaplin*, 5 A.d. & E. 634; 1 N. & P. 129.

(q) *Simons v. Gt. Western Rail. Co.*, 2 C. B., N. S. 620. As to what will not be deemed sufficient proof of a special contract to limit the carrier's liability, see *Baltimore, etc., R. R. Co. v. Brady*, 32 Md. 333; *Blossom v. Dodd*, 43 N. Y. 264; *The Pacific, Deady*, 17; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 319.

No presumptions will be indulged in in favor of exemptions from common-law liability. *Edsall v. Camden & Amboy R. R. & Transportation Co.*, 50 N. Y. 661.

(r) *White v. Gt. Western Rail. Co.*, 2 C. B., N. S. 17. *Latham v. Rutley*, 2 B. & C. 20.

(s) *Metcalfe v. London & Brighton, etc., Rail. Co.*, 27 Law J., C. P. 333. *Iliven & Mead v. Hudson River R. R. Co.*, 36 N. Y. 403. See *Great Western R. R. Co. v. McComas*, 33 Ill. 185.

latter to the goods. Common carriers are bound to receive goods properly tendered to them for carriage, and can make no inquiries into the ownership of them. "The law protects them against the real owner if they have delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect them against the pseudo owner, from whom they could not refuse to receive the goods in the event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a common carrier furnishes ample ground for so holding"(t).

702 *Damages recoverable.*—In all actions against common carriers for unlawfully refusing to receive and carry a passenger or goods, substantial damages are recoverable, as there is an injury to a right; and if the plaintiff, in consequence of the wrongful refusal(u) of the common carrier to carry him, has been obliged to take a special conveyance, and incur extraordinary expenses to reach the place to which he ought to have been carried, all such expenses are recoverable, if claimed by the plaintiff, and specified in his declaration as part of the damage he has sustained. So if a common innkeeper unlawfully refuses to receive and provide accommodation for a traveller, substantial damages are recoverable for the injury done to the plaintiff's right as a traveller and wayfarer to have shelter and accommodation in the common inn; and if he has been put to expense in seeking shelter and accommodation elsewhere, and has been obliged to hire conveyances to reach it, he is entitled to recover such special damage, if claimed.

703 All persons are responsible for all the natural and legal consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look at all the surrounding circumstances, and at the conduct of the parties, to see where the blame is, and to assess the damages according to the way in which the parties have conducted themselves(x).

Loss of, or injury to, chattels from negligence.—The amount of damages recoverable from common carriers for loss of, or injury to, goods, is regulated and controlled by the several Acts of Parliament, requiring consignors in certain cases to declare the value of the article at the time it is delivered to the common carrier to be carried (ante, p. 580). No greater damages than 50*l.* are to be recovered for loss of, or injury to, a horse through the neglect or default of a railway company or its

(t) *Sheridan v. New Quay Co.*, 4 C. B., N. S. 618; 28 Law J., C. P. 58. *Cheesman v. Exall*, 6 Exch. 341, overruling *Laclouch v. Towle*, 3 Esp. 114.

(u) *Ante*, pp. 17, 18; *post*, ch. 22.

(x) *Davis v. North-Western Rail. Co.*, 4 Jur. N. S. 1303; *post*, ch. 22.

officers; 15*l.* per head for neat cattle; and 2*l.* per head for sheep and pigs; unless the person sending or delivering the animals to the company shall, at the time of delivery, have declared them to be of higher value(*y*).

Proof of the value and of the amount of injury lies in all cases upon the person claiming compensation. If the value of horses has been declared at the time of the delivery of the animals to a railway company to be carried, and the contract between the parties has been made upon that basis, the plaintiff is bound by his declaration of value, and cannot recover beyond the declared value(*z*).

If special circumstances exist which would render the loss of the goods, or delay in the delivery of them, productive of more than ordinary injury and damage to the owner, those special circumstances ought to be communicated to the carrier at the time the goods are delivered to him, in order to make him responsible for special and extraordinary damages in cases of non-delivery(*a*). Thus, where the plaintiff delivered to the defendant certain machinery, contained in several cases, which was intended for the erection of a saw-mill abroad, and on the arrival of the vessel at its destination, one of the cases containing a part of the machinery, without which the rest could not be erected, was missing, and the defendant, although he knew generally of what the shipment consisted, did not know that the missing box contained a material part of the machinery without which the mill could not be put together, it was held that the measure of damages was the cost of replacing the lost articles abroad, with interest

(*y*) 17 & 18 Vict. c. 31, s. 7.

(*z*) *M'Cance v. London and North-Western Rail. Co.*, 7 H. & N. 477; 31 Law J., Exch. 65; 34 ib. 39.

(*a*) *Hadley v. Baxendale*, 9 Exch. 354; 23 Law J., Exch. 179. *Black v. Baxendale*, 1 Exch. 410. *Gee v. Lanc. and York. Rail. Co.*, 6 H. & N. 217. Where a publishing company were about to start a newspaper and were awaiting the arrival of machinery purchased for that purpose, and a carrier, with full knowledge of the facts, contracted to transport the machinery in a specified time, but lost on the way a portion of the machinery, which could only be replaced by ordering it at the manufactory, the carrier was held liable for the direct and necessary consequences of his negligence, including the wages of men who were idle for want of the machinery from the time when it should have been delivered, the cost of efforts made to recover the machinery and the cost of replacing that which was lost. *Cincinnati Chronicle Co. v. White Line Transit Co.*, 1 Cinc. (Ohio) 300.

Anticipated or speculative profits are not allowed in a claim of damages for the loss of goods by a common carrier. *Vicksburg, etc., R. R. Co. v. Ragsdale*, 46 Miss. 458. *Bazine v. Steamship Co.*, 3 Wall. jr. 229.

The measure of damages in an action against a common carrier for a failure to transport and deliver goods in accordance with his contract is the value of the goods at the place of destination at the time they should have been delivered under the contract and in the condition he undertook to deliver them less his freight. *Sturgess v. Bissell*, 46 N. Y. 462. *The Boston*, 1 Low. 464.

at 5% per cent. for the delay, but not the profits which the plaintiff might have made by the working of the mill(b).

When the consignor has been guilty of no intentional deception to conceal the risk (*ante*, p. 24), and his own conduct or omission to declare the nature and value of the article has not in any way conduced to the loss, but the loss has been caused solely by the negligence and want of care of the common carrier, the latter is bound by the common law to make compensation for the loss so occasioned, to the extent, at all events, of the apparent and presumable value of the article at the time it was bailed to him to be carried. But he is not, it seems, responsible for any extraordinary or unusual value which may have accidentally been imparted to it, and which could not, from the apparent nature and general character and appearance of the thing, be fairly presumed to exist. Thus, where the plaintiff had put a 50% bank-note into his carpet-bag amongst his linen and wearing apparel, and got on a coach and delivered the carpet-bag to the coachman, and on the arrival of the coach at its place of destination the bag was missed and never afterwards seen, the jury gave a verdict for the value of the linen and wearing apparel, but not for the value of the note, and the court afterwards refused to increase the verdict by the amount of the note(c). In other cases, however, the plaintiff has recovered the full value of the article lost(d).

704 *Damages in respect of delay in delivery.*—If by reason of goods not having been delivered in due time, the season for finding customers for them has passed away, and they are consequently of less value to the plaintiff, the deterioration in value may be considered in estimating the amount of damage, but not the profit which would have been made upon the sale of them if they had been delivered at the proper time(e); or, where the goods consist of machinery, the presumed profit which would have been made by the use of them, during

(b) *British Columbia Saw Mill Co. v. Nettleship*, L. R., 3 C. P. 499; 37 Law J., C. P. 235.

(c) *Miles v. Cattle*, 4 M. & P. 630; 6 Bing. 743.

(d) *Sleat v. Fagg*, 5 B. & Ald. 342. *Walker v. Jackson*, 10 M. & W. 161; 2 M. & P. 342. See Angell on Carriers, s. 262.

(e) *Wilson v. Lanc. and York. Rail. Co.*, 9 C. B., N. S. 642. *Simmons v. South-Eastern Rail. Co.*, 7 Jur. N. S. 849. *Gt. Western Rail. Co. v. Redmayne*, L. R., 1 C. P. 329. And see further, as to damages in actions against carriers, Addison on Contracts, 6th ed. 1083. When a common carrier from negligence fails to transport merchandise within a reasonable time and in the meantime its market value falls, the measure of damages is the difference in its value at the place of delivery at the time it ought to have been delivered and at the time of its actual delivery. *Ward v. New York Central R. R. Co.*, 47 N. Y. 29. *Deming v. Grand Trunk R. R. Co.*, 48 N. H. 455. *Scott v. Boston, etc., Steamship Co.*, 106 Mass. 468. *Cutting v. Grand Trunk R. R. Co.*, 13 Allen (Mass.), 531. But if the merchandise was to be delivered under a special contract of sale by the shipper the damages should be estimated with reference to the contract price. *Illinois Central R. R. Co. v. McClellan*, 54 Ill. 69.

the time it took to replace them(*f*). The right measure is the market value of the goods at the place and time at which they ought to have been delivered, or, if there is no market, then the price at the place of manufacture, with the cost of carriage, and a reasonable sum for importer's profit(*g*). Thus, where the plaintiff bought caustic soda of the defendant, to be shipped at a certain time, which the defendant neglected to do, and there was no market for caustic soda, it was held that the plaintiff was entitled to recover the increased freight and insurance which had become necessary by reason of the defendant's delay, and also the loss of his profit upon a re-sale of the soda to *A*, but not the amount of damages which he (the plaintiff) had paid *A* on a sub-sale made by him to a consumer of the article(*h*). Hotel expenses incurred by the consignee while waiting for the delivery of the goods by the carrier are not recoverable(*i*).

705 *Injunction against railway companies to enforce compliance with the Railway and Canal Traffic Act.*—By 17 & 18 Vict. c. 31, s. 3, it is enacted, that it shall be lawful for any company or person complaining against any railway company or canal company of anything done, or any omission made in contravention of the Railway and Canal Traffic Act (*ante*, pp. 572, 586), to apply in a summary way to the Court of Common Pleas, or any judge thereof, and that it shall be lawful for the court or judge to hear and determine the matter of the complaint, and to make inquiry, in the mode therein directed, and to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of the Act, and enjoining obedience to the same(*k*); and in case of disobedience of any such writ of injunction or interdict, to order that a writ of attachment, or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and to make an order directing the payment by any one or more of such companies of a sum of money not exceeding for each company the sum of £200 for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict, such moneys to be payable as the court or judge

(*f*) *British Columbia Saw Mill Co. v. Nettleship, supra. Vicksburgh etc., R. R. Co. v. Ragsdale*, 46 Miss. 458.

(*g*) *O'Hanlan v. Gt. Western Rail. Co.*, 34 Law J., Q. B. 154.

(*h*) *Borries v. Hutchinson*, 34 L. J., C. P. 169.

(*i*) *Woodger v. Gt. Western Rail. Co.*, L. R., 2 C. P. 318.

(*k*) See *Ransome v. East. Co. Rail. Co.*, 26 Law J., C. P. 91.

may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to her Majesty; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment, or order, in the nature of a writ of execution; and, in any such proceeding, the court or judge may order and determine that all or any costs thereof or thereon incurred shall be paid by or to the one party or the other, as the court or judge shall think fit(*l*).

"It is abundantly clear," observes Cockburn, C.J., "from the statutory enactments which enjoin on railway companies the obligation to afford accommodation on equal and reasonable terms, and from the provisions of the statute by which jurisdiction is given to the Court of Common Pleas against the affording of undue preference, or the imposing of undue prejudice or disadvantage, that it was not the intention of the legislature to leave to railway companies the unfettered exercise of their rights as proprietors of their respective lines; but in return for the great powers which it has conceded to them, and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public;" and they cannot promote their own interests as carriers at the expense of the right of the public to that equality(*m*), or give to one individual greater advantages at their stations(*n*), or upon their line, than they allow to another(*o*).

Where a railway company in order to compete with a particular carrier in the collection and delivery of parcels, makes a man who has his own wagons and horses, and therefore does not require the company to collect and deliver parcels for him, pay more than he ought to pay for the transit on the railway, it is a case of undue prejudice against the person not wanting the accommodation. The company have no right to make a charge nominally for carriage upon the railway, which is in reality for that and something else, and so impose upon a portion of the public services which they do not desire to avail themselves of(*p*). So if a number of tradesmen in a country town

(*l*) Forms of proceeding, etc., Reg. Gen. C. P. Hil. Term, 18 Vict., 15 C. B. 473.

(*m*) *Baxendale v. Gt. Western Rail. Co.*, 5 C. B., N. S. 354; 28 Law J., C. P. 69.

(*n*) *Marriott v. Lond. & S.-W. Rail. Co.*, 1 C. B., N. S. 499; 26 Law J., C. P. 154. *Beadell v. East. Co. Rail. Co.*, ib. 250. *Baxendale, In re*, 11 C. B., N. S. 787; 12 ib. 758.

(*o*) *Baxendale v. North Devon Rail. Co.*, 3 C. B., N. S. 324. See 31 & 32 Vict. c. 119, s. 16, *ante*, p. 603.

(*p*) Cockburn, C.J., *Garton v. Gt. Western Rail. Co.*, 5 C. B., N. S. 678. *Baxendale v. Gt. Western Rail. Co.*, 16 ib. 137; 33 Law J., C. P. 197. See 31 & 32 Vict. c. 119, s. 17, *ante*, p. 604.

request a railway company to deliver all goods addressed to them to a local carrier for distribution by him, the company cannot, in order to compete with that carrier, under the pretence of requiring a special order as to each package, in effect cause the delivery by such carrier to be so delayed as to become impracticable(*g*). Nor can a railway company exclude carriers' vans from the delivery of goods at a station after a certain hour, if they admit vans, with goods collected from their own receiving houses, after that hour(*r*).

In execution of the powers conferred on them by this statute, the courts will issue writs of injunction, enjoining railway companies proved to have given an undue preference to one person or set of persons over another in respect of the conveyance of particular classes or descriptions of commodities, to desist from giving such undue preference(*s*). But the operation of the statute is confined to undue preferences given to one person or class of persons over another in the traffic along the same railway or canal(*t*), and travelling between the same places, and not to superior advantages which may be given to one town over another town on the same line of railway(*u*). And it has been held that the statute is not contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities, and full train-loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the diminished cost of the carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee(*x*).

Before the court will put the powers of the Railway and Canal Traffic Act in motion, as regards the granting of an injunction, the court must in general be satisfied that some substantial injury or inconvenience is sustained by the public by the act complained of, and that the complaint is *bonâ fide* made on behalf of the public(*y*). And it has been held that the exercise of this special jurisdiction being

(*g*) *Parkinson v. Gt. Western Rwy.*, L. R., 6 C. P. 554. See *Chamblos v. Philadelphia, etc.*, R. R. Co., 4 Brews. (Pa.) 563; *Rogers' Locomotive, etc., Works v. Erie R. R. Co.*, 20 N. J. Eq. (5 C. E. Green) 379; *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 188.

(*r*) *Palmer v. Lond., Brighton & South Coast Rwy.*, L. R., 6 C. P., 195.

(*s*) *Harris v. Cockermouth, etc., Rail. Co.*, 3 C. B., N. S. 693; 27 Law J., C. P. 162. *Ransome v. East. Co. Rail. Co.*, ib. 166; 8 C. B., N. S. 709. *Cooper v. Lond. & S.-W. Rail. Co.*, 27 Law J., C. P. 324.

(*t*) *Bennett v. Manch., Sheff. & Linc. Rail. Co.*, 6 C. B., N. S. 715.

(*u*) *Jones v. East. Co. Rail. Co.*, 3 C. B., N. S. 718.

(*x*) *Nicholson v. Gt. Western Rail. Co.*, 5 C. B., N. S. 441. *Strick v. Swansea Canal Co.*, 31 Law J., C. P. 240.

(*y*) *Painter v. Lond. & Br. Rail. Co.*, 2 C. B., N. S. 702. *Re Caterham Rail. Co.*, 1 C. B., N. S. 410.

subject to no review, and depending in each instance upon the special facts of the case, cases previously decided under it are not binding on the court in the same way that precedents in law are binding(z).

(z) *Palmer v. Lond. & South-West. Rail. Co.*, L. R., 1 C. P. 589; diss. Willes and Keating, JJ.

CHAPTER XI.

OF WRONGFUL DISTRESS—DISTRESS FOR RENT—DISTRESS DAMAGE FEASANT.

SECTION I.—*Of unlawful and excessive distresses.*—Distress for rent in arrear—Of condition precedent to the right to distrain—Distress for rent payable in advance—Distress after the termination of the term of hiring—Distress by agents, joint-tenants, tenants-in-common, etc.—Agreements not to distrain—Acceptance of bill or note by way of payment—Tender before distress—Time, mode, and place of distraining—Things distrainable and not distrainable—Distress of growing crops—Mortgaged chattels and things in the custody of the law—Things distrainable under a license to distrain—Things fraudulently removed—What amounts to a distress—Abuse of the right to distrain rendering persons trespassers *ab initio*—Distress when no rent in arrear—Excessive distresses—Distress for more rent than due—Repeated distresses—Impounding—Pound-breach—Abandonment of distress—Statutory power of sale—Tender of rent before sale—Notice of distress—Appraisement and sale—Costs and expenses—Non-compliance with the statutes authorizing the sale—Keeping the distress without selling—Indemnification of bailiffs.

SECTION II.—*Of distress damage feasant.*—Seizure and impounding of animals damage feasant—Trespass on unfenced land—What things may be distrained damage feasant—Distress by railway companies of locomotive engines damage feasant—Tender of amends—Sale of impounded animals—Liabilities of pound-keepers.

SECTION III.—*Remedies for unlawful and excessive distresses.*—Replevin of things distrained—Actions—Parties, pleadings, defences, and evidence—Damages recoverable.

SECTION I.

OF UNLAWFUL AND EXCESSIVE DISTRESS.

706 *Distress for rent in arrear*(2).—By the common law, landlords to whom rent is due, and who are clothed with the immediate reversion of the

(2) In many of the States of the Union the common law remedy by distress has either been wholly abolished or materially modified by statute. Among the States where distress for rent is unknown are New York (Laws of 1846, ch. 274), North Carolina (Dalglish v. Grandy, C. & N. 22), Missouri (Crocker v. Mann, 3 Mo. 472), Mississippi (Marye v. Dyche, 42 Miss. 374), and Montana (Bohm v. Dunphy, 1 Mont. 333).

premises out of which the rent issues, have the power of entering in person, or by deputy, upon the demised premises(a), and seizing the moveables and personal property thereon, with certain exceptions, and holding them as a pledge for the payment of the rent, and they have now by statute the power of selling the things distrained. This remedy by distress is said to have come to us from the civil law, where the land farmed out to the tenant was hypothecated, or pledged in his hands to answer the rent agreed to be paid, the whole profits arising from the soil being liable to the lord's seizure(b).

It is essential to the lawful exercise of the power of distress, that there be a tenancy(c) for a term, or at will, at an ascertained rent(d), and that the distrainor be the person entitled to the reversion of the premises distrained upon, on the determination of the existing tenancy(e). "If he has made a lease without having any right or title to grant a lease, or if, after the making of the lease, he has sold and transferred his estate or interest to some third party(f), or being himself only a lessee, he has assigned his lease, or if, after granting an under-lease, he has forfeited his estate by some breach of covenant or otherwise, and the superior landlord has entered, and the tenant has

(a) See *Selby v. Greaves*, L. R., 3 C. P. 594.

(b) *Gilbert on Rents*, 5; on *Distresses*, 2.

(c) See *Clowes v. Hughes*, L. R., 5 Exch. 160, in which case the distress was made by a mortgagee upon the mortgaged lands under an agreement contained in the mortgage deed. See *Slocum v. Clark*, 2 Hill, 475; *Hale v. Burton*, Dudley, 105.

(d) *Anderson v. Mid. Rail. Co.*, 30 Law J., Q. B. 94. *Howe v. Scarrott*, 28 Law J., Exch. 325. *Jolly v. Arbutnot*, 28 Law J., Ch. 547. *Addison on Contracts*, p. 316, 6th ed. *Benoist v. Sollee*, 1 Brevard, 251. *Helser v. Pott*, 3 Barr. 179. *Valentine v. Jackson*, 9 Wend. 302. *Reeves v. McKenzie*, 1 Bailey, 497. *Wells v. Hornish*, 3 Penn. 30. *Steel v. Thompson*, id. 34. *Scott v. Fuller*, id. 55. *Grier v. Cowan*, Addis. 347. *Marshall v. Giles*, Const. Rep. 637. *Jacks v. Smith*, 1 Bay, 315. *Roberts v. Tennell*, 4 J. J. Marsh. 160.

In Kentucky, distress lies only for rent reserved in money. *Myers v. Mayfield*, 7 Bush (Ky.), 212. *Poer v. Peebles*, 1 B. Mon. 1. In other States it has been held that distress lies for the recovery of rent payable in iron. *Jones v. Gundrim*, 3 Watts & Serg. 531. *Owens v. Conner*, 1 Bibb, 605.

In repairs, *Smith v. Colson*, 10 Johns. 91; or other services, *Valentine v. Jackson*, 9 Wend. 302. *Smith v. Colson*, 10 Johns. 91. *Smith v. Fyler*, 2 Hill, 648. Or in any thing susceptible of valuation. *Fraser v. Davie*, 5 Rich. Law, 59. But to entitle the landlord to distrain for rent, the rent must be certain either in money or services, or such as may be reduced to a certainty. *Valentine v. Jackson*, 9 Wend. 302.

A distress does not lie where the rent is payable in iron drawn according to order, where the tenant does not and cannot know when, how much, or what size of iron to tender. *Helser v. Potts*, 3 Barr. 179. Nor does it lie on a contract to pay a specified sum as rent, in State scrip. *Purcell v. Thomas*, 7 Blackf. 306. Nor does it lie on a contract to deliver as rent a third part of the corn raised on the demised premises. *Clark v. Fraley*, 3 Blackf. 264. But it has been held that it will lie on a contract to deliver one-third of the toll for rent of a grist-mill. *Fry v. Jones*, 2 Rawl. 11.

(e) 8 & 9 Vict. c. 106, s. 9.

(f) *Parmenter v. Webber*, 8 Taunt. 593; 2 Moore, 656. *Preece v. Corrie*, 2 M. & P. 64; 5 Bing. 24; 5 M. & Ry. 157, 162. *Smith v. Mapleback*, 1 T. R. 441.

attorned to the latter, he has no right or power to distrain(*g*). It has been held, that a tenant from year to year underletting from year to year, has a reversion which enables him to distrain for rent reserved upon such under-lease”(h). However, although the distrainor be not entitled to the immediate reversion, the distrainee may be estopped from denying that he is entitled to it(i).

If the lease has been put an end to by a surrender of the term, or by a notice to quit, and the tenant, notwithstanding the termination of the demise, continues to hold, with the permission of the landlord, as tenant-at-will, or adversely and against the will of the lord as a wrong-doer, the lessor has no power at common law to distrain the goods and chattels of the tenant for rent in respect of such occupation(j). Neither can he distrain, except under the statute of Anne (*post*, p. 640), for rent that accrued due before the determination of the lease. But any slight evidence of a renewal of the tenancy, and of an agreement to hold upon the former terms, would be sufficient to justify the landlord in distraining for the old rent(k).

If the tenant becomes bankrupt or files a petition for liquidation by arrangement, the landlord or other person to whom any rent is due may still distrain, but if the distress be levied after the commencement of the bankruptcy, it is not available for more than one year's rent accrued due prior to the date of the order of adjudication(l). *A fortiori* therefore if the trustee in bankruptcy declines to take the lease, the lessor is not, in case the bankrupt tenant continues to hold the property, deprived by the bankruptcy of his right to distrain(m). Nor is he so deprived, if the creditors determine to accept a composition under s. 126 and the bankrupt tenant remains in possession(n). If a lessee, having granted an under-lease, becomes bankrupt, such

(g) *Burne v. Richardson*, 4 Taunt. 720. *Hopcroft v. Keys*, 2 M. & Sc. 760; 9 Bing. 613. *Langford v. Selmes*, 3 K. & J. 229.

(h) *Curtis v. Wheeler*, M. & M. 493. A lessee who has assigned his term for years entire, cannot distrain without a reservation to that effect. But the rule is otherwise where his lease is from year to year, and he assigns a part. *Ege v. Ege*, 5 Watts, 134. See *Harrison v. Guill*, 46 Ga. 427.

(i) *Morton v. Woods*, L. R., 3 Q. B. 658; 4 ib. 293; 28 Law J., Q. B. 81.

(j) *Jenner v. Clegg*, 1 M. & Rob. 213. *Alford v. Vickory*, 1 Car. & Marsh. 283. *Phené v. Popplewell*, 12 C. B., N. S. 334; 31 Law J., C. P. 235. *Dailey v. Grimes*, 27 Md. 440.

(k) *Zouch v. Willingale*, 1 H. Bl. 311. *Beavan v. Delahay*, 1 H. Bl. 8. See *Webber v. Shearman*, 3 Hill, 547; 6 Hill, 20; 2 Denio, 362; *Bell v. Potter*, 6 Hill, 497; *Sherwood v. Phillips*, 13 Wend. 479.

(l) 32 & 33 Vict. c. 71, s. 84. *Ex parte Birm. & Staff. Gas Light Co.*, L. R., 11 Eq. Ca. 615. See *Re Lundy Granite Co.*, *post*, p. 650.

(m) *Briggs v. Sowry*, 8 M. & W. 729. *Newton v. Scott*, 10 M. & W. 471. *Phillips v. Shervill*, 6 Q. B. 944; 14 Law J., Q. B. 144. See 32 & 33 Vict. c. 71, s. 23.

(n) *Ex parte Birm. Gas Light Co.*, L. R., 11 Eq. Ca. 204.

bankrupt lessee is not deprived by the bankruptcy of his right to distrain, unless the assignees have taken to the lease and discharged the bankrupt from the rent payable to the superior landlord(o). The power of distress is always subservient to prerogative process issued by the crown, such as an extent; and the sheriff may consequently take goods that have been distrained out of the hands of the landlord or his bailiff, and sell them for the benefit of the crown(p). A landlord, moreover, cannot distrain twice for the same rent, unless the distress has been withdrawn at the instance or request of the tenant, or unless there has been some mistake as to the value of the things taken. It is vexatious and actionable in a landlord to make repeated distresses unnecessarily(q).

707 *When there is no certain ascertained rent there is no right to distrain*(qq).

—If lands and houses have been demised together at one entire rent, and the lease is void as to part of the subject-matter of the demise and good for the residue, the lessor cannot distrain for the rent, as there is no distinct and ascertained rent fixed in respect of the part for which the lease is good(r). Where there was a lease of one hundred acres of land at an annual rent of 79*l.*, and eight of these acres were in the possession of another tenant under a prior demise, it was held that the lessor could not distrain for any part of the rent, as it was reserved in respect of the whole one hundred acres, and the rent was entire and unapportionable(s). But where a new agreement is come to providing for a specified reduction of rent, or for an ascertained and settled compensation in respect of the part held under the prior demise, such agreement may operate as a re-demise at an ascertained rent, recoverable by distress(t).

Where an oral agreement was entered into between the proprietor of a marl-pit and brick-mine, and a potter and brickmaker, upon the terms that the latter should pay 8*d.* per solid yard for all the marl that he got out of the marl-pit, and 1*s.* 8*d.* per thousand for all the bricks

(o) *Peskett v. Somers*, coram Wilde, C.J., Sittings after Hil. Term, 1850. But see 32 & 33 Vict. c. 71, s. 23.

(p) *Rex v. Cotton, Parker*, 112. And see 32 & 33 Vict. c. 14, s. 31, as to a distress at suit of the crown on property of bankrupt for duties, etc., under that Act.

(q) *Bagge v. Mawby*, 8 Exch. 649. *Dawson v. Cropp*, 1 C. B. 961.

(qq) *Wells v. Hornish*, 3 Penn. 30. *Steel v. Thompson*, 3 Penn. 34. *Scott v. Fuller*, id. 55. *Grier v. Cowan*, Addis. 347. *Marshall v. Giles*, Const. Rep. 637. *Jacks v. Smith*, 1 Bay, 315. *Roberts v. Tennell*, 4 J. J. Marsh. 160. *Valentine v. Jackson*, 9 Wend. 302. See *Smith v. Fyler*, 2 Hill, 618.

(r) *Gardiner v. Williamson*, 2 B. & Ad. 339.

(s) *Neale v. Mackenzie*, 1 M. & W. 763. *Hatfield v. Fullerton*, 24 Ill. 273. *French v. Lawrence*, 7 Hill, 519.

(t) *Watson v. Waud*, 8 Exch. 335.

that he made from the brick-mine, by quarterly payments at the usual quarter-days, and the brickmaker took possession of the pit and mine, and dug marl and burnt bricks, and made several quarterly payments, it was held that this was a demise from year to year at a rent capable of being ascertained with certainty, and that the lessor, therefore, was entitled to distrain(*u*). And where land was held upon the terms that the plaintiff should not sell hay off the demised premises under a penalty of 2s. 6d. a yard, to be recovered by distress as for rent in arrear, it was held that the penalty might be treated as a rent payable in respect of every sale made in breach of the agreement, that the amount due was capable of being ascertained with certainty, and might be recovered by distress(*v*).

If a tenant has entered into possession under an agreement which does not operate as a present demise at a fixed rent, but merely as an executory contract for a future lease afterwards to be granted, and the landlord neglects to grant the lease, and the tenant continues to occupy without paying any rent or making any absolute and unconditional admission of any specific sum being due as rent in respect of such occupation, the landlord has no right to distrain(*w*). But whenever there is an agreement for a tenancy at a fixed rent, though it be a tenancy-at-will only(*x*), or whenever by payment of rent, or otherwise, any tenancy at a fixed rent can be implied, the landlord may distrain for all rent subsequently accruing due(*y*). And if the tenant, after he has taken possession, "promises to pay a rent certain, or settles it in account, the landlord will then have a right to distrain"(*z*). So, if a man, on being let into possession under an agreement for purchase, signs an agreement admitting that he is tenant at a certain rent, he may be distrained upon(*a*).

By the 14 & 15 Vict. c. 25, s. 1, it is provided, that where the lease of any farm or lands shall determine by the death or cesser of the estate of a landlord entitled for life or for some uncertain interest, instead of a claim to emblements, the tenant shall continue to hold till the expiration of the then current year, and shall then quit as if his lease had expired by effluxion of time, and the succeeding landlord shall be entitled "to recover and receive of the tenant" a fair proportion of the

(*u*) *Daniel v. Gracie*, 6 Q. B. 145.

(*v*) *Pollitt v. Forest*, 11 Q. B. 949; 16 Law J., Q. B. 424.

(*w*) *Hegan v. Johnson*, 2 Taunt. 148.

(*x*) *Anderson v. Mid. Rail. Co.*, 30 Law J., Q. B. 96.

(*y*) *M'Leish v. Tate*, Cowp. 783.

(*z*) *Knight v. Bennett*, 11 Moore, 222; 3 Bing. 361. *Cox v. Bent*, 2 M. & P. 281; 5 Bing. 185.

(*a*) *Yeoman v. Ellison*, L. R., 2 C. P. 681. See *Morton v. Woods*, *ante*, p. 635.

rent for the period since the lessor's death. The above act applies to all tenancies in respect of which there exists a valid claim to emblements, and confers a right to distrain for the rent, as well as to recover it by action(b).

708 *Of conditions precedent to the right to distrain.*—The right to distrain may be made conditional, or may be postponed by the contract of the parties(c). Where a lessee agreed to take, and the lessor to let, a house and premises at a yearly rent, payable quarterly, and the lessor agreed to complete the house, and fix a bresummer in the window, and allow the lessee 15*l.* towards erecting an oven, and the lessee took possession and built the oven, but the lessor never completed the house nor fixed the bresummer, and the lessee refused payment of the rent, whereupon the lessor distrained, it was held that the distress was illegal, as the condition upon which the rent was to become due remained unaccomplished(d). And where an oral agreement was entered into for the letting and hiring of a house and furniture at an annual rent, payable quarterly, the house to be furnished completely, in a manner suitable to a ladies' school, and the lessee took possession, it was held that the furnishing of the house by the lessor in the manner agreed upon was a condition precedent to his right to distrain for the rent(e). Whenever a covenant or promise to pay rent is conditional and dependent, and the lessor is ready and willing to fulfil the condition on his part, but the lessee prevents him, the lessor will have his power of distress.

709 *Distress for rent payable in advance(f)*—*Rent when due*—*Several demises.*—Rent may be made payable in advance, so as to entitle the landlord to distrain for it at the commencement instead of at the end of each quarter(g). When there is a reservation of an annual rent, or a covenant, or agreement by a tenant to pay so much a year, a stipulation for the determination of the tenancy at the expiration of any one quarter of a year, by a six or three months' notice, will not raise a presumption that the rent was to be paid quarterly(h). Where a landlord agreed to let a house at a yearly rent of 50*l.*, and likewise a stable and loft at a further rental of 25*l.* per annum, to be paid on the

(b) *Haines v. Welch*, L. R., 4 C. P. 91. See 33 & 34 Vict. c. 35, "The Apportionment Act, 1870."

(c) *Giles v. Spencer*, 3 C. B., N. S. 253; 26 Law J., C. P. 237.

(d) *Regnert v. Porter*, 5 M. & P. 370.

(e) *Mechelen v. Wallace*, 7 Ad. & E. 54, n.

(f) See *De Nichols v. Saunders*, *post*, p. 641.

(g) *Lee v. Smith*, 9 Exch. 665. *Conway v. Starkweather*, 1 Denio, 113.

(h) *Collett v. Curling*, 10 Q. B. 785; 16 Law J., Q. B. 396.

usual quarter-days, it was held that this was a demise of two different sets of premises at separate rents, payable at different periods; that the 50% rent was payable yearly, and the 25% rent payable quarterly(*i*). Where a contract was entered into for the letting and hiring of a house for a year certain, at a rent payable quarterly, "or half-quarterly if required," and the tenant entered into possession, and paid his rent quarterly for the first year of the tenancy, at the expiration of which period the lessor, without any previous demand or notice to the tenant, distrained for half a quarter's rent then alleged to be due, it was held that the lessor had no right so to do without giving a previous intimation and notice to the tenant of his election to take the rent half-quarterly(*j*).

If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and after a seizure has been made, he may rescue his goods at any time before they have been impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them(*k*).

710 *Distress after the termination of the term of hiring*.—At common law the landlord could not, it seems, have distrained after the expiration of the term for rent that accrued due before the termination thereof, as his reversion was then gone, the entire estate being revested in him in possession(*l*), but now, by 8 Anne, ch. 14, ss. 6, 7, it is enacted, that it shall be lawful for him to distrain for arrears of rent due upon any lease ended or determined after the determination of the lease, in the same manner as he might have done if such lease had not been ended or determined; provided such distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom such arrears became due(*m*). *Primâ facie*, therefore, the executors or other personal representatives of a tenant could not be distrained upon. But the Court of Queen's

(*i*) *Coomber v. Howard*, 1 C. B. 440.

(*j*) *Mallam v. Arden*, 3 M. & Sc. 795; 10 Bing. 269.

(*k*) 1 Inst. 47b, 161a; Gilbert on Distress, 61. See *Bailey v. Wright*, 3 McCord, 484; *Myers v. Mayfield*, 7 Bush (Ky.), 212; *Evans v. Herring*, 3 Dutch. (N. J.) 243; *Fry v. Breckenridge*, 7 B. Mon. 31; *O'Farrill v. Nance*, 2 Hill (S. C.), 484.

(*l*) *Williams v. Stiven*, 9 Q. B. 14; 15 Law J., Q. B. 321.

(*m*) See *Burr v. Van Buskirk*, 3 Cow. 263; *Pemberton v. Van Rensselaer*, 1 Wend. 307; *Williams v. Terboss*, 2 ib. 148.

In Pennsylvania, the landlord's right to distrain after the termination of the term is not limited as to time; the statute giving him this right whenever the rent is in the arrear, if the title remains in him. *Moss' Appeal*, 35 Penn. St. 162.

Bench has held a distress to be good during the possession of the executors, when the tenancy was not determined by the death of the tenant(*m*). Where, however, there is no possession by any one who can be said to be the representative of the tenant, and the tenancy is determined by the death of the tenant, the statute of Anne does not apply, and there is no power to distrain(*n*). Where a tenant went away, leaving behind him a cow and a few pigs, without asking permission to leave them, or saying when he was going to take them away, and the succeeding tenant entered and took possession, it was held that the lessor had no right to distrain the things so left, as the tenant was not then in the possession and occupation of the premises(*o*). The customary right of the tenant to an away-going crop always operates as a prolongation of the term as to the land on which the crop grows for the period allowed by the custom for getting in and gathering the crop. All the rights and properties belonging to the original contract are continued during the period in question, and among them the landlord's right to distrain. Therefore, where a part of the tenant's corn remained in a barn on the demised premises beyond the period of six calendar months, but within the term allowed by custom for the outgoing tenant to get in and dispose of his crop, it was held that the corn might be distrained by the landlord(*p*).

If, by the tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract are also continued, and among them the landlord's right to distrain. It has often been determined that if there be a lease, and after the determination of it, the tenant holds over, with the consent of the landlord, he must hold upon the terms, and is liable to all the conditions and covenants, of the lease(*q*). If after the determination of a tenancy by the expiration of a notice to quit the tenant holds over, and the landlord distrains for rent, the landlord thereby waives the notice, and affirms and continues the tenancy(*r*).

(*m*) *Braithwaite v. Cooksey*, 1 H. Bl. 465. In Maryland, it has been held that a distress for rent due from a deceased tenant may be made on the premises so long as they are in the possession of any person claiming by, from or under the deceased tenant, although letters of administration have not been granted. *Keller v. Weber*, 27 Md. 680. See *Mickle v. Miles*, 1 Grant's Cas. (Penn.) 320.

(*n*) *Turner v. Barnes*, 31 Law J., Q. B. 170. See 33 & 34 Vict. c. 35.

(*o*) *Taylorson v. Peters*, 7 Ad. & E. 110; 2 N. & P. 622.

(*p*) *Beavan v. Delahay*, 1 H. & Bl. 9. *Lewis v. Harris*, ib. 7, *u.* (*a*). *Nuttall v. Staunton*, 4 B. & C. 51.

(*q*) *Beavan v. Delahay*, 1 H. Bl. 9; *ante*, p. 635.

(*r*) *Zouch v. Willingale*, 1 H. Bl. 311.

711 *Distress by agents—Joint tenants—Tenants in common, etc.*—A mere receiver of rents (not being a receiver appointed by the Court of Chancery) has no power to distrain, although he may be authorized to collect and receive the rents for his own benefit(s). And when an agent or bailiff receives a special authority from the lessor to levy a distress upon the demised premises, the authority should be given and acted upon in the name of the lessor or reversioner. But if the agent distrains in his own name, and gives a notice in writing, stating the rent to be due to himself, he may, nevertheless, justify in the name and as the bailiff of the lessor. A person beneficially interested in the demised premises may use the name of the owner of the legal estate to levy a distress. The cestui que trust, therefore, may distrain in the name of the trustee, and a mortgagor, in certain cases, in the name of the mortgagee(t). A receiver appointed by the Court of Chancery has a power of distress, and need not previously apply to the Court for a particular order for that purpose(u). One joint-owner or joint-reversioner may distrain alone, but he must, it seems, avow and justify the taking of the distress in his own right, and as bailiff to the other(v). He may also sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others expressly dissent(w). The same rule prevails in the case of co-parceners and co-heirs in gavelkind, any one of whom may avow and justify the distress in his own right, and make conusance as the bailiff of the others without averring or showing any express authority from them to distrain(x). If one of several joint-tenants of the reversion to which the rent is incident conveys away all his estate and interest in the demised premises, the right to distrain for the rent is extinguished, for there can be no apportionment of the rent by the severance of the reversion(y). The payment of rent in advance to a landlord mortgagor, unless by agreement the tenant is bound to do it, is not valid as against mortgagees, who may consequently distrain for it(z).

Tenants in common who have several estates, and are severally entitled to the rent and the reversion of the demised premises, should make several distresses. They may, of course, authorize a bailiff to

(s) *Ward v. Shew*, 2 M. & Sc. 756; 9 Bing. 608.

(t) *Trent v. Hunt*, 9 Exch. 14; 22 Law J., Exch. 320. *Snell v. Finch*, 32 Law J., C. P. 177; 13 C. B., N. S. 651.

(u) *Brandon v. Brandon*, 5 Madd. 473. *Bennett v. Robins*, 5 C. & P. 379.

(v) *Pullen v. Palmer*, 5 Mod. 73, 150; 3 Salk. 207.

(w) *Robinson v. Hoffman*, 1 M. & P. 474; 4 Bing. 562; 3 C. & P. 234.

(x) *Leigh v. Shepherd*, 5 Moore, 297; 2 B. & B. 465.

(y) *Staveley v. Allcock*, 16 Q. B. 636; 20 Law J., Q. B. 321.

(z) *De Nicholls v. Saunders*, L. R., 5 C. P. 589. See *Cook v. Guerra*, L. R., 7 C. P. 132.

distrain on behalf of all, or one tenant in common may distrain on his own account, and as the bailiff and agent of others, but they must avow and justify the taking of the distress separately in respect of their several shares(a). And one tenant in common may distrain for his own share of the rent, although the rent has been reserved in one sum payable to all generally, and not in several sums payable to each; and therefore, where a lessee holding under two tenants in common, at a yearly rent of 18*l.*, payable quarterly, received notice from one of them to pay to him a moiety of the rent as soon as it became due, and the lessee, notwithstanding such notice, paid the whole rent to the other tenant in common, it was held that the one who had thus given the notice might distrain upon the land for his moiety of the rent(b). Where fifty acres of arable land were demised by four persons (whose original title did not appear) at one entire rent of 94*l.* per annum, to be divided and paid to the four lessors separately in equal portions, it was held that as between themselves and the lessee they must be taken to be tenants in common of the reversion, and that one of the four was entitled to distrain for a fourth part of the rent independently of the rest(c).

712 *Distress by executors and administrators.*—By 3 & 4 Wm. 4, c. 42, ss. 37, 38, the executors and administrators of a lessor or landlord may distrain upon lands demised for any term or at will for arrearages of rent due to such lessor or landlord in his lifetime.

713 *Agreements not to distrain.*—The right to distrain may be waived, abandoned, or postponed by the express contract or agreement of the landlord, for it is not an inseparable incident to a rent service(d). If, therefore, a landlord has agreed with the owner of cattle not to distrain them if they are put into a particular close, and they are afterwards distrained there by the landlord, in violation of his agreement, an action for a trespass in taking the cattle is maintainable against him(e).

714 *Acceptance of a bill or note by way of payment.*—A landlord is not deprived of his right to distrain by taking a bill, or note, or other security for the rent, unless it be proved that the landlord, at the time he accepted the security, bound himself not to distrain(f), or unless

(a) Litt. sec. 314-317.

(b) *Harrison v. Barnby*, 5 T. R. 246.

(c) *Whitley v. Roberts*, McL. & Y. 107.

(d) *Giles v. Spencer*, 3 C. B., N. S. 244; 26 Law J., C. P. 237.

(e) *Horsford v. Webster*, 1 C. M. & R. 699. *Welsh v. Rose*, 6 Bing. 638; 4 M. & P. 490.

(f) *Davis v. Gyde*, 2 Ad. & E. 626. See *Bramwell v. Eglinton*, 33 Law J., Q. B. 130. *Henderson v. Boyer*, 44 Penn. St. 220. *Sherman v. Dutch*, 16 Ill. 288.

it be proved that the note was paid at maturity(*g*). If the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and pays over the amount of the note to the landlord, and the note is subsequently dishonored, the landlord may return the money to the bailiff or treat it as an advance or loan from him, and distrain again for the unpaid rent(*h*).

715 *Tender of rent before distress* renders the distress wrongful *ab initio*. If, therefore, after a broker has received a warrant of distress, but, before it is executed, the rent is tendered, the right to distrain is gone(*i*).

716 *Time, mode, and place of distraining*.—The tenant has the whole day on which the rent becomes due to pay such rent, and a distress therefore cannot be made until the day after the day appointed for the payment of the rent(*k*). A landlord or his bailiff cannot lawfully break open gates, or break down inclosures, or force open the outer door of any dwelling-house or building(*l*), or even enter by a window which is shut but not fastened(*m*), in order to make a distress, but he may enter by a door which is shut but not fastened, for that is the ordinary method of entry, and a person who leaves his door unfastened implies a license to any one who has business to enter the premises, and so he may draw a staple or undo fastenings which are ordinarily opened from the outside of the house(*n*), or perhaps enter by an open window(*o*). A distress, moreover, cannot be made after sunset, or before sunrise(*p*); nor upon land which does not form part or parcel of the demise, and from which the rent reserved does not issue, unless the goods of the tenant have been removed thereto from the demised premises within sight of the lord coming to distrain, or unless they have been fraudulently removed thereto by the tenant to avoid the distress. If, therefore, a tenant enjoys an easement over, or a right to use, the land of a third person, and has, in the *bonâ fide* exercise of such right, placed his goods and chattels on the land of such third person, the lessor has no right to distrain them there. Thus, where a

(*g*) *Harris v. Shipway*, Bull. N. P. 182a. *Giles v. Ebsworth*, 10 Md. 333. *Snyder v. Kunkle man*, 3 Penn. 487. *Bailey v. Wright*, 3 M'Cord, 484.

(*h*) *Parrott v. Anderson*, 7 Exch. 93; 21 Law J., Exch. 291.

(*i*) *Bennett v. Bayes*, 5 H. & N. 391; 29 Law J., Exch. 224.

(*k*) 21 Hen. 6, 40. *Duppa v. Mayo*, 1 Saund. 287.

(*l*) *Brown v. Glenn*, 16 Q. B. 254; 20 Law J., Q. B. 205. *Dent v. Hancock*, 5 Gill, 120.

(*m*) *Nash v. Lucas*, L. R., 2 Q. B. 590.

(*n*) *Ryan v. Shilcock*, 7 Exch. 72; 21 Law J., Exch. 55.

(*o*) *Nixon v. Freeman*, 5 H. & N. 647.

(*p*) Co. Litt. 142a; *Gilbert on Distress*, 50. *Tutton v. Darke*, 5 H. & N. 654; 29 Law J. Exch. 271. *Sherman v. Dutch*, 16 Ill. 283. *Fry v. Breckinridge*, 7 B. Mon. 31.

wharf on the banks of a tidal river was demised to a tenant at an annual rent, with a right to use part of the bed of the river, between high and low-water mark, as a place of deposit for boats, and barges resorting to the wharf; it was held that the lessor of the wharf had no right to distrain the barges of the tenant lying on such land and bed of the river alongside the wharf, although they were attached to the wharf by head and stern-ropes, inasmuch as the land on which the barges were lying belonged to the crown, and had never been demised to the tenant(*q*). For the same reason a landlord could not, by the common law, distrain the beasts and cattle of a tenant feeding upon a common, and which had been placed there by the tenant in the *bonâ fide* exercise of a right of common vested in him in his own right, or as appurtenant to the land demised to him by the lessor. But this has been altered by 11 Geo. 2, c. 19, s. 8, which empowers landlords to take and seize, as a distress for arrears of rent, any cattle or stock of their tenants feeding or pasturing upon any common appendant or appurtenant.

717 Things not distrainable.—Tenants' fixtures annexed to the freehold by nails and permanent fastenings, such as furnaces, chimney-pieces, kitchen-ranges, stoves, coppers, grates, blinds, etc., are not distrainable, as they cannot be removed and restored without sustaining some injury(*r*). But if they are attached to the freehold by bolts and screws, so as to be moveable, they may be distrained and taken. Therefore cotton-spinning machines fixed to a wooden floor by screws, or soldered to a stone flooring, but fastened so as to be readily removable, are distrainable(*s*). A millstone in a mill, and an anvil in a smith's shop, however, cannot be distrained for rent, although the anvil be removed out of the stock, or the millstone out of the socket to be picked, for the anvil is accounted part of the forge, and the millstone part of the mill, though when taken it is not actually affixed to the freehold(*t*). Tram-plates and sleepers of a railway merely laid upon the ground, although they have become indented in the soil by user, are distrainable(*u*); but if they have been packed in ballast, so that they cannot be removed without making holes in the ballast, they are not(*v*).

(*q*) *Buszard v. Capel*, 8 B. & C. 141; 3 M. & P. 494; 6 Bing. 150.

(*r*) Co. Litt. 47b. *Pitt v. Shew*, 4 B. & Ald. 207. *Darby v. Harris*, 1 Q. B. 898. *Dalton v. Whitten*, 3 Q. B. 961.

(*s*) *Hellawell v. Eastwood*, 6 Exch. 309; 20 Law J., Exch. 155. See *Longbottom v. Berry* L. R., 5 Q. B. 123; *Holland v. Hodgson*, L. R., 7 C. P. 328.

(*t*) Bro. Abr. DISTRESS, pl. 23.

(*u*) *Beaufort (Duke of) v. Bates*, 3 De G., F. & J. 381; 31 Law J., Ch. 481.

(*v*) *Turner v. Cameron*, L. R., 5 Q. B. 308.

By 51 Hen. 3, stat. 4, it is provided that no man of religion, nor other person, shall be distrained by his beasts that profit his land, nor by his sheep, by the king's or other bailiffs, so long as they can find other distress, or other chattels sufficient for the levying of the distress. Beasts of the plough are by common law exempt from distress; but to render other animals exempt on the ground that they profit the land, within the above statute, it is not enough to show that they are occasionally used in manuring the soil: it must be proved that they have been broken to harness, and are regularly employed in ploughing, harrowing, or drawing carts or wagons upon the farm, in the ordinary cultivation of the land. Heifers and steers, therefore, and young colts not broken to harness, are not "beasts that profit the land" within the meaning of the statute. Sheep, also, are exempt from distress at common law, independently of the statute, so long as there are other distrainable chattels and animals, not being beasts of the plough, sufficient to satisfy the rent(*w*).

Implements of husbandry are also exempt from distress, and so are the tools and instruments of a man's trade or profession, such as the books of the scholar, the axe of the carpenter, the anvil of the smith, the stocking-loom of the weaver, the threshing-machine of the farmer, and the spade and axe of the laborer, so long as they are in actual use, or there are other goods on the demised premises sufficient to satisfy the rent without them(*x*). Wearing apparel, also, in actual use about the person of the wearer, is not distrainable, whether it be the wearing apparel of the tenant himself or of a guest in his house(*y*).

718 *Perishable articles, growing crops, fruit, money, etc.*, have always been considered to be unfit to be taken and detained as a pledge for rent, inasmuch as they are liable to rapid deterioration, and cannot be restored to the tenant in as good plight as they were in when taken, within the period allowed by law for their redemption. Therefore fruit, milk, the flesh of animals recently slaughtered(*z*), and other things of a perishable nature, could not be distrained; but as the 2 W. & M. c. 5, s. 3, directs the distress to be sold within five days unless replevied, perhaps the ancient rule of the common law with respect to the perishable nature of the distress no longer extends, in the case

(*w*) *Keen v. Priest*, 4 H. & N. 236; 28 Law J., Exch. 157.

(*x*) *Simpson v. Hartopp*, Willes, 512. *Wood v. Clarke*, 1 Cr. & J. 484. *Harvey v. Pocock*, 11 M. & W. 740; Co. Litt. 47a. *Nargatt v. Nias*, 28 Law J., Q. B. 143. *McDowell v. Shotwell*, 2 Whart. 26.

(*y*) Bac. Abr. INNS, B.

(*z*) *Morley v. Pincombe*, 2 Exch. 101.

of a distress for rent, to anything which is not liable to deterioration within the period prescribed by the statute for the sale of it. As the things distrained were regarded at common law in the light of a pledge, to be returned to the tenant when the rent was paid, it was held that money could not be distrained unless in a bag, because the identical pieces could not be known and restored; and that grain or flour could not be taken out of a sack, or hay from a barn, because it could not well be ascertained whether the identical quantity taken had been returned. Corn in the sheaf was not distrainable unless found in a cart^(zz). Growing corn, grass, fruits, hops, roots, and growing produce, also, were not distrainable, as the crop was attached to the freehold, and could not be taken up and returned to the tenant, in case he chose to redeem the pledge, in the same state and condition as it was when removed^(a). But the 2 W. & M. sess. 1, c. 5, s. 3, and 11 Geo. 2, c. 19, ss. 8 and 9, now enable the lessor to distrain loose corn and corn in the sheaf, straw and hay, growing corn, grass, hops, roots, fruit, pulse, and growing produce generally. These Acts, however, do not extend to trees, shrubs, and plants growing in nursery gardens, nor to money^(b).

719 *Property of strangers on the demised premises in their own possession.*—

The landlord has no right to distrain the carriage and horses of a morning visitor standing at the door of the tenant's dwelling house, or under a shed upon the demised premises; or the horse of a stranger who has called at the house on business, and tied up the animal to the gate or the stable-door. He cannot distrain a horse which has brought corn to be ground at the tenant's mill, and has been fastened to the mill door whilst the corn was being ground to be taken back, nor a horse which has brought yarn to a private weighing machine belonging to the tenant to be weighed, and has been placed in a stable on the demised premises whilst the weighing was accomplished; the horse in each of these cases being in the possession and use, and under the control, of the owner or his servant^(c). Neither can the landlord distrain the boat or barge of a third person lying in a private dock or private canal, or alongside a wharf upon the demised premises, provided such boat or barge is in the hands and under the care of the master and crew of the owner, and is at the time employed in the owner's business, and is in his use and possession, and not in the use

(zz) *Given v. Blann*, 3 Blatchf. 64.

(a) 1 Roll. Abr. 667; *Bradley on Distress*, 213; *Gilbert on Distress*, 32.

(b) *Clark v. Gaskarth*, 2 Moore 491.

(c) *Read v. Burley*, Cro. Eliz. 596.

and possession nor under the control of the tenant; but if it is abandoned and left upon the premises, in the possession or use, or under the care, of the tenant or his servants, then it is distrainable(*d*).

The goods and chattels and wearing apparel of a guest in the tenant's house, in the actual possession and use of such guest cannot be distrained for rent, whether the house in which the guest is lodged is a private dwelling-house or a common inn; nor the goods and chattels of third persons placed upon the demised premises, in the possession and under the care of the tenant, in the ordinary course of trade; nor the goods and chattels, horses and carriages of travellers, deposited in hostelries and public stables, or in a market or fair where things are taken to be bought or sold; nor goods delivered to a carrier to be carried for hire. The horse in the smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, etc., in the hostelry, nor the materials in the weaver's shop for the making of cloth, or cloth or garments at a tailor's, nor sacks of corn nor meal in a mill, nor in a market, for it is in custody (protection) of law(*e*).

720 *Property of strangers placed on the demised premises*, if placed there with the leave and license of the landlord, is not distrainable. If, for example, the landlord's permission to place cattle on the demised premises has been sought for and obtained, and the beasts are placed thereon with his authority, he is held impliedly to have undertaken not to exercise his power of distress against them(*f*). By 34 & 35 Vict. c. 79, if the goods of a lodger are taken as a distress by the superior landlord, the lodger may make and serve upon the landlord or his bailiff a declaration that such is the fact, accompanied by a correct inventory of the goods, and a tender of the rent, if any, which the lodger then owes to the tenant, and if after service of such declaration and inventory the landlord proceeds with the distress, he will be guilty of an illegal distress, and liable to an action at law at the suit of the lodger. The lodger may also apply to a magistrate for an order for the restoration of the goods. By 35 & 36 Vict. c. 50, the rolling stock of a railway company at any works to which there is a railway siding, which rolling stock is not the property of the tenant of such works, is exempt from distress, if marked with the name or brand, etc., of the actual owner.

(*d*) *Muspratt v. Gregory*, 3 M. & W. 677.

(*e*) 7 Hen. 7, 1b; Bro. Abr. DISTRESS, pl. 57, 71; 1 Roll. Abr. 688, pl. 12; Co. Litt. 47a. *Gisbourn v. Hurst*, 1 Salk. 249.

(*f*) *Joyce v. Fowkes*, 2 Vern. 129. *Horseford v. Webster*, 1 C. M. & R. 696. *Giles v. Spencer*, 3 C. B., N. S. 253.

721 *Materials placed on the demised premises to be manufactured or worked upon.*—The goods and chattels of third persons placed on the demised premises for trading or manufacturing purposes are, by the policy of the law, exempt from distress; such as the yarn of a stocking-manufacturer, placed in the house of the tenant, a stocking-weaver, to be woven into stockings, but not the frame or machinery of the manufacturer, delivered to the weaver to enable him to weave the yarn(*g*); also the silk of a velvet-manufacturer, delivered to a tenant, a silk-weaver, and taken home by him to be made into velvet at his own house(*h*); bullocks sent to a slaughterer or carcase-butcher, to be slaughtered and cut up in the way of his trade, and sent back in joints to the owner to be sold or consumed(*i*); corn sent to a miller to be ground; clothes sent to a tailor's, casks sent to a cooper's, or boats to a boat-builder, to be repaired; goods sent to a weigher to be weighed, or to an auctioneer, commission-agent, factor, warehouseman, granary-keeper, wharfinger, or other agent, to be sold or exported, or otherwise to be dealt with in the course of trade(*k*). And so of goods in the possession of a pawnbroker as security for money advanced(*l*). "The principle of the exemption," observes Parke, B., "is the public good; that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately; or buy or sell in markets or fairs, and thus supply themselves with the commodities of life"(*m*).

722 *Property of guests at a common inn cannot be distrained* for the rent of the inn, for it would be a sore detriment to travellers and wayfarers who are obliged by necessity to resort to common inns, if their goods and effects were liable to be seized and sold in case of non-payment of the rent of the inn(*n*).

723 *Chattels in the custody of the law are not distrainable.*—Goods and

(*g*) Wood v. Clarke, 1 Cr. & J. 484. Unfinished cloth sent to a mill to be wrought is not distrainable unless it belongs to the tenant. Hoskins v. Paul, 4 Halst. 110.

(*h*) Gibson v. Ireson, 3 Q. B. 39.

(*i*) Brown v. Shevill, 2 Ad. & E. 138.

(*k*) Bac. Abr. DISTRESS, B. Williams v. Holmes, 8 Exch. 861. Adams v. Crane, 1 C. & M. 380. Brown v. Arundel, 10 C. B. 54. Gilman v. Elton, 6 Moore, 243. Thompson v. Mashiter, 8 Moore, 254. Matthias v. Mesnard, 2 C. & P. 353. Himely v. Wyatt, 1 Bay, 102. Brown v. Simms, 17 S. & R. 138. Walker v. Johnson, 4 M'Cord, 552. McCreery v. Claffin, 37 Md. 435. Bevan v. Crooks, 7 Watts & Serg. 452. Owen v. Boyle, 9 Shep. 47. Connah v. Hale, 23 Wend. 462. Briggs v. Large, 30 Penn. St. 287. But see Elford v. Clark, 2 Brevard, 88.

(*l*) Swire v. Leach, 34 L. J., C. P. 150.

(*m*) Joule v. Jackson, 7 M. & W. 451.

(*n*) Bro. Abr. DISTRESS, pl. 57, 71; 1 Roll. Abr. 68, pl. 12. Stone v. Matthews, 7 Hill, 428. Riddle v. Welden, 5 Whart. 9. But see Trieber v. Knabe, 12 Md. 491. Harris v. Boggs, 5 Blackf. 489.

chattels which have been actually seized under a *fi. fa.* or taken under an attachment, and are in the possession of a sheriff's officer or bailiff, cannot be distrained for rent, as they are in the custody of the law(o), but if the landlord is beforehand with the sheriff, and puts in a distress before the sheriff's officer has got possession, the sheriff cannot then seize them. The landlord is entitled to distrain for six years' arrears of rent(p), and if he gets possession before the sheriff he is entitled to retain and sell, and satisfy the whole six years' arrears if they be due.

If growing crops have been taken in execution and sold by the sheriff, such crops, as long as they remain on the demised premises, are liable to be distrained for rent accruing due subsequently to the execution and sale (14 & 15 Vict. c. 25, s. 2), in default of sufficient distress of the goods and chattels of the tenant; and if the execution is fraudulent(q), or the sheriff's officer, after the seizure of the goods, relinquishes the possession, and leaves no one in possession of them, then they may be distrained and taken(r).

The landlord is entitled, in some cases, to a year's rent, and in other cases to four weeks' arrears of rent, before goods taken in execution by the sheriff or the officers of the county court can be removed from the premises(s).

724 *Statutory exemption from distress in favor of foreign ambassadors, and public companies in liquidation.*—It is enacted by 7 Anne, c. 12, s. 3, on grounds of public policy, that process of distress against the goods of any ambassador, or other public minister of a foreign state, or of his domestic servants, shall be void.

By the 25 & 26 Vict. c. 89, s. 163, it is enacted that where any company is being wound up by the court, or subject to the supervision of the court (of Chancery), any attachment, distress, execution, etc., put in force against the estate and effects of the company after the commencement of the winding-up, shall be void to all intents(t). And the 87th section provides that after a winding-up order, no suit, action, or other proceeding shall be commenced or proceeded with against the company without the leave of the court. However, if a company, being equitable owner of a lease, continues in occupation

(o) *Wharton v. Naylor*, 12 Q. B. 673. *Pierce v. Scott*, 4 Watts & Serg. 344.

(p) *Humfrey v. Gery*, 7 C. B. 567. Cattle taken to be pastured by a tenant for hire are not liable to distress for rent. *Cadwalder v. Tindall*, 20 Penn. 422.

(q) *Smith v. Russell*, 3 Taunt. 400. *St. John's College v. Murcott*, 7 T. R. 263.

(r) *Blades v. Arundale*, 1 M. & S. 713.

(s) As to this, and as to Distress by Bailiffs of the County Court, see *post*, ch. 14, s. 1.

(t) See *Re Progress Assurance Co.*, L. R., 6 Eq. Ca. 370.

after a winding-up order, the landlord is not prevented by ss. 87 or 163 of the above Act from distraining upon the goods of the company for rent accrued since the winding-up(*u*).

725 Things distrainable—*Chattels of traders left on the demised premises in the possession of the tenant*.—If a trade can be carried on with profit and advantage, without the things used in the trade being left on the demised premises in the custody and possession of the tenant, they are not there *ex necessitate*, and are consequently distrainable. Thus it has been held that if a brewer's casks be left with a publican until the beer is consumed, the casks do not fall within the exemption, and are not privileged from distress, inasmuch as it is nowise essential to the carrying on the trade of the publican, that the brewer should find the casks(*v*). So, if the barge of a purchaser of salt is left at the salt-works in the possession of the vendor of the salt, it is distrainable for rent, inasmuch as "it is not necessary for the protection of trade that the boat should be delivered into the custody of the person manufacturing and selling salt. The trade may well be carried on at the salt-works without the possession of the boat being at all parted with by the owner." Upon the same principle it has been held that a farmer's cart which has brought malt to a brewer, and has been left in the brewer's yard, in possession of the brewer or his servant, to be loaded with a return cargo of grains, or beer, is distrainable for the rent of the brewing premises(*w*).

If a carriage which has been sent to a coach-maker to be repaired is left on the premises after the repairs have been completed, for purposes foreign to the trade of a coach-maker, it is distrainable, unless the coach-maker exercise some other trade thereon, and the carriage is left with him for the purpose of being dealt with by him in the exercise of such trade. If he exercises the trade of a commission agent for the sale of coaches and carriages, as well as the trade of a coach-maker, and the carriage is left with him to be sold, it would then come within the principle of the exemption(*x*). It has been held that a carriage standing at livery is distrainable(*y*). Whenever a chattel, such as a threshing machine, or a loom, found upon the demised premises, has been lent or let by the owner to the tenant, it is distrainable, if it

(*u*) *Re Lundy Granite Co.*, L. R., 6 Ch. App. 462. Whether the leave of the Court is necessary, *quære*. S. C.

(*v*) *Joule v. Jackson*, 7 M. & W. 451.

(*w*) *Muspratt v. Gregory*, 3 M. & W. 677.

(*x*) *Findon v. M Laren*, 6 Q. B. 891.

(*y*) *Francis v. Wyatt*, 3 Burr. 1498; 1 W. Bl. 483. *Parsons v. Gingell*, 4 C. B. 545.

is not in actual use at the time of the levying the distress(z). There is a decision to the effect that cattle on their way to market in charge of a drover, and turned into a close on the demised premises in the night, are distrainable(a); but this decision appears to be directly at variance with numerous authorities, and with the principles established for the benefit of trade, and cannot now be considered law(b).

With the exception of fixtures, perishable articles, and things used in trade or placed on the demised premises for trading or manufacturing purposes, or standing there in the custody or possession of the owner, as previously mentioned (*ante*, p. 645), all the goods and chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable for the rent due from such premises(bb). This is the case with the horses and carriages of strangers standing at livery on the demised premises, and not being at the time of the distress under the charge or in the possession of the owner or his servants(c).

726 Distress of chattels mortgaged by the tenant.—Where a tenant from whom rent was due assigned all his goods and chattels by a registered bill of sale by way of mortgage, and was left in possession of the mortgaged chattels, and the landlord distrained them for rent, and caused them to be appraised, and removed to an auction-room to be sold, and the mortgagee, before the sale, and whilst the goods were in the custody of the law, gave notice to the landlord of the mortgage, and required the landlord to deliver to him, the mortgagee, any goods that might remain after the landlord had sold enough to satisfy the distress and costs, and the landlord promised so to do, and part of the goods remained unsold, and the landlord carried them back to the demised premises and returned them to the custody and possession of his tenant, from whom he took them, taking no heed of the notice given him by the mortgagee, or of his promise to return the goods to the latter, it was held that the landlord was not liable to an action at the suit of the mortgagee, as it did not appear that he had been guilty of any tortious act, or that the mortgagee had sustained any damage in respect of the removal of those goods which had been taken

(z) *Fenton v. Logan*, 3 M. & Sc. 82. *Gorton v. Falkner*, 4 T. R. 565.

(a) *Fowkes v. Joyce*, 3 Lev. 260; 2 Ventr. 50.

(b) *Tate v. Glead*, 2 Saund. 290a.

(bb) *Kessler v. McConachy*, 1 Rawle, 435. *Himely v. Wyatt*, 1 Bay, 102. *Spencer v. McGowen*, 13 Wend. 256. *Blanche v. Bradford*, 38 Penn. St. 344.

(c) *Parsons v. Gingell*, 4 C. B. 545; 16 Law J., C. P. 230. But see *Youngblood v. Lowry*, 2 McCord, 39.

away from and returned to the mortgagor, in whose possession the mortgagee had left them, and which were as much subject to the provisions of the bill of sale after their return as they had been before they were taken away(*d*).

If, after the tenant has mortgaged the goods and chattels on the demised premises, the mortgagee enters and takes possession, and the tenant becomes bankrupt, owing more than a year's rent, and the landlord distrains, he is entitled to make the distress available for the whole rent due to him, as the Bankrupt Act was never intended to favor the mortgagee at the expense of the landlord(*e*).

727 *Things distrainable under a license to distrain*.—If a debtor gives his creditor a license to enter upon the debtor's land and distrain all the goods and chattels upon the debtor's premises(*f*), and sell them in satisfaction and discharge of the debt, this will not enable the creditor to seize and sell the property of a stranger, for a license of this sort cannot be made to extend to and bind those who are not parties to it(*g*). If, therefore, the occupier of a farm borrows money, and binds himself to pay interest, and covenants that if the interest should be in arrear for a certain time, the covenantee shall have power to enter upon the farm and distrain for the arrears in the same manner as landlords may distrain for rent, this will be a license to the covenantee to enter and seize all the goods on the premises then belonging to the covenantor, but will not enable him to take the goods of a stranger(*h*). A license to seize chattels is a mere personal authority, to be exercised by the licensee, and cannot be granted over or assigned to another(*i*).

The grantee of a rent-charge, with power of distress, may justify the taking corn, etc., in a stack or in trusses, under the 2 Wm. & M., sess. 1, c. 5 (*ante*, p. 645), in the same way as a landlord under a distress for rent; also the taking of the goods of a stranger on the premises charged with the rent. If the plaintiff whose goods have been taken held under a demise prior to the rent-charge, he ought to reply that fact(*k*).

(*d*) *Evans v. Wright*, 2 H. & N. 527; 27 Law J., Exch. 50. Chattels in the possession of the tenant, but under a *bona fide* mortgage, are not distrainable. *Stamps v. Gilman*, 43 Miss. 456.

(*e*) *Brocklehurst v. Lawe*, 7 Ell. & Bl. 185; 26 Law J., Q. B. 107. The 120th section of the old Act (12 & 13 Vict. c. 106), under which this case was decided, and the 34th section of the present Act (32 & 33 Vict. c. 71) are substantially the same.

(*f*) As to after-acquired property, see *Reeve v. Whitmore*, 32 Law J., Ch. 497.

(*g*) *Howes v. Ball*, 7 B. & C. 481.

(*h*) *Freeman v. Edwards*, 2 Exch. 739.

(*i*) *Brown v. Metrop. County Society*, 1 Ell. & Ell. 838; 28 Law J., Q. B. 236; *ante*, p. 116.

(*k*) *Johnson v. Faulkner*, 2 Q. B. 936. As to a distress for tithe rent-charge, see *Ex parte Arnison*, L. R., 3 Exch. 36.

728 *Distress and seizure of things fraudulently removed.*—By 11 Geo. 2, c. 19, s. 1, it is enacted, that if any tenant of any lands or tenements, upon the demise or holding whereof any rent is reserved, shall fraudulently or clandestinely convey away from the demised premises his goods or chattels, to prevent the landlord from distraining for arrears of rent, it shall be lawful for the landlord, or any person by him for that purpose lawfully empowered, within thirty days next ensuing the carrying away of the goods, to seize the same wherever they shall be found, as a distress for the rent, and sell and dispose of them as if they had been actually distrained upon the demised premises, provided (s. 2) they have not, before the seizure, been sold *bonâ fide* and for a valuable consideration to a person ignorant of the fraud. Where the goods have been placed in any building or inclosure locked or fastened, the landlord, his bailiff or agent, first calling to his assistance a constable or peace-officer, etc., may in the daytime break open the building and seize the goods; but before breaking open a dwelling-house, oath must be made (s. 7), before a justice of the peace, that there is reasonable ground to suspect that such goods and chattels are in the dwelling-house(l).

If it appears that rent was due at the time of the removal of the goods, and that the goods were taken away on or after the day the rent became due, for the purpose of putting them out of reach of a distress, the removal is a fraudulent removal within the meaning of the statute(m).

If, therefore, goods are removed on quarter-day, they may be followed, though the rent is not in arrear, and there is no right to distrain until the day after(n). But if the rent is not due, or there is sufficient distress on the demised premises, independently of the goods removed, to satisfy the rent, the removal is not fraudulent, and the lessor cannot consequently follow and distrain the goods(o). The statute applies solely to the goods of a tenant and not to those of a stranger. If, therefore, a lodger removes his goods to prevent them from being distrained for rent due from the tenant whose lodger he is, the landlord cannot follow them and distrain them(p). To deter tenants from fraudulently removing their goods to avoid a distress, a

(l) As to pleas of justification of the seizure of goods under this statute, see *Williams v. Roberts*, 7 Exch. 629.

(m) *Opperman v. Smith*, 4 D. & R. 33. *Johns v. Jenkins*, 1 Cr. & M. 227. See *Purfel v. Sands*, 1 Ashmead, 120; *Rogers v. Brown*, 1 Spears, 283.

(n) *Dibble v. Bowater*, 2 Ell. & Bl. 564.

(o) *Rand v. Vaughn*, 1 Sc. 670.

(p) *Thornton v. Adams*, 5 M. & S. 38. See *Sleeper v. Parrish*, 7 Phil. (Pa.) 247.

penalty to the amount of double the value of the things distrained is imposed upon the offender, which may be recovered by an action of debt, or (if the goods do not exceed 50*l.* in value) by a summary proceeding before two justices(*q*).

729 *What amounts to a distress for rent.*—It is not necessary, in order to make a distress for rent, that the lessor or his agent should take corporal possession of the things intended to be distrained. It is sufficient if the lessor, in person or by deputy, enters upon the demised premises and announces to the tenant, or his servants, or the persons in actual occupation of the property, that he detains them for his rent. Thus, where a stranger was about to remove some goods he had deposited on the demised premises, and the lessor, hearing of his intention, came upon the land and declared that he would not suffer the things to be removed until his rent was paid, and then went away, and in the course of the day sent a broker, who made a formal distress, but in the meantime the stranger had removed his property off the demised premises, it was held that the distress was commenced by the landlord's entry and declaration, and that the landlord was justified in retaking the goods at the place to which they had been removed(*r*). So, where the landlord's agent entered upon the demised premises in the absence of the tenant, and told the servants of the latter that he was come to distrain for rent, and walked round the premises, took an inventory, and left his inventory at the dwelling-house, with a notice of distress addressed to the tenant, informing him that he had distrained the goods mentioned in the inventory for rent due to his landlord, it was held that the distress was completed and accomplished by these acts of the agent, and that the subsequent departure of the latter without leaving any one in possession of the things distrained was not an abandonment of the distress(*s*). And where the agent of the lessor went into a field forming part of the demised premises, where the tenant's cattle were grazing, and placing his hand upon one of the beasts, declared that he distrained the whole of them for the rent then due, it was held that this was an actual levying of a distress on all the cattle in that particular inclosure(*t*). But a mere notice by a landlord that he has distrained things which are not

(*q*) *Horsefall v. Davy*, 1 Stark. 169. *Bromley v. Holden*, M. & M. 175. *Bach v. Meats*, 5 M. & S. 200.

(*r*) *Wood v. Nunn*, 2 M. & P. 30; 5 Bing. 10. *Cramer v. Mott*, L. R., 5 Q. B. 357.

(*s*) *Swann v. Falmouth (Earl of)*, 8 B. & C. 456; 2 M. & Ry. 534.

(*t*) *Thomas v. Harries*, 1 Sc. N. R. 524.

distrainable, unaccompanied by any seizure or removal of the goods, will not constitute any cause of action(*u*).

If a warehouse-keeper, who lets out warehouse-room and places of deposit for goods, or receives goods to be warehoused and kept at a certain rent, and has power to distrain the goods in his hands for the warehouse-rent, gives notice to the owner of the goods that he will not deliver certain goods in his warehouse to the order of the latter until the rent due for warehouse-room is paid, and then detains the goods, the detainer and notice amount to a distress for the rent(*x*). Where a lodging-house keeper, to whom rent was due for the hire of furnished apartments, refused to permit the wearing apparel, jewels, and chattels of his tenant to be removed from the apartments, saying that he should detain them until his rent was paid, and the tenant brought an action against him for a conversion of the chattels, it was held that the detainer amounted to a distress for rent, and that the action was not maintainable(*y*). And where a lodging-house keeper, claiming rent to be due to him from his lodger, locked up the goods of the latter in the room which the lodger held, and in which they had been placed by him, and kept the key in his pocket, refusing the lodger access to them, saying that nothing should be removed until his bill was paid, and the lodger brought an action of trespass for a seizure of the goods, it was held that the action was not maintainable(*z*).

730 *Abuse of the right to distrain, rendering persons trespassers ab initio*.—If a landlord going to distrain breaks open an outer door, or gets in through a window, and then breaks the door open and seizes the goods in the house, this is not a distress (*ante*, p. 264), but a trespass, and he is responsible for all the damage sustained by the tenant(*a*); and if a distress has been lawfully effected in the first instance, but the landlord or his bailiff abuses the distress by using or working horses or animals distrained, he becomes, at common law, a trespasser *ab initio*(*b*); but, by 11 Geo. 2, c. 19, s. 19, where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio* but the party grieved may recover satisfaction for the damage in a

(*u*) *Beck v. Denbigh*, 29 Law J., C. P. 273.

(*x*) *Green v. St. Kath. Dock Co.*, 19 Law J., Q. B. 53.

(*y*) *Cotton v. Bull*, Eastern Term, 1857, C. P. *Cramer v. Mott*, *ante*, p. 654.

(*z*) *Hartley v. Moxham*, 3 Q. B. 701.

(*a*) *Attack v. Bramwell*, 32 Law J., Q. B. 148.

(*b*) *Oxley v. Watts*, 1 T. R. 12. *Six Carpenters' case*, 8 Co. 146a.

special action of trespass, or on the case, at the election of the plaintiff, and if he recover he shall have full costs. This statute, however, does not apply where the original entry was unlawful, and no valid distress has been effected(c).

If a distrainer abuses a distress by working an animal distrained, the owner may interfere to prevent it, and an action cannot be maintained against him for pound-breach or rescue(d).

731 *Of unlawful distress when no rent was in arrear.*—If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and, after a seizure has been made, he may rescue his goods at any time before they are impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them(e). By the 2 Wm. & M. sess. 1, c. 5, s. 5, it is enacted, that if any person shall distrain for rent pretended to be due or in arrear when no rent was due, the party so distraining shall forfeit double the value of the chattels so distrained and sold, together with full costs of suit (*post*, ch. 22).

732 *Excessive distresses.*—By the statute of Marlbridge, 52 Hen. 3, c. 4, it is enacted, that distresses shall be reasonable and not too great; and that he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses. Lord Coke, in his reading on this statute, observes, that it is worthy of observation “how provident the makers of the statute be that men’s beasts, cattell, or goods be not excessively distrained,” and that “this agreeth with the reason of the common law”(f). It is the duty, therefore, of every person who has by law a right to distrain, to make a fair and reasonable distress; and if there be a breach of that duty, and the landlord distrains goods and chattels beyond what is reasonably and fairly necessary for the purpose of realizing the rent and expenses, he renders himself liable to an action for damages at the suit of the tenant, even although the tenant has not, in fact, sustained any damage(g). If he distrains the crops growing in two fields, when the crop growing in one would be sufficient, when at maturity, to satisfy the rent and charges, the distress is an excessive distress(h). But it is not for every trifling excess that an action is maintainable; it must be clearly

(c) *Attack v. Bramwell*, *ante*, p. 656.

(d) *Smith v. Wright*, 6 H. & N. 821; 30 Law J., Exch. 313.

(e) *Gilbert on Distress*, 61.

(f) 2 Inst. c. 4, p. 107.

(g) *Chandler v. Doulton*, 34 Law J., Exch. 89.

(h) *Piggott v. Birtles*, 1 M. & W. 441.

disproportionate and excessive(i). And "if there is but one thing which can be taken, so that it must be taken or the party must go without his distress, for taking it no action lies, though it much exceeds the sum for which the distress is taken"(k). A distress may be excessive although the goods when sold may not realize enough to cover the rent due and the expenses(l). The action may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself(m); and if the lessee, after the distress, enters into an agreement with the landlord respecting the sale and disposition of such distress, or authorizes him to dispense with some or all of the usual forms preparatory to a sale, he does not thereby waive or abandon his right of action for the excessive distress(n). The tenant is entitled to recover damages for a wrongful distress, although he had the free use of the goods all the time they were in the constructive custody of the law(o).

733 *Distress for more rent than is due*.—If a landlord who has distrained, not excessively, for rent in arrear demands a larger sum for arrears than the tenant admits to be due, that alone does not make the detention of the goods by the landlord or his bailiff unlawful. The tenant must be taken to know, that neither the validity of the distress nor of the detainer depends on that demand, and that if he wishes to make the latter unlawful he should tender the sum which he alleges to be really due, together with the costs of the distress(p). A declaration, therefore, which alleges that the plaintiff held certain premises as tenant to the defendant at a certain rent, and that the defendant wrongfully seized certain goods of the plaintiff on the demised premises for certain arrears of rent alleged to be due, and afterwards sold the goods for the said arrears, whereas a small part only of the rent claimed to be due was due, discloses no cause of action in the absence of an allegation that the defendant sold more than was enough to satisfy the rent actually due and the costs of the distress(q). The distraining of chattels on a claim of more rent being in arrear

(i) *Roden v. Eyton*, 6 C. B. 430.

(k) *Field v. Mitchell*, 6 Esp. 71.

(l) *Smith v. Ashforth*, 29 Law J., Exch. 259.

(m) *Fisher v. Algar*, 2 C. & P. 374. *Bail v. Mellor*, 19 Law J., Exch. 279.

(n) *Willoughby v. Marshall*, 4 D. & R. 539; 2 B. & C. 821.

(o) *Baylis v. Usher*, 4 M. & P. 790.

(p) *Glynn v. Thomas*, 11 Exch. 870; 25 Law J., Exch. 127. Trespass will not lie against a landlord for distraining for more rent than is due and in arrear. *Hamilton v. Windolf*, 33 Md. 301. But see *McElroy v. Dice*, 17 Penn. St. 163.

(q) *Tancred v. Leyland*, 16 Q. B. 669. *French v. Phillips*, 26 Law J., Exch. 82. 1 H. & N. 564.

than is in fact in arrear, and selling them, is not actionable; firstly, because the distrainor for rent is not bound by the amount for which he claims to distrain, and though he takes the distress, alleging that he does so for an amount exceeding the real arrears of rent, he may sell afterwards only for that which is really due; secondly, because, from a mere allegation that the distrainor sold for the alleged arrears and costs, it is not to be inferred that he sold more than was necessary to raise the amount of the arrears actually due. If, however, the untrue claim has been followed by a sale of more of the goods taken than was sufficient to raise the amount of rent really in arrear, with the legal charges, then there is a cause of action. It is not enough in an action against a landlord for distraining for more rent than is really due to allege it to have been done maliciously, for an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent(r).

734 *Repeated distresses for the same rent.*—A landlord cannot lawfully distrain twice for the same rent, unless the distress has been withdrawn at the instance of the tenant, or unless there has been some mistake as to the value of the things taken(s); or unless the distress has been rendered abortive by the threats or misconduct of the tenant. If, after a sale of chattels that have been distrained and sold in due course of law, the tenant by force or threats prevents the purchaser from taking the chattels off the land, the landlord may re-enter and distrain again(t). And if the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and the note is dishonored when it arrives at maturity, the landlord may, as we have seen, distrain again(u).

735 *Impounding the goods—Pound-breach.*—The landlord may now impound the things distrained in any barn or building, hovel or rick, or on any fit part of the demised premises(x). No formal impounding is required, as in ancient times, in order to remove the goods from the possession and control of the tenant, and place them in the custody of the law. As soon as the distrainor has made out and delivered to the tenant, or has left upon the premises, an inventory of the goods he has taken, they are impounded within the meaning of the statute. Thus, where the landlord distrained four casks of beer in a

(r) *Stevenson v. Newnham*, 13 C. B. 297; 22 Law J., C. P. 110.

(s) *Smith v. Goodwin*, 4 B. & Ad. 13. *Bagg v. Mawby*, 8 Exch. 649. *Dawson v. Cropp*, 1 C. B. 961.

(t) *Lee v. Cooke*, 2 H. & N. 584; 3 H. & N. 203; 27 Law J., Exch. 337.

(u) *Parrott v. Anderson*, 7 Exch. 93; 21 Law J., Exch. 291.

(x) 2 Wm. & M. sess. 1, c. 5; 11 Geo. 2, c. 19, s. 10.

cellar, and gave the usual notice of the distress to the tenant, and left the casks where he found them in the cellar, without placing them under lock or key, or leaving any person in charge of them, it was held that the casks were duly impounded(*y*). So, where cattle which had been distrained for rent were left in a field on a farm where they were taken, and the gates of the field, which had been properly secured by the broker who levied the distress, were opened, and the beasts taken out and driven away, it was held that this was a pound-breach, rendering the person who committed the act liable to treble damages under the statute(*z*). And if the distrainor enters and makes a general announcement of the distress on one day, and follows up the proceeding on the next, by giving the tenant notice of the particular things distrained and taken, the impounding is complete, at all events from the time of such notice(*a*).

Formerly the distrainor, in removing the goods distrained, might have removed them to any place he thought fit for the purpose of impounding them, but the 1 & 2 Ph. & M. c. 12, s. 1, amending the statute of Marlbridge (*ante*, p. 656), prohibits the distrainor from driving the distress out of the hundred, rape, wapentake, or lathe in which it has been taken, except it be to a pound-overt within the same shire, not above three miles distant from the place where such distress was taken, and enacts that no cattle or goods distrained shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of the distress so taken at one time. If the distrainor uses or consumes for his own private use things distrained and impounded; if he draws beer out of a barrel(*b*), tans hides, or uses or works beasts or cattle, he of course subjects himself to an action for damages at the suit of the owner thereof(*c*). As soon as the goods are impounded they are in the custody of the law, and the tenant cannot retake them without being guilty of pound-breach, and subjecting himself to an indictment(*d*), and also to an action for treble damages and costs of suit, although the distress may be wrongful or irregular, and no rent may be in arrear or due(*e*). But where the distress is being used in a manner

(*y*) *Firth v. Purvis*, 5 T. R. 432.

(*z*) *Castleman v. Hicks*, Car. & M. 266.

(*a*) *Thomas v. Harries*, 1 Sc. N. R. 534.

(*b*) *Dod v. Monger*, 6 Mod. 216.

(*c*) *Duncomb v. Reeve*, Cro. Eliz. 783.

(*d*) *Rex v. Bradshaw*, 7 C. & P. 233.

(*e*) 2 Wm. & M. sess. 1, c. 5, s. 4; 11 Geo. 2, c. 19, s. 10; Co. Litt. 47b. *Costworth v. Betison*, 1 Ld. Raym. 104.

which the law will not justify, the owner may interfere to prevent the abuse(*f*). If the pound is broken, and the goods are unlawfully taken away, the landlord may follow them and recapture them, but he must not break open the doors of a private house, or stable, or inclosure, nor enter the grounds of a third person for the purpose of retaking the goods, except it be on fresh pursuit(*g*).

Penalties are imposed by 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, on parties neglecting to feed impounded cattle.

If the landlord refrains, at the request of the tenant, from removing the goods from the different rooms in which the landlord or his bailiff finds them, but takes an inventory of the goods, puts a man in possession, and hands to the tenant a notice of distress referring to the inventory, this is to all intents and purposes a distraining and impounding of the goods. Each room is, for the convenience of the tenant, and with his assent, converted into a pound for the goods therein(*h*).

736 *Abandonment of distress*.—Leaving possession of goods distrained is not necessarily an abandonment of the distress. If, therefore, a bailiff or party in possession goes away for a temporary purpose, and is then locked out, he may break open the outer door of the house to recover possession of the distress(*i*).

737 *Statutory power of sale*.—The 2 Wm. & M., c. 5, s. 1, recites that, distresses not being to be sold, but only detained as pledges for enforcing the payment of rent, the persons distraining have little benefit thereby, for remedying whereof it is enacted (s. 2), that where any goods and chattels shall be distrained for any rent reserved or due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods shall not, within five days next after such distress taken, with notice thereof and the cause of such taking left at the chief mansion-house, or other most notorious place on the premises charged with the rent, replevy the same with sufficient security, etc. (*post*, s. 2); that then, after such distress and notice, and after the expiration of the said five days, the person distraining “shall and may,” with the sheriff or under-sheriff of the county, or with the constable, etc., cause the goods and chattels to be appraised by two sworn appraisers, and after such appraisalment “shall and may lawfully

(*f*) *Smith v. Wright*, 6 H. & N. 821.

(*g*) *Rich v. Woolley*, 5 M. & P. 675; 7 Bing. 651.

(*h*) *Tennant v. Field*, 8 Ell. & Bl. 336; 27 Law J., Q. B. 83.

(*i*) *Bannister v. Hyde*, 29 Law J., Q. B. 141.

sell(*k*) the goods so distrained for the best price that can be gotten towards satisfaction of the rent and charges."

738 Tender of rent rendering a sale unlawful.—If, after the impounding, and before the sale, a tender of the rent and expenses is made, the landlord cannot lawfully proceed to sell the things distrained; for it has been held that upon the equity of the above statute, which gives the tenant five days to replevy the things distrained (s. 2), the tenant ought to have the same time for tendering the rent and expenses, and that an action is maintainable against a landlord who persists in selling after tender of the rent and costs at any time within five days(*l*). In the case of a distress of growing crops the tenant may, at any time before the corn is ripe and fit to be cut, tender the rent due, and if, after that, the landlord takes the corn, he may be proceeded against as a trespasser(*m*).

Whenever goods have been seized as a distress for rent, and a tender is made of a sum sufficient to cover the rent actually due, and the costs of the distress up to the time of the tender, and the bailiff refuses to give up the goods, and the tenant is obliged to pay a larger sum to get back his goods, he is entitled to an action for damages(*n*). But if the landlord distrains for a larger sum than is due, but not excessively, the tenant should tender the amount really due, if he wishes to make the detention of the goods unlawful(*o*).

739 Parties to whom tender may be made.—A bailiff authorized to distrain for rent has power given him at the same time to receive the rent, and the landlord has no right to circumscribe the bailiff's authority in this respect, for a tenant whose goods are seized under the extraordinary power vested in the landlord of distraining, ought to be enabled in all cases to release them at once by tender of the rent and costs to the bailiff. The power to receive the rent is therefore necessarily annexed to the warrant to distrain(*p*); but it does not follow that because the tender may be made to the bailiff who distrains, it may be made also to any bailiff's follower who may be put into temporary possession of the goods(*q*).

740 Power of sale of growing crops and things fraudulently removed—Tender before sale.—The 11 Geo. 2, c. 19, which enables landlords to dis-

(*k*) See *King v. England*, *post*, p. 666.

(*l*) *Johnson v. Upham*, 21 Law J., Q. B. 252, overruling, on this point, *Ladd v. Thomas*, 12 Ad. & E. 117, and *Ellis v. Taylor*, 8 M. & W. 415.

(*m*) *Owen v. Legh*, 3 B. & Ald., 473.

(*n*) *Loring v. Warburton*, 28 Law J., Q. B. 31. *Johnson v. Upham*, *supra*.

(*o*) *Glynn v. Thomas*, 11 Exch. 878.

(*p*) *Hatch v. Hale*, 15 Q. B. 15; 19 Law J., Q. B. 289.

(*q*) *Boulton v. Reynolds*, 29 Law J., Q. B. 11.

train things fraudulently removed from the demised premises, also cattle or stock of their tenants depasturing on commons appurtenant, or in any ways belonging to the demised premises, and growing crops (*ante*, p. 645), enacts that it shall be lawful for the landlord, in convenient time, to appraise, sell, or otherwise dispose of the same towards satisfaction of the rent and charges, in the same manner as other goods and chattels may be appraised and disposed of, the appraisement to be taken when the crops are cut, gathered, cured and made, and not before; but it is enacted (s. 8), that, if after any distress for arrears of rent so taken, and at any time before the crops shall be ripe and cut, cured or gathered, the tenant or lessee, his executors, etc., shall pay to the landlord, or to the steward or other person usually employed to receive the rent, the whole rent then in arrear, with the costs and charges of the distress, then, and upon such payment, or lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same shall cease, and the crops and produce distrained shall be delivered up to the tenant.

741 *Notice of distress* is not essential at common law to the validity of the distress(*r*). It has been expressly laid down, that if the lord distrain for rent or services, he has no occasion to give notice to the tenant for what thing he distrains, for the tenant by intendment knows what things are in arrear for his lands as rent and services, etc.(*s*); but the 2 Wm. & M. c. 5, s. 1, requires, as we have seen (*ante*, p. 660), notice of the distress to be given preparatory to a sale by the landlord, and the 11 Geo. 2, c. 19, authorizing the distress and sale of goods fraudulently removed (*ante*, p. 653), and of the cattle and stock of tenants depasturing on commons appurtenant or belonging to the demised premises, and growing crops (*ante*, p. 644), requires (s. 9) notice of the place where the goods and chattels distrained shall be lodged, to be given within one week to the tenant, or left at his last place of abode.

As the tenant is to have five days, under the statute of Wm. & Mary, to replevy from the time he receives notice of the distress, the notice should be given as soon as the distress has been levied. If the distress is not clearly intended to include all the goods and chattels upon the demised premises, the landlord must give the lessee distinct notice of the things included in such distress, in order that he may know what he is to replevy. And for this purpose, as soon as the distress is made, whether by the lessor or his bailiff, in inventory of

(*r*) *Trent v. Hunt*, 9 Exch. 20.

(*s*) 1 Roll. Abr. 674, *DISTRESS*, pl. 1. *Tancred v. Leyland*, 16 Q. B. 680.

the goods distrained should be made and served upon the lessee, together with the notice of the distress. The notice of the distress should set forth the amount of rent distrained for, and the particular things taken(*t*). A written notice of distress is not invalidated by a statement that the rent is due to *A*, whereas it is due to *B*, provided *B* has authorized the distress(*u*). If the landlord removes and sells goods and chattels which were not included in the inventory and notice, and which have not consequently been comprised in the distress, he is liable to an action for damages at the suit of the tenant(*x*).

742 *Appraisement and sale*.—If the tenant, after he has received notice of the distress, neglects for five days, to be reckoned exclusively both of the day of distress and of the day of sale, to pay the rent, the lessor or distrainor may cause the goods to be appraised in the mode appointed by the statute (*ante*, p. 660), and may afterwards sell them for the best price that can be got for them, and apply the purchase-money in discharge of the rent and the costs of the sale(*y*), leaving the surplus, if any, in the hands of the sheriff, under-sheriff, or constable, for the owner's use. The schedule of the 57 Geo. 3, c. 93, regulating the costs of appraisements, "whether made by one broker or more," refers only to the case of the employment of a single appraiser by consent, and does not dispense with the attendance of the two sworn appraisers(*z*). If the broker or person actually making the distress on behalf of the landlord constitutes himself one of the appraisers, the appraisement is wrongful and irregular(*a*). If the tenant holds under a covenant not to carry hay or straw off the demised premises, the landlord who has distrained hay or straw must, nevertheless, sell it in the ordinary way for the best price. If he sells it, subject to a condition that the purchaser shall consume it on the land, he is liable to an action by the tenant for not selling at the best price(*b*).

743 *Costs and expenses*.—By 57 Geo. 3, c. 93, it is enacted, that no persons making any distress for rent under 20*l*. shall take or receive out of the produce of the things distrained and sold any more than the

(*t*) *Wakeman v. Lindsey*, 14 Q. B. 625; 19 Law J., Q. B. 166. *Kerby v. Harding*, 6 Exch. 234; 20 Law J., Exch. 163.

(*u*) *Trent v. Hunt*, 9 Exch. 14.

(*x*) *Bishop v. Bryant*, 6 C. P. 484.

(*y*) *Robinson v. Waddington*, 18 Law J., Q. B. 250. The marginal note of this case, in 13 Q. B. 753, is incorrect.

(*z*) *Allen v. Flicker*, 10 Ad. & E. 640.

(*a*) *Westwood v. Cowen*, 1 Stark. 172.

(*b*) *Ridgeway v. Ld. Stafford*, 6 Exch. 404; 20 Law J., Exch. 226.

following costs and charges: *i.e.* for levying the distress, 3s.; for the man in possession, 2s. 6d. per day (and even this charge may not under all circumstances be justifiable(c)); for the appraisement, 6d. in the pound, and the amount of the stamp; for advertisements, 10s.; for catalogues, sale, and commission, and delivery of goods to the purchaser, 1s. in the pound on the net produce of the sale. If more costs and charges are levied than those allowed by the Act, the party aggrieved has a summary remedy before two justices for treble the amount of the charges, or he may bring an action for the recovery of them; but it is provided (s. 4) that no judgment shall be given against the landlord for such treble costs, unless he has personally levied the distress. Every broker or other person who shall make and levy any distress is to give a copy of his charges, and of all the costs and charges of the distress, signed by him, to the person on whose goods and chattels any distress shall have been levied, although the rent demanded may exceed the sum of 20l.(d). When the rent distrained for exceeds 20l., the costs are not limited to any particular amount or fixed scale of charge, but they must be fair and reasonable(e).

744 *Effect of non-compliance with the statutes authorizing the sale.*—The 11 Geo. 2, c. 19, s. 19, after reciting that it hath sometimes happened that upon a distress made for rent justly due, the directions of the 2 W. & M. c. 5, for enabling the sale of goods distrained for rent, have not been strictly pursued, but through the mistake or inadvertency of the landlord or other person entitled to such rent, and distraining for the same, or of the bailiff or agent of such landlord or other person, some irregularity or tortious act hath been afterwards done in the disposition of the distress so seized or taken, for which the party distraining hath been deemed a trespasser *ab initio*, and in an action brought against him, the plaintiff hath recovered the full value of the rent for which the distress was taken, enacts, that where any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agents, the distress itself shall not be deemed to be unlawful, nor the parties making it be therefore deemed trespassers *ab initio*; but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage he shall have sustained thereby, and no more.

(c) *Ex parte Arnison*, L. R., 3 Exch. 56.

(d) 1 & 2 Ph. & M. c. 12, s. 2. *Child v. Chamberlain*, 5 B. & Ad. 1049.

(e) *Lyon v. Tomkies*, 1 M. & W. 603.

The plaintiff, therefore, can only recover for an irregularity in distraining and selling where actual damage is proved. For the original taking there is to be no action; the distrainer is to be considered as being in possession of the goods, notwithstanding a subsequent irregularity. And although he holds the goods with a special authority to deal with them in a particular way, and is liable for abusing that authority, yet the Act says that the tenant shall recover full satisfaction for the damage, and no more. Where, therefore, there is no special damage there can be no satisfaction, and a verdict for nominal damages is not sustainable. Wherever the damages are merely nominal the defendant is entitled to a verdict(*f*). Where, therefore, the plaintiff in his declaration complained of the sale of his goods within five days, and proved that they were sold too soon, but there was no evidence to show that he had sustained any damage thereby, it was held that the judge ought to direct a verdict for the defendant(*g*). But the statute, as we have seen, does not apply to cases where the original entry upon the premises was effected in an unlawful manner, as by breaking open an outer door, and where, consequently, no valid distress has ever been effected(*h*).

745 *Keeping the distress without selling*.—It has generally been considered that the words in the 2 Wm. & M. c. 5, “shall and may lawfully sell,” mean that the landlord must give the statutory notice of the distress, and must proceed to appraise and sell, if the tenant does not replevy within the five days, or desire the landlord not to sell. If, however, the landlord should neglect to give notice of the distress, and to appraise and sell, but should content himself with keeping the goods in his hands, he will not be liable to an action for the detention or conversion of the chattels, unless the tenant can prove that he had gained a right to have the goods delivered up to him, and that he had sustained some special damage by the detention(*i*). The landlord has a lien for his rent upon the things distrained, and has at common law a right to keep them as a pledge until his rent is paid (*ante*, p. 633), and he can only be made responsible for not selling in an action founded upon the statute.

The landlord may, with the assent of the tenant, detain the things distrained, or convert them to his own use in satisfaction and dis-

(*f*) *Rogers v. Parker*, 18 C. B. 112; 25 Law J., C. P. 220.

(*g*) *Lucas v. Tarleton*, 3 H. & N. 116; 27 Law J., Exch. 248.

(*h*) *Attack v. Bramwell*, *ante*, p. 655.

(*i*) *West v. Nibbs*, 4 C. B. 186; *Glynn v. Thomas*, 11 Exch. 870. *Rodgers v. Parker*, *supra*.

charge of the rent(*k*). But to obtain a title as against a third person whose goods have been distrained, there must be an actual sale. A taking of the goods by the landlord at the appraised value is not sufficient(*l*).

746 *Indemnification of bailiffs*.—We have already seen, that if a landlord employs a bailiff to make a distress on a tenant for rent alleged to be due from such tenant to the landlord, and it turns out that the landlord had no right to distrain, and the bailiff has to pay damages for the unlawful distress in an action brought against him by such tenant, the bailiff may maintain an action against the landlord for compensation(*m*).

A distress for rent affirms the continuance of the tenancy up to the day when the rent distrained for became due(*n*).

SECTION II.

OF DISTRESS DAMAGE FEASANT.

747 *Seizure and impounding of animals and chattels damage feasant*.—

Every occupier of land has a right to seize animals and chattels trespassing upon and doing damage to his land, and to detain them until he is tendered or paid a fair compensation for the injury. The distress must be taken at the time the damage is done, for if the damage was done yesterday, and the distress taken to-day, that would be illegal(*o*). “If, therefore, a man coming to distrain beasts damage feasant sees the beasts on his ground, and the owner of the beasts, or his servants, chases them out before the distress be taken, though it be of purpose to prevent the distress, yet the owner of the soil cannot distrain them; and if he doth, the owner of the cattle may rescue them, for the beasts must be damage feasant at the time of the distress. A man may, therefore, distrain cattle damage feasant in the night, for otherwise, perhaps the cattle will be gone before he can take them.”

(*k*) *Jones v. Sawkins*, 5 C. B. 142.

(*l*) *King v. England*, 33 Law J., Q. B. 145.

(*m*) *Rawlings v. Bell*, 1 C. B. 959. *Ibbett v. De La Salle*, 6 H. & N. 237; 30 Law J., Exch. 44

(*n*) *Cotesworth v. Spokes*, 10 C. B., N. S. 103; 30 Law J., C. P. 220.

(*o*) *Wormer v. Biggs*, 2 C. & K. 81. *Lindon v. Hooper*, Cowp. 414.

"If a man takes my cattle and puts them into the land of another man, the tenant of the land may take these cattle damage feasant, though I, who was the owner, was not privy to the cattle's being damage feasant; and he may keep them against me until he has obtained satisfaction of the damages."

A commoner may justify the taking of the cattle of a stranger upon the land damage feasant. And if a man hath a right of common for ten cattle, and he puts in more, the surplusage above the ten may be distrained damage feasant. If many cattle are doing damage, a man cannot take one of them as a distress for the whole damage, but he may distrain one of them for its own damage, and bring an action of trespass for the damage done by the rest(*p*). If cattle get out of the close before the party coming to distrain has got into it, they cannot be followed and distrained when off the land(*q*).

The lord may distrain in respect of injuries done to his soil, and to his hedges, fences, and trees, although he has no interest in the herbage(*r*).

748 *Right to distrain animals trespassing and doing damage on unfenced lands adjoining public highways.*—If the owner of lands adjoining a highway is bound by a statute or prescription (*ante*, pp. 149, 327), to fence against the highway, and he neglects to do so, and cattle, while passing along the highway under the care of the owner or his servants, stray therefrom into the adjoining land, and do damage there, the owner of such adjoining land, who has brought the mischief on himself by neglecting to fence, has no right to distrain the cattle, unless they are abandoned and left there by the owner or his servants an unreasonable time. And if a man who has land adjoining a highway plants tempting green crops close adjoining the highway, and neglects to fence them off therefrom, so that cattle being driven along the public thoroughfare are irresistibly invited to trespass on the adjoining land through the operation of the tempting food upon their natural instincts, the owner of such adjoining land who has so neglected to fence has no right to distrain the trespassing animals, unless the drovers who have charge of them fail in their duty in endeavoring to prevent them from trespassing and from continuing on the adjoining land(*s*).

Whilst cattle are lawfully passing along a highway the owners of the cattle are, as we have seen, using the highway according to the

(*p*) Gilbert on Distress, 4th ed., p. 22. Co. Litt. 161a. Bac. Abr. DISTRESS, F.

(*q*) Clement v. Milner, 3 Esp. 95. Wormer v. Biggs, 2 C. & K. 33.

(*r*) Hoskins v. Robins, 2 Wms. Saund. 327a.

(*s*) Goodwyn v. Chevely, 4 H. & N. 631; 28 Law J., Exch. 298. See *ante*, p. 213.

dedication of the owner of the soil, and, being there with his consent, they are occupying the highway; but if the cattle have strayed into the high road, and have passed therefrom into the adjoining close, they may be distrained there damage feasant, notwithstanding the owner of that close was bound to repair the fence between his close and the road, because the cattle were wrongfully on the road, and the owners were not occupying it so as to cast any obligation to repair the fence upon the distrainor, who is not bound to fence against trespassers(*t*).

If a landowner neglects to repair and maintain a fence which he is by law bound to repair, and by reason thereof his neighbor's cattle stray into his land, he has no right to distrain them damage feasant, as he is himself the occasion of the injury(*u*).

749 *What things may be distrained damage feasant.*—The right of the owner or occupier of land to seize and detain animals and chattels trespassing upon and doing damage to his land is restricted to such animals and chattels as are not in the actual possession and use, and under the personal care, of some human being(*x*). If a man rides upon my corn I cannot take his horse damage feasant, for that would lead to a breach of the peace(*y*); neither can I take a horse and cart away from a man who is actually driving it, nor a horse or a dog which a man is leading by a string, nor any animal which is under the immediate control of the owner(*z*). It is not enough, however, to exempt a dog from seizure damage feasant, to allege that the dog was in the possession and under the personal care of the plaintiff, for that may be so and yet the dog may be running about trespassing, and may not be under his immediate control. Where, therefore, to a plea justifying the seizure of a dog damage feasant, the plaintiff replied that the dog when taken was in the actual possession of the servant of the plaintiff, and was then under his personal care, and was being used by him, it was held that these allegations as applied to a dog were insufficient to establish such a possession and user as would exempt the dog from seizure. "The allegations," observes Patterson, J., "would be satisfied by proof that the dog was within sound of the servant's whistle, though the servant was out of sight"(*a*).

(*t*) *Manch., Sheffield & Linc. Rail. Co. v. Wallis*, 14 C. B. 213; 23 Law J., C. P. 85.

(*u*) *Singleton v. Williamson*, 31 Law J., Exch. 17; 7 H. & N. 410.

(*x*) *Gilbert on Distress*, 4th ed., p. 21. See *ante*, p. 644.

(*y*) 9 Vin. Abr. 121. *DISTRESS*, A., pl. 4.

(*z*) *Field v. Adames*, 12 Ad. & E. 649.

(*a*) *Bunch v. Kennington*, 1 Q. B. 680.

Shocks of corn may be taken damage feasant. If turves lie upon a common, damage feasant, a commoner may distrain them, but he cannot burn them. A greyhound may be distrained running after conies in a warren, and so may a ferret brought into a warren. If a man brings gins and nets through my warren I cannot take them out of his hand, but if men are rowing upon my water, and endeavoring with their nets to catch fish in my several fishery, I may take their oars and nets, and detain them as damage feasant, to stop their further fishing(b).

If domestic pigeons come upon land sown with corn, and eat up the corn, the occupier of the land is justified in shooting them, as he has no other means of taking them damage feasant(c).

750 *Distress by railway companies of locomotive engines damage feasant.*—

All railway companies have a common-law right to distrain engines and carriages encumbering their railway and obstructing the right of passage along the line; and the provisions of the Railway Clauses Consolidation Act, with respect to the introduction of engines upon the railway and the removal of improperly constructed engines, do not control or qualify this right, but give a cumulative remedy(d).

751 *Tender of amends.*—If the lord or his bailiff comes to distrain beasts damage feasant, and before the distress the owner of the beasts tenders sufficient amends, and the distrainer refuses it, the latter becomes a wrong-doer if he then distrains. Tender before the distress makes the distress tortious. Tender after the distress, and before the impounding, makes the detainer and not the taking wrongful. Tender after the impounding is of no avail, as the distress taken is then in the custody of the law(e). But tender in cases of distress for rent renders a subsequent sale unlawful, as we have seen, *ante*, p. 541.

The hazard of the sufficiency of the tender rests upon the wrong-doer whose cattle have trespassed, and not upon the party who has suffered by the trespass. If the latter, therefore, demands an exorbitant sum for compensation, that will not dispense with the necessity of a tender of a proper compensation, and will not relieve the owner of the trespassing cattle from the obligation of estimating and tendering, at his own risk, the proper amount of damage(f); for he, being

(b) *Bac. Abr. DISTRESS, F.*

(c) *Ante*, p. 329.

(d) *Ambergate, etc., Rail. Co. v. Mid. Rail. Co.*, 2 Ell. & Bl. 793.

(e) *Singleton v. Williamson*, 31 Law J., Exch. 287. *Thomas v. Harries*, 1 M. & Gr. 695; 1 Sc. N. R. 524.

(f) *Gulliver v. Cosens*, 1 C. B. 795.

the original wrong-doer, by suffering his cattle to trespass, is bound to tender the sum which he maintains to be sufficient, before he is in a position to complain of the exorbitant amount of compensation claimed. If he has tendered a sufficient sum before distress made, his remedy would be by replevin or action for a trespass, and if, after the distress, but before impounding, an action for the unlawful detention of the things taken(*g*).

The 2 W. & M. c. 5, which enables landlords to sell things distrained for rent, does not extend to distresses damage feasant. Consequently they remain as they were at common law, mere pledges, and the sale of them will make the party distraining a trespasser *ab initio*, unless the sale was necessary to cover the expense of finding food and water for the animals distrained, and can be justified under 17 & 18 Vict. c. 60 (*infra*).

The distrainer must at his peril find a proper pound. Generally, the manor pound would be the proper place, but if that is not in a fit state he must find another. He cannot impound so as to injure or destroy the subject-matter of the distress(*h*).

752 Sale of impounded animals.—By 12 & 13 Vict. c. 92, s. 5, it is enacted, that every person who shall impound or confine any animal in any common pound or inclosed place, shall provide it with food and water, and by 17 & 18 Vict. c. 60, s. 1, it is further enacted, that every person who has supplied such animal with food and water, shall be at liberty, after the expiration of seven clear days after the time of impounding the same, to sell any such animal openly in the public market, after having given three days' public printed notice thereof, and to apply the produce of the sale in discharge of the value of such food and nourishment and the expenses of the sale, rendering the overplus to the owner of the animal. Where several beasts have been distrained and impounded damage feasant, the distrainer cannot justify the sale of each beast individually in discharge of the cost of its food and the expenses. Parties availing themselves of the statute must show that it was necessary to sell the number they did sell, or that they sold one, and that it did not produce enough, and then that they sold more. "The power is measured by the necessity of the case, and if the distrainer is obliged to keep the distress for an indefinite period, there is nothing to prevent him from selling from time to time to defray the expenses."(*i*)

(*g*) *Glynn v. Thomas*, 11 Exch. 870; 25 Law J., Exch. 128.

(*h*) *Wilder v. Speer*, 8 Ad. & E. 547. *Bignell v. Clarke*, 5 H. & N. 485; 29 Law J., Exch. 257.

(*i*) *Layton v. Hurry*, 8 Q. B. 819; 15 L. J., Q. B. 244.

By the Roman law, he who took the cattle of another person feeding in his ground, or doing any other damage, was responsible for any violence doing hurt to the cattle, or for driving them in any other manner than he would his own; and if he caused any damage to the cattle, he was bound to make it good(*k*).

753 *Duties and responsibilities of pound-keepers.*—It has been held, that if an officer charged with the performance of certain public duties does that which belongs to his office, and intermeddles no further, he shall not be liable for any precedent tortious act of which he could know nothing. A pound-keeper, therefore, who only does the duties of his office by impounding things brought to him, does not by detaining them in the pound, render himself responsible for the unlawfulness of the distress. The pound-keeper is bound to take and keep whatever is brought to him, at the peril of the person who brings it, without any judgment, discretion, examination or warrant; and if the things have been wrongfully taken, the person bringing them to the pound and not the pound-keeper, is responsible for the wrong. “It would be terrible,” observes Lord Mansfield, “if a pound-keeper were liable to an action for refusing to take cattle in, and were also liable to another action for not letting them go”(*l*).

SECTION III.

REMEDIES FOR UNLAWFUL AND EXCESSIVE DISTRESSES

754 *Replevin of things distrained.*—By the common law, whenever the goods of one man had been wrongfully distrained by another (not being a sheriff or his officer acting in execution of the process of a superior court), and the person out of whose possession the goods had been taken wished to have them restored to him, and to try the lawfulness of the seizure, he might get back his goods by giving security to the sheriff of the county to prosecute an action with success, and make out the injustice of the taking. The proceeding by which this was accomplished was called a replevin, or the getting back of a chattel taken and detained as a pledge or security, by substituting another pledge in the place of the thing taken(*m*).

(*k*) Domat, liv. 2, tit. 8, s. 2, § 6.

(*l*) Badkin v. Powell, Cowp. 478.

(*m*) Co. Lit. 145b; Spelm. Gloss. 485. Gilbert on Replevins.

The authorities all lay it down that replevin can only be maintained where goods are taken by one man out of the possession of another; not where they have been delivered upon a contract; and this is clear upon the form of pleading, which always is, that the defendant "took and detained" the goods, the plea to which allegation is *non cepit*(*n*).

Replevin does not lie for goods which were taken abroad, but are detained here(*o*), as the object of the proceeding is to restore the possession as it was before the taking.

The writ of replevin, observes Lord Redesdale, "is merely meant to apply to the case where *A* takes goods wrongfully from *B*, and *B* applies to have them redelivered to him upon giving security, until it shall appear whether *A* has taken them rightfully. But if *A* be in possession of goods and *B* claims a property, this is not the writ to try that right"(*p*). Where therefore, a bailee, who had the lawful possession of chattels by delivery from the owner, placed the chattels in the hands of the defendant, who set up a lien upon them, and the plaintiff proceeded to replevy the goods and bring an action of replevin, it was held that he had mistaken his remedy and could not proceed by replevin, but should have proved his prior right in an action for detaining, or for wrongfully converting, the chattels. "The whole proceeding of replevin at common law," observes Coleridge, J.(*q*), "is distinguished from that in trespass, in this, amongst other things, that while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure a restitution of the goods themselves, and this it effects by a preliminary ex-parte interference by the officers of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from the action of trespass by this, that, at the time of declaring, the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were originally taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant."

"As a general rule, it is thought just that a party in the peaceable possession of goods should remain undisturbed, either by the parties claiming adversely or by the officers of the law, until the right be

(*n*) *Galloway v. Bird*, 4 Bing. 301.

(*o*) *Nightingale v. Adams*, 1 Show. 91.

(*p*) *Wilsons, In re*, 1 Sch. & Lef. 320n.

(*q*) In *Mennie v. Blake*, *infra*.

determined and the possession shown to be unlawful. But where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exceptional case arises; and it is thought just that even before any determination of the right the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried, and the goods be forthcoming to abide the decision"(r).

The proceedings in replevin were formerly originated by a writ sued out of the High Court of Chancery, by the person whose goods had been taken and directed to the sheriff of the county, commanding him to replevy the goods and to do justice in the matter. But the statute of Marlbridge (52 Hen. 3, c. 21) authorized the sheriff to replevy on his own authority, and without any suit in replevin, on complaint being made to him of the wrongful taking, and the requisite sureties and pledges being tendered(s). The statute, 19 & 20 Vict. c. 108, for amending the Acts relating to the county courts, enacts (s. 63), that the powers and responsibilities of the sheriff with respect to replevins shall thenceforth cease; and the registrar of the county court of the district in which any distress subject to replevin is taken is empowered to approve of replevin bonds, and to grant replevins on security being given (ss. 65, 66), and to issue all necessary process in relation thereto to be executed by the high bailiff.

755 *Replevin in the county court.*—If the replevisor wishes to proceed in the county court, he must give security, to be approved of by the registrar, for the rent or damage in respect of which the distress was made and the costs in the county court, and must bind himself with sureties to commence an action of replevin against the distrainer in the county court of the district within which the distress was taken within one month from the date of the security, and to prosecute such action with effect and without delay, and to make a return of the goods, if a return thereof shall be adjudged.

The action of replevin in the county court may be removed by *certiorari* into the superior court by the defendant, on security being given by him to the master conditioned to defend the action with effect, and to prove that the defendant had good ground for believing that title, etc., was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l*. The county court, however, has power to try an action of replevin, although the title to land

(r) *Mennie v. Blake*, 6 Ell. & Bl. 851; 25 Law J., Q. B. 401.

(s) See the statute of Westminster the 2nd, 13 Edw. 1, stat. 1.

may come in question, if the defendant has not removed the cause under the above provision(*t*). An appeal from the decision of the county court is allowed where the amount of the rent or damage exceeds 20*l.*, and in all actions where the parties have agreed to the jurisdiction.

Replevin cannot be joined with any other form of action in the county court(*u*).

756 *Replevin in the superior courts.*—The action of replevin may be commenced in any superior court in the form applicable to personal actions therein. By 19 & 20 Vict. c. 108, s. 65, it is enacted that if the replevisor shall wish to commence proceedings in any superior court, he shall at the time of replevying give security, to be approved of by the registrar of the county court, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in the superior court; conditioned to commence an action of replevin against the distrainer in such superior court as shall be named in the security within one week from the date thereof, and to prosecute such action with effect and without delay, and unless judgment thereon be obtained by default, to prove before such superior court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that such rent or damage exceeded 20*l.*, and to make return of the goods if a return thereof shall be adjudged.

757 *Actions of replevin of things distrained damage feasant*, when tried in the county court, are to be tried in a summary way, as other actions in those courts held under the authority of 9 & 10 Vict. c. 95(*x*). Where the distress is for damage feasant, and the defendant in the county court is entitled to judgment for a return of the things distrained, the plaintiff is entitled to have the amount of the damage done found, and to have judgment found for the defendant in the alternative, for a return of the distress, or for the amount of the damage so found(*y*).

758 *Actions for unlawfully selling impounded animals and cattle.*—To enable a person to avail himself of the power to sell impounded animals, given by 17 & 18 Vict. c. 60, s. 1 (*ante*, p. 670), it must be shown that the animals had been impounded by some person in the exercise or intended exercise of a right to distrain. The word “confined” in

(*t*) *Fordham v. Akers*, 33 Law J., Q. B. 67.

(*u*) *Munegan v. Wheateley*, 6 Exch., 88.

(*x*) County Court Rules, Rule 179; 2 Jur. N. S. 551, part 2.

(*y*) County Court Rules, Rule 181; 2 Jur. N. S. 551, part 2.

the 12 & 13 Vict. c. 92, s. 5 (*ibid.*), does not apply to all takings and confinement of animals under all circumstances(*z*).

759 *Actions for unlawful and excessive distresses.*—If a landlord has distrained for rent, no rent being in arrear or due, the proper remedy is by action upon the statute for double the value of the things distrained (*ante*, p. 656). If the landlord has distrained for more rent than is due, and the tenant has tendered the amount due before the distress made, his remedy, if a distress is afterwards made, would be either by replevin, or an action for a trespass, or for a wrongful seizure and conversion of the things distrained. If the tender is made after the distress, an action would be maintainable for the detention of the property(*a*). The mere retaining by the landlord of the goods distrained after the tenant has gained a right to have them delivered up to him will not render the landlord liable to an action for a trespass. A landlord, therefore, who refuses a proper tender, is not to be regarded as a trespasser merely by reason of his non-feasance in failing to deliver up the distress on being required so to do, but his refusal may amount to evidence of a conversion(*b*).

If a landlord makes a second distress for the same rent when he might have taken sufficient at first, he is liable to an action for the wrongful conversion of the things seized under the second distress(*c*).

The wrongful seizure of beasts of the plough, or of the tools and implements of a man's trade, may be made the foundation of an action of trespass as well as of an action upon the case(*d*).

By the 30 & 31 Vict. c. 142, s. 10, a defendant against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort has been brought in a superior court, may, on an affidavit that the plaintiff has no visible means of paying costs in case of a verdict against him, apply to a judge to stay proceedings, until the plaintiff gives security for costs, or satisfies the judge that he has a cause of action fit to be tried in a superior court; and the judge may make an order accordingly, or may remit the case for trial before a county court, as he may think best.

760 *Parties to be made plaintiffs.*—A person from whose possession goods and chattels have been taken is entitled to replevy them, and try the

(*z*) *Machell v. Ellis*, 1 C. & K. 685. *Mason v. Newland*, 9 C. & P. 575.

(*a*) *Gulliver v. Cosens*, 1 C. B. 788. *Glynn v. Thomas*, 11 Exch. 878; *ante*, p. 662.

(*b*) *West v. Nibbs*, 4 C. B. 172.

(*c*) *Dawson v. Cropp*, 1 C. B. 961.

(*d*) *Nargett v. Nias*, 1 Ell. & Ell. 439; 28 Law J., Q. B. 143.

lawfulness of the taking. Thus, he who hath the goods of another pledged to him, or who hath the cattle of another to manure his land, has a sufficient property to maintain replevin(*e*). If the cattle of a *feme sole* be taken, and afterwards she marry, the husband alone must bring the action, for the cattle rest exclusively in the husband by the marriage; but if the goods taken are those which the *feme* has as an executrix, she may join with her husband in the replevin(*f*).

An action for an excessive distress may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself(*g*). Where the plaintiff was tenant of a house, in which were goods that had been assigned to his wife's trustee, who lived with them, but the plaintiff had the actual use and enjoyment of the goods, it was held he had sufficient special property in the goods to entitle him to maintain an action for an excessive distress(*h*).

761 *Parties to be made defendants*.—If a servant, authorized merely to distrain cattle damage feasant, drives cattle from the highway into his master's close, and there distrains them, the master will not be responsible for the wrongful act(*i*). Where a landlord authorized his bailiff to distrain for rent due to him from his farm tenant, and the bailiff by mistake distrained the cattle of another person beyond the boundary of the farm, and sold them, and paid over the money he received for them to the landlord, it was held that the landlord was not responsible for the trespass, unless he received the money knowing of the wrongful seizure, or unless he meant to adopt the act of the bailiff at all hazards(*k*). But if the landlord has appointed an inexperienced, insolvent, or incompetent bailiff, or has neglected to furnish him with proper instructions, he will be responsible in damages in an action for negligence (*ante*, p. 30). And every landlord who gives a broker a general authority to distrain is responsible if his broker exceeds his authority, by distraining things which are not distrainable(*l*), or if he sells goods without having them duly appraised(*m*); but a landlord who does not personally interfere in making a distress

(*e*) Co. Litt. 145; Winch, 26; Bac. Abr. REPLEVIN, F. G.

(*f*) Powes v. Marshall, 1 Sid. 172; Bro. Abr. Bar. & Feme, pl. 85. Blackborn v. Greaves, 2 Lev. 107. Serres v. Dod, 2 B. & P. N. R. 405.

(*g*) Fisher v. Algar, 2 C. & P. 374. Bail v. Mellor, 19 Law J., Exch. 279. And see further as to parties to actions for the unlawful seizure and conversion, and unlawful detention of chattels, *ante*, pp. 443-448, 553-555.

(*h*) Fell v. Whittaker, L. R., 7 Q. B. 120.

(*i*) Lyons v. Martin, 8 Ad. & E. 512; *ante*, p. 31.

(*k*) Lewis v. Read, 13 M. & W. 837. Freeman v. Rosher, 13 Q. B. 780.

(*l*) Gauntlett v. King, 3 C. B., N. S. 59.

(*m*) Hasler v. Lemoyne, 5 C. B., N. S. 530.

is not liable for the neglect of the broker in not delivering a copy of his charges, etc., pursuant to the statute(n) (*ante*, p. 663).

All persons who aid, or counsel, or direct, or join in a trespass, are, as we have seen, joint-trespassers, but one partner cannot drag another into a trespass without his previous consent, or without his subsequent concurrence. Where, therefore, one of several partners signed a distress-warrant in his own name on behalf of the firm, it was held that this was no proof that the distress was authorized by the firm, so as to render the other partners responsible for it. It must be shown, either by evidence before the transaction that they all joined in ordering the distress, or by evidence afterwards that they concurred in and received the benefit of it(o).

762 *Declarations in replevin* simply set forth that in a certain dwelling-house, or in a certain close or common, in a certain named parish and county, the defendant took certain cattle or goods and chattels of the plaintiff (describing them), and that the plaintiff unjustly detains them against sureties and pledge until, etc., claiming damages.

763 *Declarations for a wrongful and excessive distress*.—If beasts of the plough or the tools of a man's trade have been wrongfully distrained, there being other goods of sufficient value on the demised premises to satisfy the rent, the ordinary declaration for a trespass in seizing and taking away the plaintiff's chattels correctly describes the true cause of action(p). A plaintiff cannot, under the common count for an excessive distress, *i.e.*, for seizing more than was necessary, show that the defendant distrained for and sold goods exceeding the rent due, and a count for such a cause of action will not be allowed to be added at the trial, where it does not appear to have been a matter in dispute between the parties at the commencement of the action(q).

764 *Declarations for distraining and selling goods without notice of distress or without appraisement, or for not selling for the best price*.—A good cause of action may be shown by a declaration which alleges that the defendant wrongfully seized divers goods and chattels of the plaintiff (enumerating them), of a certain specified value, then being upon certain premises of the defendant, as and for a distress for rent claimed by the defendant to be in arrear and due from the plaintiff to the defendant for the said premises, and afterwards wrongfully sold the said goods and chattels, without having given to the plaintiff

(n) *Hart v. Leach*, 1 M. & W. 560.

(o) *Petrie v. Lamont*, Car. & M. 96; *ante*, pp. 33, 446-448.

(p) *Nargett v. Nias*, *ante*, p. 675.

(q) *Lucas v. Tarleton*, 3 H. & N. 116; 27 Law J., Exch. 246.

a notice of the said distress and of the cause of taking the same, or left such notice at the chief mansion-house or other most notorious place on the said premises;—or wrongfully sold the said goods and chattels, without causing them to be duly appraised by two sworn appraisers^(r);—or wrongfully sold the said goods and chattels for much less than the best price that could have been gotten for them, had they been sold with reasonable care and diligence. Selling under value is a distinct ground of complaint, and ought to be distinctly stated on the face of the declaration, if the plaintiff means to rely upon it(s).

765 Pleas in replevin—*Non cepit*.—Pleas in replevin are generally either pleas in bar, or in justification, or by way of cognizance, or by way of avowry. The defendant may either avow or justify, at his election. The general issue in replevin is *non cepit*, and this may be pleaded by one of several defendants. It is a simple traverse of the allegation in the declaration of the taking of the chattels, and merely alleges that the defendant did not take the cattle or the goods and chattels in the declaration mentioned. This is the proper plea when the defendant denies that he was the party distraining, or that he distrained in the place described in the declaration. If the defendant wishes to dispute the plaintiff's property in the goods, he must plead a plea specially alleging that the goods and chattels in the declaration mentioned were, at the said time when, etc., the property of the defendant, or of some named third party, and not the property of the plaintiff(t).

Under a plea of *non cepit* in an action of replevin the defendant may, under the Municipal Corporations Act, show that he was a constable appointed for a borough, and took the goods within the county wherein the borough is situate, but without the borough, on a charge that they had been stolen(u).

766 Avowries in replevin.—By 11 Geo. 2, c. 19, s. 22, it is enacted, that all defendants in replevin may avow or make cognizance generally that the plaintiff or other tenant of the lands and tenements whereon a distress was made enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for accrued, which rent was then due, and still remains due, without further setting forth the grant, tenure, demise, or title of such land-land or landlords, lessor or lessors, owner or owners of such manor

(r) *Bishop v. Byrant*, 6 C. & P. 484.

(s) *Thompson v. Wood*, 4 Q. B. 498.

(t) *Com. Dig. PLEADER*, 3 K. 11. *Dover v. Rawlings*, 2 M. & Rob. 544.

(u) *Mellor v. Leather*, 1 Ell. & Bl. 619; 5 & 6 Wm. 4, c. 76, s. 76; *post*, ch. 12, s. 1.

The common avowry or cognizance should show that the tenancy continued up to the time of the making of the distress(*x*). If the tenancy was determined at the time of the distress, but the tenant still continued in possession, and the distress was founded on 8 Anne, c. 14 (*ante*, p. 639), the avowry should be based on that statute. After setting forth the tenancy, the amount of rent in arrear, the time when it became due, etc.(*y*), the avowry or cognizance avows generally that the defendant took the cattle, goods, and chattels in the close in the declaration mentioned, as and for a distress for the rent due and in arrear, or that he took them as bailiff of the landlord. The landlord who authorized the distress, and the bailiff who seized by his directions, may both join in making the common avowry and cognizance.

The general form of avowry, authorized by 11 Geo. 2, c. 19, s. 22, applies to rents only; but penalties for breaches of covenants respecting the cultivation of the demised premises, granted by deed, to be levied by distress, may be treated as rent(*z*).

A cognizance by a defendant, as bailiff of an executor, for rent due to the testator is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death, such distress, though made before probate, having been afterwards adopted and ratified by the executor(*a*).

767 *Avowries for double rent*, under the 11 Geo. 2, c. 19, s. 18, should show the nature of the tenancy: that the tenant had power to determine it by giving notice to quit; that he did give notice to quit at a time mentioned in such notice; that the tenancy became thereby determined; that the defendant did not deliver up possession at the time mentioned in such notice, and then became liable to pay double the rent which he would otherwise have paid; that a certain specified sum, being half a year, or three quarters of a year, of such double rent, became due, and that the plaintiff took the goods in the declaration mentioned as and for a distress for such rent(*b*).

768 *Avowries by joint-tenants, coparceners, and tenants-in-common*.—We have seen that any one of several coparceners and co-heirs in gavelkind who has levied a distress may avow and justify the distress in his own right, and make conusance as the bailiff of the others, without averring or proving any express authority from them to distrain (*ante*,

(*x*) *Williams v. Stiven*, 9 Q. B. 14.

(*y*) *Roskrige v. Caddy*, 7 Exch. 840.

(*z*) *Pollitt v. Forrest*, 11 Q. B. 967.

(*a*) *Whitehead v. Taylor*, 10 Ad. & E. 210.

(*b*) *Humberstone v. Dubois*, 10 M. & W. 765. See Addison on Contracts, 316, 6th ed.

p. 641). If the distress is made by a bailiff or agent on behalf of all, all must join in the avowry and conusance(c). Tenants in common, on the other hand must avow the taking of the distress in respect of their several shares. Thus, if three tenants in common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more(d). But one of several tenants in common may, as we have seen, distrain and avow for his own share of the rent (*ante*, p. 642).

769 *Pleas in bar to an avowry—Non tenuit—Riens in arriere.*—The plaintiff may, by a plea in bar, deny generally all the allegations contained in the avowry(e), unless he is compelled by a judge's order, under the provisions of the Common Law Procedure Act, to traverse separately the tenancy, the fact of the rent being in arrear, or the authority to distrain. The plea of *non tenuit* is a traverse of the demise stated in the avowry. It alleges that the plaintiff did not hold the said messuage or tenement, land and premises, under the alleged demise thereof in the avowry mentioned. Under this plea it may be shown that the tenure alleged in the avowry was extinguished and put an end to before the time of the distress, either by twenty years' adverse possession under the statute of limitations(f), or by a transfer of the landlord's reversionary estate to an assignee or mortgagee who has demanded the rent(g).

The plea of *riens in arriere* simply alleges that no part of the rent alleged in the avowry to be in arrear was in arrear. Under this plea payments made to a ground landlord, or other incumbrancer having claims paramount to the claim of the immediate landlord making the distress, may be given in evidence in reduction of the rent, as such payments are always presumed to be authorized by the landlord, he being obliged to protect the tenant from them, and are treated as payments of rent by the tenant(h). But payments which are not a direct charge upon the demised premises cannot be given in evidence in satisfaction and discharge of the rent, unless they were directed or sanctioned by the landlord(i). The meaning of the plea of *riens in arriere* is, that the plaintiff at the time of the distress was in arrear

(c) *Stedman v. Bates*, 1 Salk. 389.

(d) Litt. sec. 314-317. *Philpott v. Dobbinson*, 3 M. & P. 320.

(e) *Trent v. Hunt*, 9 Exch. 20.

(f) *De Beauvoir v. Owen*, 5 Exch., 177.

(g) *Wheeler v. Branscombe*, 5 Q. B. 379.

(h) *Jones v. Morris*, 3 Exch. 748. As to payments under the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102, s. 96, see *Ryan v. Thompson*, L. R., 3 C. P. 144.

(i) *Davies v. Stacey*, 12 Ad. & E. 511.

to nobody; and if ne has not paid anybody, he cannot, under this plea, contest the defendant's right to the rent(k).

770 *Payment of money into court.*—If goods have been taken in closes A and B, and the defendant can justify as to part of the taking in A, but not as to the taking in B, as, for instance, if B was not part of the demised premises, the defendant may give up the case wholly as to B, by paying money into court in respect of the goods there taken, and partially as to A, by paying in respect of those which he does not propose to justify the taking of, and making avowry as to the residue(l).

771 *Of the plea of not guilty "by statute" in actions of trespass, or upon the case for an unlawful distress.*—By the 11 Geo. 2, c. 19, s. 21, it is enacted, that in all actions of trespass, or upon the case, against persons entitled to rents or services, their bailiffs or other persons, relating to any entry upon premises chargeable with such rents or services, or to any distress or seizure thereupon, it shall be lawful for the defendants to plead the general issue, and give the special matter in evidence, inserting in the margin of the plea the words "by statute"(m). Under the plea of not guilty "by statute," therefore, the defendant may give in evidence that he entered the plaintiff's house under a warrant of distress for rent, and was forcibly turned out of possession, and that he thereupon re-entered, and broke open the door of the house, in order to seize the plaintiff's goods. Everything which he might lawfully do in order to make the distress is admissible in evidence under this plea(n). The plea puts in issue not only the matter of justification, but the tenancy and ownership of the goods(o).

A plea of justification of trespass on the ground that the plaintiff had a right to distrain, must show that the plaintiff had such an estate and interest in the premises as would entitle him to distrain(p); or that he had some express authority or license to distrain. The common avowry of a distress for rent does not set out title, because the 11 Geo. 2, c. 19, s. 22, gives a statutory form, and therefore a lawful demise is implied; but that statute is confined to actions of replevin.

772 *Pleas justifying an entry upon land for the purpose of distraining goods fraudulently removed,* should set forth the fact of the tenancy, of

(k) *Wightman, J., Wheeler v. Branscombe*, 5 Q. B. 379.

(l) *Lambert v. Hepworth*, 2 Q. B. 729; 3 & 4 Wm. 4, c. 42, s. 21. As to payment into court generally, see *post*, ch. 21.

(m) *Reg. Gen. Hil. Term*, 16 Vict. R. 21; 1 Ell. & Bl. App. lxxxiii.

(n) *Eagleton v. Gutteridge*, 11 M. & W. 469.

(o) *Williams v. Jones*, 11 Ad. & E. 643; and see *post*, ch. 21.

(p) *Pinhorn v. Souster*, 8 Exch. 138.

rent being in arrear, and of the fraudulent removal of the goods by the tenant from the house demised to him by the defendant, in order to prevent the defendant from distraining the goods, and the deposit of the goods in the plaintiff's house, and should then go on to justify the entering the house in order to seize the goods under the provisions and in the mode prescribed by the 11 Geo. 2, c. 19, s. 1(*g*).

773 *Pleas justifying the seizure of animals damage feasant*, should set forth the defendant's possession of a close or of land whereon certain cattle of the plaintiff were trespassing and doing damage, and that the defendant thereupon took the cattle by way of a distress for the damage, and drove them to a common pound and there impounded them, and that this act of the defendant is the injury complained of by the plaintiff in his declaration(*r*). If the plaintiff's cattle strayed from a high road into a defendant's close, through the defendant's neglect to repair fences, which he was bound by statute or prescription to repair, this must be replied specially by a replication, alleging that the cattle were lawfully using the highway, that it was the duty of the defendant to have fenced against the highway, and that he neglected so to do(*s*).

774 *Plea of a recovery of the goods in an action of replevin*.—A plea by the defendant, setting forth that the plaintiff commenced and prosecuted an action against the defendant in the county court of the district within which the distress was taken, and obtained the judgment of the court for the return of the goods, and has recovered his goods, and damages for the taking and detaining them, is a good plea in bar to an action for an excessive distress, as it shows that the plaintiff has already had his remedy(*t*).

775 *Evidence at the trial—Proof of distress*.—In order to establish the fact of a distress having been made by the defendant upon the goods and chattels of the plaintiff, it is not necessary to prove an actual seizure of the plaintiff's goods. If the landlord's agent goes upon the plaintiff's premises, and declares that he has come to distrain for rent, and that nothing shall be removed, this, as we have seen, is evidence of the making of a distress, though no single article is touched by such agent (*ante*, p. 654). Where a warehouse-keeper or lodging-house keeper refused to let the goods and chattels of his tenant or lodger be removed

(*g*) See the forms in *Norman v. Wescombe*, 2 M. & W. 349. *Rich v. Woolley*, 7 Bing. 651. *Bowler v. Nicholson*, 12 Ad. & E. 341.

(*r*) *Bond v. Downton*, 2 Ad. & E. 26.

(*s*) *Goodwyn v. Chevely*, 4 H. & N. 631.

(*t*) *Phillips v. Berryman*, 2 Doug. 288 ; *post*, ch. 21.

until rent claimed by him to be due was paid, this was held to be evidence of the making of a distress (*ante*, p. 655). So, where the defendant's broker appeared upon the plaintiff's premises, and said, "Unless you pay me 21*l.* for rent, and three guineas for expenses, I shall take your goods," and the plaintiff paid the money, it was held that it did not lie in the defendant's mouth, after receiving the money, to say there was no distress(*u*).

776 *Proof of no rent being due, and of unlawful and excessive distresses.*—

If the plaintiff sues the defendant on the statute for distraining when no rent was due, he must prove that he held the land on which the distress was taken as tenant to the defendant, and must in general produce and prove the lease, if he holds under a written demise. If the lease is in the hands of the landlord, he should give the latter notice to produce it; he should then prove the amount of the rent, the period at which it became payable, and that it had been paid to and received by the landlord or his authorized agent, at the time of the levy of the distress. If the plaintiff complains of the wrongful seizure of goods not distrainable, he must prove the nature and character of the goods seized, and that they were privileged from distress (*ante*, pp. 644, *et seq.*), and it is for the defendant to show any circumstances rendering the distress in the particular instance lawful, such as that there were no other distrainable goods on the demised premises sufficient to satisfy the rent (*ante*, p. 645). If the plaintiff complains of an excessive distress, he must prove the tenancy; the amount of rent payable to the defendant; the value of the goods distrained, and that some actual or special damage has been sustained from the defendant's having distrained and taken an unreasonable quantity of the plaintiff's goods. It is not, as we have seen, for every trifling excess that an action is maintainable for an excessive distress. It must be disproportionate to some considerable extent (*ante*, p. 657), and must be productive of actual loss or damage to the plaintiff(*x*).

If the ground of action is that the defendant distrained for more rent than was really due, the plaintiff must prove that he tendered to the defendant the sum really due, with enough to cover the lawful charges of the distress(*y*); or that the defendant sold the things distrained, and realized by the sale of them more than was sufficient to satisfy the rent really due with the costs of the distress(*z*). A distress

(*u*) *Hutchins v. Scott*, 2 M. & W. 811.

(*x*) *Lucas v. Tarleton*, 3 H. & N. 120; 27 Law J., Exch. 246. *Piggott v. Birtles*, 1 M. & W. 450.

(*y*) *Glynn v. Thomas*, 11 Exch. 878; 25 Law J., Exch. 125.

(*z*) *Tancred v. Leyland*, 16 Q. B. 680. *French v. Phillips*, 1 H. & N. 567.

may, as we have seen, be excessive, although the goods when sold may realize less than the rent and expenses(a).

777 Proof of material averments in the declaration.—The statement in a declaration for an unlawful distress of the name of the person to whom the rent distrained for is due, is material, and must be proved as laid(b). But it is not necessary to prove the precise amount of rent alleged in the declaration to be due(c).

778 Proof that the defendant ordered or authorized the distress.—In order to prove that the distress was made by the order or authority of the defendant, the warrant should, if the distress was authorized by warrant in writing, be produced and proved, or a notice to produce it should be given to let in secondary evidence of it; but it is not necessary, as we have seen, to prove the warrant in order to fix the defendant as the author of the unlawful proceeding. His conduct, and acts, and admissions in the matter are evidence against him, although he has clothed his agent with an authority in writing. If he has received the money realized by the distress (*ante*, p. 677), or has personally interfered with the impounding or sale of the goods, or has ratified and adopted the act of the broker levying the distress, these circumstances are admissible in evidence against him, to show that he ordered or authorized the distress (see *ante*, p. 676, and *post*, ch. 20, s. 2).

779 When proof of special damage is necessary.—We have already seen that the 11 Geo. 2, c. 19, s. 19, provides that where a distress has been made for rent justly due, and an irregularity or unlawful act has afterwards been committed by the distrainer or his agents, the distress is not to be deemed unlawful, nor the parties making it trespassers *ab initio*, but that the party aggrieved by the unlawful act or the irregularity may recover full satisfaction for the special damage he has sustained and no more (*ante*, p. 664), and that, to enable a tenant to maintain an action against his landlord for an irregularity in selling goods distrained, it must be proved that he has sustained actual damage from the wrongful act, and if no such proof is forthcoming, it is the duty of the judge to direct a verdict for the defendant(d).

780 Proof of waiver of right of action.—A right of action for an unlawful or excessive distress once vested, can only be destroyed by a release under seal, or by the acceptance and receipt of something in satisfaction of the wrong done. A tenant, therefore, does not waive his right

(a) *Smith v. Ashforth*, *ante*, p. 657.

(b) *Ireland v. Johnson*, 1 B. N. C. 166.

(c) *Gwinnett v. Phillips*, 3 T. R. 643. *Sells v. Hoare*, 8 Moore, 454.

(d) *Rodgers v. Parker*, 18 C. B. 112; 25 Law J., C. P. 220. *Lucas v. Tarleton*, 3 H. & N. 116.

of action for an excessive distress, though he afterwards enters into a written agreement with his landlord respecting the sale of the effects seized(e).

781 *Proof of tenancy as between plaintiff and defendant*, if not admitted upon the record, may be established by parol evidence of the fact, notwithstanding that the tenancy has been created by a lease or agreement in writing not produced(f). Proof of payment and acceptance of rent will establish the fact of the relationship of landlord and tenant between the person paying and the person receiving the rent, notwithstanding the existence of a written contract of demise between them which is not produced(g). And "I have no doubt," observes Bayley, J., "that submitting to a distress acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, is, I think, precluded from denying the title of the landlord"(h). But payment of rent under a distress is not a conclusive admission of the title of the distrainer. Counter-evidence may be given on the part of the tenant to show that the distrainer never had any title(i).

Proof of payment of rent by a tenant to an agent of the landlord who has received it on account of the landlord, and paid it over to him, is evidence against the tenant that he holds of such landlord, although the latter was unknown to him, and he supposed at the time he paid the money that the agent received it on account of another person(k). But proof of payment of rent to a particular individual claiming to be entitled to receive it, is only *prima facie* evidence of a tenancy under the claimant, and the presumption of the particular tenancy may be rebutted by proof that the payment was made by mistake or under a false representation(l).

Proof of an attornment by the tenant to a receiver appointed by the Court of Chancery, is proof of a tenancy by estoppel as between the tenant and the receiver; but the attornment does not enure to the benefit of the person subsequently declared by the court to be the owner of the property(m).

782 *Proof of the nature and terms of a tenancy* will best be effected by

(e) Willoughby v. Backhouse, 2 B. & C. 821. Baylis v. Usher, 4 M. & P. 790; 7 Bing. 153.

(f) Rex v. Hull, 7 B. & C. 611; 1 M. & Ry. 448.

(g) Doe v. Morris, 12 East, 237, 239n.

(h) Panton v. Jones, 3 Campb. 372. Cooper v. Blandy, 4 M. & Sc. 569; 1 B. N. C. 45.

(i) Knight v. Cox, 18 C. B. 615.

(k) Hitchings v. Thompson, 5 Exch. 54.

(l) Fenner v. Duplock, 9 Moore, 40.

(m) Evans v. Matthias, 7 Ell. & Bl. 590; 26 Law J., Q. B. 309.

production of the written demise, where the tenant holds under a lease or agreement in writing. If the contract is in the hands of the defendant, the plaintiff who desires to prove the amount of the rent, the time at which, or the circumstances under which, it became due, should give notice to the defendant to produce it at the trial, in order to let in secondary evidence of its contents⁽ⁿ⁾. The old rule of law, that the terms of a tenancy or the amount of the rent can be proved only by the production of the writing when the tenant holds under a written contract of demise, does not exclude evidence of admissions and acknowledgments of those terms made by a defendant holding under a lease in writing not produced. It has been held that whatever a person says, or his acts amounting to admissions, are evidence against himself, although they relate to the contents of some deed or writing, and go to prove the nature and contents of a written instrument not produced^(o). Where, therefore, a defendant held lands under a written demise, it was held that the defendant's verbal declarations of the existence of the tenancy, and of the amount of the rent paid by him to the plaintiff, were admissible in evidence against him, without the production of the writing under which he held^(p).

Where on the letting of lands the terms of the demise were read from a printed paper by the landlord's agent, and the tenant entered and occupied, and paid rent, it was held that the agent might give oral evidence of the terms, using the printed memorandum to refresh his memory^(q).

783 *Damages recoverable—Double value.*—By 2 W. & M. sess. 1, c. 5, s. 5, it is enacted that if any distress and sale be made by virtue and under color of that Act for rent pretended to be arrear and due, where no rent is arrear or due to the person distraining, the owner of goods distrained and sold may by action of trespass, or upon the case, against the person distraining, recover double the value of the chattels so distrained and sold, together with full costs of suit. When an action is brought upon this statute for the seizure and sale of goods for rent pretended to be in arrear and due, when in truth no rent is in arrear or due to the person distraining, and the plaintiff claims double the value of the goods distrained, the jury should be directed, if they find for the plaintiff, to ascertain in the first place the actual value of the goods, and then to give damages to the plaintiff to the amount of

(n) *Post*, ch. 21.

(o) *Slatterie v. Pooley*, 6 M. & W. 665. *Boulter v. Peplow*, 9 C. B. 493; 19 Law J., C. P. 193. *Earle v. Picken*, 5 C. & P. 542.

(p) *Howard v. Smith*, 3 M. & Gr. 254; 3 Sc. N. R. 574.

(q) *Bolton (Lord) v. Tomlin*, 5 Ad. & E. 863.

double the value. If the jury assess the damages generally at a certain sum, and it turns out that they have assessed only the actual value or the single damage, the mistake cannot be rectified, and judgment cannot be entered up for the double or treble value. But if they expressly find and assess only the actual value, the plaintiff may apply to the court to have judgment entered up for double value, according to the statute(r).

Whenever the landlord has distrained, without any right or authority to distrain, there is a trespass upon, and injury to, the realty, independently of the trespass in regard of the seizure of the chattels, and the tenant is entitled to recover substantial damages for the disturbance of the peaceable possession of his house, as well as for the unlawful seizure of his goods.

784 *The damages recoverable where the entry upon the premises was effected in an unlawful manner*, and the parties had no right to touch the goods after they had entered, by reason of the trespass in entering, are the same as would be recoverable from a stranger who had broken and entered the house without any color of authority, and it does not lie in the defendant's mouth to say, in mitigation of damages, that he has sold the goods, and applied the proceeds of the sale in satisfaction and discharge of the rent(s). Where a distress is wrongful, the party distrained upon has a right to be replaced in the situation in which he was before the seizure, for "parties are not to extort even what is justly due by the improper execution of a warrant." If goods, therefore, wrongfully distrained have been sold, or money has been paid to procure the liberation of goods distrained, the value of the goods in the one case and the money paid in the other will be recoverable, as well as any special damage that may have been sustained, and the landlord cannot appropriate the money he has received by trespass and wrong in payment of the rent due to him(t).

785 *Recovery of special damage*.—We have already seen that by the express terms of the 11 Geo. 2, c. 19, s. 19, the party injured by an unlawful act committed *after* a lawful distress, is only to recover the amount of damage he has actually sustained. This damage, in the case of a wrongful seizure and sale of growing crops, is the difference between the amount for which the crops would have been sold if the sale had been regular, and what they actually sold for; and where

(r) *Masters v. Farris*, 1 C. B. 716; *post*, ch. 21. RECOVERY OF DOUBLE AND TREBLE DAMAGES.

(s) *Attack v. Bramwell*, 32 Law J., Q. B. 146.

(t) *Attack v. Bramwell*, 3 B. & S. 520; 32 Law J., Q. B. 146. *Sowell v. Champion*, 6 Ad. & E. 407.

there is no difference, or it is proved that the crops were sold for more than they were worth, no damages are recoverable, and the defendant is entitled to a verdict(*u*).

In an action for selling goods distrained for rent without an appraisement, and without complying with the provisions of 2 Wm. & M., sess. 1, c. 5 (*ante*, p. 660), the measure of damages is the real value of the goods sold minus the rent. The wrong-doers cannot get off by handing over to the plaintiff the mere proceeds of the sale(*x*).

In an action for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, the plaintiff is not entitled to recover the full value of the crops beyond the amount for which the distress ought to have been levied. "The true measure of damage is simply a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession; and some compensation for the loss of the absolute ownership and power of disposition for the same time; or, if the tenant has replevied, then a compensation for the additional expense and inconvenience of replevying to a greater amount"(*y*).

Where the plaintiff in his declaration for a wrongful distress claimed damages for the loss of divers lodgers, without naming any, Lord Ellenborough refused to allow him to prove that he had in fact lost a lodger, because the name of the lodger had not been specified in the declaration(*z*).

If the landlord takes some things that are distrainable, and other things which are not, this does not render the distress wrongful *ab initio*; but the wrong is limited to the seizure of the goods which were not distrainable, and the tenant is entitled to recover only the actual damage sustained by him from the seizure of those particular chattels(*a*). In respect of the things not distrainable, the distrainer is a trespasser *ab initio*, and the full value of them is recoverable(*b*).

786 *Nominal damages* are recoverable in an action for an excessive distress where no actual damage is proved(*c*).

(*u*) *Rodgers v. Parker*, 13 C. B. 112. *Lucas v. Tarleton*, 3 H. & N. 116. *Proudlove v. Tremlow*, 1 Cr. & M. 326.

(*x*) *Knight v. Egerton*, 7 Exch. 407. *Biggins v. Goode*, 2 Cr. & J. 367. *Whitworth v. Maden*, 2 C. & K. 517.

(*y*) *Piggott v. Birtles*, 1 M. & W. 451.

(*z*) *Westwood v. Cowne*, 1 Stark. 172.

(*a*) *Harvey v. Pocock*, 11 M. & W. 740.

(*b*) *Keen v. Priest*, 4 H. & N. 236; 28 Law J., Exch. 157. *Attack v. Bramwell*, *ante*, p. 656. *Edmondson v. Nuttall*, 34 Law J., C. P. 102. See further as to damages, *post*, ch. 22.

(*c*) *Chandler v. Doulton*, 3 H. & C. 553; 34 Law J., Exch. 89.

